UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS, LAW AND ART

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The Impact of Criminal Legal Aid Finance Reduction on the Work of Defence Lawyers

by

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Thesis for the degree of Doctor of Philosophy

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ABSTRACT

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This thesis investigates the criminal justice system of England and Wales – in particular, the criminal legal aid system: how those who are unable to afford their own defence lawyer are provided with advice and representation. Building on the work of Packer's criminal justice process models of Due Process and Crime Control; later works critical of Packer's approach; and Bourdieu's concepts of habitus, field and capital, it constructs a new and enhanced way of understanding and analysing the values at play in the criminal justice process: the toolbox approach. Using this framework, it analyses the findings from empirical research into how changes to defence lawyer fees impact their work. Drawing on 29 in-depth qualitative interviews with solicitors and barristers of varying levels of experience, it uncovers the impact of criminal legal aid finance on defence lawyer behaviour and how this operates. It also makes findings as to the state and operation of the criminal justice process in broader terms.

Chapter 1 outlines the legal aid system and introduces the research question in detail. Chapter 2 builds on this by analysing how to answer the research question, discussing the research methods and methodology and introducing the role played by criminal justice process models and Bourdieu's concepts of habitus, field and capital. Chapter 3 considers the literature on criminal justice process models in detail, advancing an argument that criticisms of Packer's work are useful, but ultimately misplaced. Chapter 4 builds on the foregoing discussion to construct the multi-dimensional analysis tool: the toolbox approach. Chapters 5 and 6 apply this framework to analyse the empirical data and draw conclusions from it about legal aid finance. Finally, in Chapter 7, there are some concluding remarks, which reflect on the overall analysis and consider its implications.

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- - s17(2)

National Health Service Act 1946

List of Abbreviations

CPS – Crown Prosecution Service

FCA – Financial Conduct Authority

LAA – Legal Aid Agency

LASPO – Legal Aid, Sentencing and Punishment of Offenders Act 2012

MoJ – Ministry of Justice

PPE – Pages of Prosecution Evidence

SFO – Serious Fraud Office

DECLARATION OF AUTHORSHIP

I, James William Albert Thornton, declare that this thesis, entitled *The Impact of Criminal Legal Aid Finance Reduction on the Work of Defence Lawyers,* and the work presented in it is my own and has been generated by me as the result of my own original research.

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. No part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. This thesis is not based on work done jointly with others;
7. None of this work has been published before submission

Signed: .....

Date: .....

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Chapter 1: Introduction to Subject Matter and Research Question

In May 2012, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") was enacted. This was the formal start of a series of legal aid reforms that continue to have a significant impact on many areas of the legal system, including the criminal justice process. However, it also provided the opportunity to consider in some detail what happens when lawyers' fees for criminal defence work are cut.

The coming chapters will introduce a more complex and thorough analytical framework for analysing this issue. Before we can begin our enquiry though, there are some preliminary details to consider. The passing of LASPO was the *start* of reforms, but later and current events are crucial to our understanding of the issues. It is also important to be clear as to what legal aid actually is and how the system roughly works. Hence, the aim of this short introductory chapter is to provide a clear picture of the subject matter under discussion – as well as the more conventional thesis introduction topics of the rationale for research and the formulation of the research question. Lastly, it will set out the framework for the discussion that follows in the later chapters on how to go about answering that research question.

1.1 The Subject Matter

1.1.1 The Basics

What follows is a very brief introduction to the Anglo-Welsh criminal legal aid system. It is meant to provide the reader with a simple sketch of the landscape, so they know the backdrop to this research. It is not meant as a comprehensive guide.[1] Parts of it are simplified or incomplete for the sake of space and clarity. Those parts of this picture that are relevant will be filled out with more detail in the next section.

[1] For which, see the excellent work of Ling, Pugh and Edwards, *LAG Legal Aid Handbook* (Legal Action Group 2013/14 and 2015/16 editions)

Chapter 1 – Introduction to Subject Matter and Research Question

In general terms, "legal aid" is part of the welfare state. The system as we know it was first introduced as part of a package of welfare state reforms initiated by Clement Atlee's post 2nd World War Labour government - alongside, for example, the National Health Service.[2] The legal aid system ensures those who cannot afford to pay for lawyers can nonetheless receive representation and advice with legal issues. This work deals with the extreme end of that: criminal law.

The legal aid system runs differently to other parts of the welfare state. Unlike the National Health Service, there is no large-scale, central, government run, "National Criminal Defence Service". Indeed, given the fact that nearly all prosecutions are brought by the Crown, such a set up would seem a little inappropriate.[3] Instead, we have a system where criminal defence advice and advocacy is, in the main, provided by the private sector. Individual solicitors firms make contracts with the Legal Aid Agency (LAA) to provide criminal defence services for particular parts of the country. In terms of advocacy, self-employed advocates are either (for less serious, magistrates court, cases) paid by solicitors firms (who receive a fee from the government, which includes payment for the advocacy) or (for Crown Court work) directly by the government. There is also the option of the advocate working in-house at a solicitors firm on a salary (in which case, the fee is paid to their firm instead).

Work is generally paid in the form of fixed fees. Different fixed fees exist for different kinds of work, such as different kinds of offences and different outcomes (guilty plea vs trial etc.). In some cases, that fixed fee will be increased if the case crosses a certain complexity threshold. Various measures are used to determine "complexity" at different stages. For example, for Crown Court work, the number of pages of prosecution evidence (PPE), witnesses and trial days allow the fee to "graduate" steadily upwards.

There are certain categories of legal aid work that are free at point of use for all: namely, police station advice and assistance and, in the magistrates court, *advice* and certain, very limited, types

[2] The Legal Aid and Advice Act 1949 followed the National Health Service Act 1946

[3] Not that this hasn't been tried. See: Bridges, Cape, Fenn, Mitchell, Moorhead and Sherr, *Evaluation of the Public Defender Service in England and Wales* (Legal Services Commission 2007) for an analysis of some pilots. The result is that there are now a very small number of public defender offices with lawyers salaried directly by the government

of court *representation*, such as a bail application or an early guilty plea. Both such instances of work are dealt with by an on-call "duty solicitor". A duty solicitor agrees to be available to help clients in court or the police station that day and receives fixed fees for doing so.

Before a firm or self-employed advocate can be paid for doing any other legal aid work – including trials - they must apply for a Representation Order. In other words, outside the categories just listed, not every instance of criminal defence work is automatically covered by the legal aid scheme. The client must apply and satisfy tests as to means and merits. It should be noted at this point, however, that it is possible (indeed, very common) for a duty solicitor to apply for a Representation Order for a client they first met in their capacity as a duty solicitor. This is important, as it means that a duty solicitor can have the privilege of first access to a (in many cases quite literally) *captive* market of clients for their firm.

There are two tests a defendant must clear in order to be granted an order: income ("means") and interests of justice ("merits").[4] The means test restricts the scheme to those whose finances are below a certain level. The merits test then further restricts the scheme to cases that are deemed serious enough to warrant professional representation. In deciding whether the merits test is met, the LAA must "take into account" the following five factors:[5]

1. Whether the individual is likely to (if convicted) lose their liberty or suffer serious damage to their reputation
2. Whether the proceedings may involve substantial questions of law
3. Whether the individual may be unable to understand the proceedings or state their case
4. Whether the proceedings involve tracing, interviewing or expert cross examination of witnesses
5. Whether it is in the interests of another person that the individual be represented.

The merits test is automatically passed for trials in the Crown Court.[6]

[4] Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), s17(1)
[5] ibid. s17(2)
[6] '2015 Own Client Crime Contract Specification' (Legal Aid Agency October 2015), clause 9.120

In addition, a Representation Order for work in the Crown Court usually (unless the defendant's income is very low) comes bundled with an unwelcome plus-one: a Contribution Order. Such an order requires the defendant to pay the government a financial contribution (but less than the cost of paying privately would be) towards their representation, which is returned to them if they are acquitted.

To sum up the general landscape then: all legal advice at the police station is free. Advice at the magistrates' court and very limited representation is free from the duty solicitor. Any other work is subject to the granting of a Representation Order. Representation Orders are only granted once means and merits tests have been passed. In the Crown Court, a Representation Order (if the defendant is above a certain level of means) may also be subject to a Contribution Order.

Having sketched a rough picture of the system, it is now time for the following sections to fill in the details and, in doing so, draw attention to the changes that form the subject matter of this research.

1.1.2 The 2010, 2017 and discarded "2015" Contracting Schemes and Rates

An important development in this area was the attempt to introduce a "2015" contract scheme, to replace the previous "2010" scheme. Under the 2010 scheme, solicitors' firms had one contract with the Legal Services Commission (now LAA) to carry out criminal legal aid work.[7] This was supplemented by schedule/s (setting out the work a provider was authorised to perform)[8] and the specification (containing rules governing the day-today performance of the work).[9] Importantly, although the contract is labelled "2010", the scheme continued to be used (albeit with cuts to the rates paid) until 2017. The plan was to introduce the "2015" contracts to replace the "2010" ones, however the 2015 scheme was repeatedly delayed (and the 2010 scheme repeatedly extended)[10]

[7] 'Crime 2010 Contract Standard Terms' (Legal Services Commission 2010), clause 12.1
[8] ibid. clause 12.3
[9] ibid. clause 12.4
[10] Accomplished by various extension notices.

until January 2016. At this point, the "2015" contracts were abandoned entirely.[11] A 2017 contract (which, for our purposes, is substantially similar to the 2010 system) came into effect on 1st April 2017.[12]

Why did this happen? In the first instance, there were a number of judicial reviews of various aspects of the proposed 2015 contracts, [13] which resulted in delays and extensions. Then things took a rather more dramatic turn: several individuals who had worked at the Ministry of Justice (MoJ), assessing the bids from solicitors firms in the 2015 contract tendering process became whistle-blowers. They went to the press and alleged a woefully inadequate process in deciding who to award contracts to. One senior insider called the process "shambolic and unprofessional".[14] The result was further litigation by those firms whose bids had been unsuccessful and an injunction on continuing with the allocation of new contracts. It was this that eventually swayed then Justice Secretary Michael Gove to shelve the plans for the 2015 contracts – at least for now.[15]

Nonetheless, it is important to understand how the 2015 contracts were set up and what effect they would have had on defence lawyers. For one thing, the situation is still rather delicately balanced. There have been a lot of back and forth changes in criminal legal aid policy during the period under discussion and it is by no means guaranteed that something similar will not be introduced at a later date.[16] Ministerial turnover in the MoJ is also extremely high: there has been a new justice secretary every year since 2015. The other reason is that, as discussed in the next chapter, interviews with defence lawyers were conducted as part of this research. Hence, a thorough knowledge of this background is also necessary because: 1) in order to have the best chance of understanding fully what an interviewee is talking about, it is necessary to understand

[11] Written Statement by Secretary of State for Justice Michael Gove MP, HC Deb 28 January 2016, vol 605, cols 15WS-18WS

[12] '2017 Standard Crime Contract – Contract for Signature' (Legal Aid Agency 2017), clause 2.1

[13] *R (LCCSA & CLSA) v The Lord Chancellor* [2014] EWHC 3020 (Admin) which upheld applicants' claim of procedural unfairness of the consultation process and *R (the Law Society) v The Lord Chancellor* [2015] EWCA Civ 230 on substantial and human rights grounds.

[14] Jon Robins, James Cusick and David Connett 'Legal Aid Cuts: Plans on Hold after Law Firms Challenge New Contracts System' *The Independent* (London, 14th November 2015)

[15] Gove written statement (n 11)

[16] Note, for example, recent consultations on the fee system. Although these do not suggest bringing back the 2015 contracts, they illustrate that there is still no concrete plan for how the system is to work: Ministry of Justice, *Reforming the Litigators' Graduated Fees Scheme and Court Appointees* (2017); Ministry of Justice, *Reforming the Advocates' Graduated Fee Scheme* (2017)

the fundamentals of the topic being discussed and 2) a small number of the interviews were carried out prior to Michael Gove's statement, so the 2015 scheme (which would have seemed imminent at the time) may well have influenced what was said.[17]

The "2015" contracts were set up in a similar way to the 2010 one, with schedules and a specification. The key difference being that firms would have *two* contracts with the LAA: one for duty solicitor work and one for work done outside the duty solicitor scheme: own client work.[18] Under the 2010 scheme, they had one contract that dealt with both of these.

The documents provided by the LAA, formerly the Legal Services Commission, are extensive and complex. For our purposes, all we need to know is the rates and how duty solicitor contracts were allocated because this is all that the reforms have changed. The subject matter of this research being the impact of the reforms, it is unnecessary to consider the other elements of the contracts in detail. To do so is beyond the scope of this enquiry.

1.1.2.1 Rates

First then, rates. The rates paid have been reduced numerous times over the years. A useful starting point though, would be 2013, since this represents the rates situation just prior to the scheduled introduction of two-tier contracts (see below). These rates are set out in the Criminal Legal Aid (Remuneration) Regulations 2013. The government's plan was for a 17.5% cut to all fees paid to litigators (that is, all criminal defence work aside from court advocacy).[19] Advocates' fees (outside of the exceptional "very high costs cases", for which a different fee scheme applies and a smaller, 9% cut was introduced) were also in the firing line, but these cuts were, following industrial action, suspended[20] and eventually dropped following a change in Justice Secretary.[21]

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[17] See Chapter 2, section 2.3.6, below

[18] Though a firm is in theory free to apply for just one or the other, because of the captive duty solicitor client market effect discussed above, few would do so.

[19] See Ministry of Justice, *Transforming Legal Aid: Delivering a More Credible and Efficient system* (CP14/2013) Ch 4, Q8

[20] 'Agreement Between Ministry of Justice, Bar Council and Criminal Bar Association' (Ministry of Justice, 27th March 2014) <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/user_uploads/advocacy-note.pdf> accessed 22nd October 2015

[21] Alistair MacDonald, 'Bar Council Responds to Ministry of Justice Announcement on Legal Aid' (Bar Council, 10th June 2015) < http://www.barcouncil.org.uk/media-centre/news-and-press-

For reasons that will become clear later however, it was still far from plain sailing at the Criminal Bar because the litigator cut has a significant indirect effect on them and, like solicitors, they had already absorbed many cuts prior to these events.

The 17.5% litigators' cut was introduced in stages up to the present situation. For example, the regulations, as originally enacted, put the fixed fee for providing police station telephone advice in London at £31.45 per client.[22] This was then amended in 2014 to £28.70[23] and then briefly again, in 2015, to £25.95.[24] The cut from £31.45 to £25.95 equates to 17.5%. The final 8.75% of this is currently "suspended", following industrial action taken by solicitors in the summer of 2015.[25] The MoJ may reintroduce this at any time via statutory instrument (the original "deal" was for one year, from 1st April 2016)[26] - though the practitioner association that negotiated it hoped it would become permanent.[27] However, it appears that a cut of some sort will be maintained, whether that is the 8.75% cut or not. Comments in a recent MoJ consultation document suggest that the ministry was prepared to use reinstatement as a bargaining chip to secure the profession's cooperation with their proposals for further changes to the fee system.[28] However, these suggested further changes to the fee system amount to a further cut in themselves. The MoJ suggests removing the increased fee based on PPE where the pages are greater than 6000 (currently, firms can claim up to 10,000 pages) and removing generous payment provisions for court appointed advocates. Hence, although different to a flat percentage cut, it still amounts to less money being paid in many cases. It may well be that, as practitioner associations argue, the choice between reinstating the further 8.75% cut or accepting the further changes to the fee system is no substantial choice at all.[29]

releases/2015/june/bar-council-responds-to-ministry-of-justice-announcement-on-legal-aid/> accessed 22nd October 2015

[22] Criminal Legal Aid (Remuneration) Regulations 2013/435, Sch 4, para 2(1)(a)

[23] ibid. as amended by Criminal Legal Aid (Remuneration) (Amendment) Regulations 2014/415 Sch.3 para.2(a)

[24] ibid. as amended by Criminal Legal Aid (Remuneration etc.) (Amendment) Regulations 2015/1369 Sch.3 para.2(a)(i)

[25] CLSA, 'Statement regarding response from The Lord Chancellor' (19th September 2015) <http://www.clsa.co.uk/index.php?q=Statement-regarding-response-from-The-Lord-Chancellor> accessed 16th March 2016

[26] HC Deb 28th January 2016, vol 605, cols 16WS-17WS

[27] CLSA Statement (n 25)

[28] *Litigators' Graduated Fees Scheme and Court Appointees consultation* (n 16), 2

[29] Law Society, Legal Aid Practitioners Group, Criminal Law Solicitors Association and London Criminal Courts Solicitors Association, 'LGFS Consultation Position Statement' (February 2017)

In a similar vein, the shelved 2015 contracts would have introduced a rather more savage element to this than is apparent from simply looking at the value "17.5%" in the abstract because they also changed the fee system – albeit in a different way. At present, it is just the fees themselves that have changed. The 2015 scheme would have also changed the *structure*. This change in structure would have meant the reality of the cut to rates was more than 17.5%. There would have been three significant changes here: police station fees, magistrates court fees and Crown Court fees. [30]

Police station fees vary according to the part of the country the station is in. Hence, in the remuneration regulations, as enacted in July 2015, there is a large table of fixed fees matched with particular areas of the country and, for London, particular stations.[31] The situation following the introduction of the 2015 contracts would have been that this was reduced to two fees: London and non-London. This was done by calculating the average fee and then applying the 17.5% cut. Obviously, this would have meant that some areas were, in reality, hit with far more than a 17.5% cut, when compared to the fee they get under the 2010 system.

For magistrates court work, one first categorises the case into category 1B, 1A or 2 work.[32] This is in order of seriousness and, therefore, category 2 work attracts the highest fees. Category 2 includes, for example, contested trials. At the other end of the scale, category 1B includes summary offence guilty pleas and attracts the lowest fee.[33] This would also have been the case with the 2015 scheme. The difference is that, for the 2010 and 2017 contracts, one can claim a lower standard fee, a higher standard fee, or a non-standard fee. One can claim a higher standard fee (still a fixed fee though) if, after calculating the overall costs of running the case, a specified numerical threshold is crossed.[34] One can then claim an even higher fee: the exact costs incurred, if the total crosses another, even higher threshold.[35] So, in total, there are seven possibilities:

[30] For a useful analysis of this (in the context of discussing whether halving the 17.5% overall cut would help), see Steven Bird, 'Just How Generous is Michael Gove's Offer to Defence Lawyers?' (*The Justice Gap* September 21st 2015) < http://thejusticegap.com/2015/09/just-how-generous-is-michael-goves-offer-to-defence-lawyers/>

[31] Criminal Legal Aid (Remuneration) Regulations 2013/435, Sch 4, para 2(8) (as of July 2015)

[32] ibid. para 5(2)

[33] ibid. para 5(2)-(3)

[34] '2010 Standard Crime Contract – Specification PART B', para B10.89 (LAA 2010)
Criminal Legal Aid (Remuneration) Regulations 2013/435, Sch 4, para 5(2)

[35] Ibid.

1. Lower 1B
2. Higher 1B
3. Lower 1A
4. Higher 1A
5. Lower 2
6. Higher 2
7. Full Case Costs Incurred

Under the proposed 2015 scheme, the higher standard fee was abolished. There was a single standard fee for each category, although the possibility of claiming full costs if the highest threshold was crossed remained. Hence, work that would previously have been categorised as "higher standard fee" work (but not high enough to cross the get-paid-your-exact-costs threshold), would have suffered a cut of considerably more than 17.5%: some calculated it as being over 50%.[36]

Finally, Crown Court litigator fees under the 2010 and 2017 schemes are mostly "graduated" - meaning that the fixed-fee increases incrementally as the number of pages of prosecution evidence ("PPE") and number of hearing/trial days goes up. The exception to this is for cases where the defendant insisted on an indictment trial despite magistrates' being willing to try the matter summarily and cases where the defendant is in the Crown Court for some reason other than being tried on indictment, such as for a magistrates court appeal. In which case, a fixed fee is paid instead. The 2015 scheme would have enlarged the fixed fees system to all cases where there were less than 500 PPE. There were five fixed fees – one per 100 pages – e.g. 100 pages gets one fee, 200 pages gets a higher one, etc. Under the current graduated fee system, one carries out a more complex calculation, involving length of trial, number of PPE and classification of offence (by letter, from A-K). Under the 2015 scheme one would simply have referred to the fixed fee table and offence letter, unless the PPE was over 500. Again, the practical effect of this shift from graduated fees to greater use of fixed fees would have been that the cut was significantly

[36] Bird (n 30)

more than 17.5%. In some cases, when one compares the 2010 graduated rate one would have at a certain PPE with the proposed 2015 scheme fixed fee, the cut would have been over 50%.[37]

As stated earlier though, this enhanced fixed fee system was to be brought in with the now shelved 2015 scheme. Hence, currently the fee change consists of a cut of 8.75% to all litigator fees - with either the second 8.75% due to be reintroduced fairly soon or, if not, an alternative effective cut via a change to the litigators' fee scheme.

1.1.2.2 How Duty Contracts are Allocated

Under the 2010 and 2017 schemes, the contract is awarded to anyone who can successfully apply for one, as part of the general contract they have with the LAA. There are certain standards of quality that need to be met, but otherwise there is no competition at the *contracting* stage. Getting a contract does not guarantee firms a certain amount of work; rather it operates as a sort of "licence" to undertake work for legal aid clients and to be paid by the government. There is a rota system for allocating duty solicitor slots.

The 2015 scheme was different. It split the contracts into Own Client and Duty. The number of Duty contracts was artificially restricted to a fixed level of contracts, which bore no relation to the number of defendants in the system: 527.[38] Under the 2010 system, the number of contracts awarded was over 1500. The, rather puzzling (for a *Conservative* government), aim was to encourage much larger firms and economies of scale, at the expense of small independent businesses. Those who could persuade the LAA that they should be allocated the contract were to be given a partial state-sponsored monopoly in a given area.

1.1.3 Recent Events

Both the 2015 contracts and the flat-rate cuts were controversial from day 1. An online petition against them gained over 100,000 signatures,[39] there were debates in both Houses of

[37] ibid.
[38] in the event, 520 bids were accepted and 519 of those firms accepted the new contract
[39] < http://epetitions.direct.gov.uk/petitions/48628> accessed 25/02/2014.

Parliament[40] and a Human Rights Select Committee report criticising the proposals.[41] Critics predicted the destruction of the independent Criminal Bar,[42] the insolvency of many small legal businesses[43] and a reduction in talented individuals entering the criminal law professions.[44] On the other hand, the Ministry of Justice predicted a more credible and efficient system. Such was the pressure that the, now-shelved, two-tier contract arrangement was actually the third proposal: two previous ones based on "best value tendering" and "price competitive tendering" were similarly binned early on due to pressure.[45]

The changes have provoked (and continue to provoke) extreme responses from criminal lawyers. On 6th January 2014, as a protest, criminal lawyers refused to attend court for the first time ever.[46] Over the summer of 2015, this developed into a sustained refusal to take on non-duty solicitor work (to ensure no breach of contract) by many criminal solicitors and barristers.[47] In February 2017, *all* of the representative groups of criminal law solicitors stated that further cuts (i.e. either the 8.75% cut being unsuspended, or the aforementioned changes to PPE) were unsustainable,[48] whilst the Law Society Gazette suggested that further protests could be on the way.[49]

1.2 Rationale for Research and Formulating a Research Question

We have so far considered the criminal legal aid system, the proposed and implemented changes to it and what those changes consist of. We will now consider how to focus in on a particular element of that in order to formulate a research question that provides a unique and useful understanding of the issues when answered. The ultimate research question is the following:

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[40] HC Deb 27 June, vol 565, cols 508-566; HL Deb 11 July 2013, vol 747, cols 444-484.
[41] Joint Committee on Human Rights, *The Implications for Access to Justice of the Government's Proposals to Reform Legal Aid* (2013-14, HL 100, HC 766).
[42] Criminal Bar Association of England and Wales, ' "Transforming Legal Aid – Next Steps" Consultation Paper The Response of the Criminal Bar Association of England and Wales' (October 2013), para 25.
[43] Ibid. para 27.
[44] Ibid. para 82.
[45] Ministry of Justice, *Transforming Legal Aid: Next Steps*, 2.27-2.28.
[46] Owen Bowcott, Peter Walker and Lis O'Carroll, 'Courts close across England and Wales as lawyers protest at legal aid cuts' *The Gurdian* (London, 6 Januray 2014) < http://www.theguardian.com/law/2014/jan/06/courts-close-england-wales-lawyers-legal-aid-cuts> accessed 25/02/14.
[47] Dan Johnson, 'Legal Aid Boycott "causing chaos" ' (*BBC News* 8th July 2015) < http://www.bbc.co.uk/news/uk-33443413>
[48] LGFS Consultation Position Statement (n 28) and 'Big Firms' Group statement in response to MoJ cuts proposals' (Big Firms Group February 2017)
[49] Monidipa Fouzder, 'New Protests Over Legal Aid Cuts' *Law Society Gazette* (London, 20 February 2017)

what impact does reducing levels of criminal defence legal aid funding have on the professional criminal justice value-sets of criminal defence lawyers? There are several reasons for taking this particular focus. Firstly, the people initially and most directly affected by cuts to the rates paid to defence lawyers are *defence lawyers*. Hence, the focus was always going to be (to a greater or lesser extent) on them to begin with. That alone does not lead us to professional criminal justice value-sets though. It would be possible to conduct research looking into the personal impact on defence lawyers - who ends up losing their job, how many hardworking lawyers and support staff could be made redundant etc. or even the personal values of defence lawyers (as opposed to the values relevant to doing their job). However, significant consideration of these issues has already taken place (and continues to do so). The organisations representing the professions,[50] from the very first iteration of these policies, were looking into and highlighting those particular problems. I also became aware quite early on of another doctoral researcher looking at that angle of the changes too. What appeared to be getting rather less attention was the impact on the professional values held by those lawyers working within the system. This is a problem because it is this that seems to me to be of much more far-reaching significance - affecting many people, far beyond the individual defence lawyers themselves.

The values held and prioritised by practitioners, those practitioners' ability to influence how the system runs and the relevance of financial issues to that, has long been considered a topic warranting close attention.[51] For example, in 1968, Herbert Packer argued that the day-to-day functioning of the criminal justice process involves a "constant series of minute adjustments between the competing demands of two *value systems*" (emphasis added).[52]

Bottoms and McClean's early study on the experiences of defendants (rather than directly looking at the behaviour of lawyers), when considering why so many defendants in their interviewed sample pleaded guilty, found that defendants felt pressured by their lawyers to plead guilty. Bottoms and McClean considered a legal advisor in a police interview room more as an early form of pressure for informal settlement than adversarial assistance. [53] Similarly, Baldwin and McConville's study interviewing 121 defendants on why they pleaded guilty reported defendant

[50] Chiefly the Criminal Bar Association; Criminal Law Solicitors Association; London Criminal Courts Solicitors' Association and, later on, the Law Society
[51] Albeit not recently and not in relation to the changes just discussed
[52] Herbert Packer, *Limits of the Criminal Sanction* (Stanford University Press 1968)
[53] A.E. Bottoms and J.D. McClean, *Defendants in the Criminal Process* (Routledge and Keegan Paul 1976) 231

interviewees describing being "instructed", "ordered", "forced", or even "terrorised" into pleading guilty by their lawyers.[54] This was in spite of the fact that a former justices clerk and (even) a Chief Constable examining several of the cases considered that the defendants would have had a good chance of acquittal at trial.[55] Building upon this, Baldwin's later work observing pre-trial discussions between defence and prosecution lawyers (as well as interviewing lawyers alone), found defence lawyers speaking in terms of how they would "definitely put pressure on" the defendant to plead guilty, including asking for evidential; "ammunition" from the prosecution to help them do so.[56] The ability to influence how the system runs was clear - as one lawyer Baldwin spoke to put it "Only very rarely does a client not take one's advice".[57] In considering how to tackle the issue of defendants pleading guilty at the last minute before trial (as part of a 9 month pilot project into pre-sentence reports), Bredar similarly reported defence and prosecution counsel discussing how to make a guilty plea happen (albeit not necessarily for selfish reasons).[58]

Later work by Sanders, Bridges and Mulvaney on advice in police stations also found evidence of practitioner influence (pressure to confess from the defence lawyer) at the police station stage – indeed, a reluctance to attend the police station at all.[59] Dixon, also, investigated defence lawyer advice in the police station, conducting 35 interviews with advisers. He noted the variety of value-sets displayed by advisers and their approach: from strong adversarial views to others "of which any chief constable would be proud".[60] Later work for the Royal Commission on Criminal Justice would find further evidence of poor practice in the police station,[61] with Hodgson later remarking (on the issue of value-sets): that many defence lawyers displayed a "non-adversarial ideology" rather than an adversarial one.[62] The Commission's overall report candidly described the findings on police station advice as "disturbing".[63] Work by Bridges, Cape, Abubaker and Bennett also

[54] John Baldwin and Mike McConville, *Negotiated Justice* (Martin Robertson 1977) 46
[55] ibid. 74-75
[56] John Baldwin, *Pre-trial Justice* (Basil Blackwell 1985) 87-88
[57] ibid. 89
[58] James Bredar, 'Moving up the Day of Reckoning: Strategies for Attacking the Cracked Trial Problem' [1992] Crim LR 153, 155
[59] Andrew Sanders, Lee Bridges and Adele Mulvaney, 'Advice and Assistance at Police Stations and the Duty Solicitor Scheme' (Lord Chancellor's Department 1989) 118-120
[60] David Dixon, 'Common sense, Legal Advice and the Right to Silence' [1991] Public Law 233, 236
[61] See John Baldwin, 'The Role of Legal Representatives at the Police Station (Royal Commission on Criminal Justice Research Study 3, HMSO 1992/3); Mike McConville and Jacqueline Hodgson, 'Custodial Legal Advice and the Right to Silence' (Royal Commission on Criminal Justice Research Study 16, HMSO 1993)
[62] Jacqueline Hodgson, 'Adding Injury to Injustice : the suspect at the police station' (1994) 21 JLS 85, 96
[63] The Royal Commission on Criminal Justice Report (Cm 2263, HMSO 1993) Para 59

highlighted poor police station practice here – for our purposes an interesting finding being how supervision of trainees was not taken seriously.[64]

Commenting on how financial systems can influence lawyer behaviour more generally, McConville and Mirsky's work on public defence lawyers in New York noted how the publicly funded system there institutionalised methods depending on routinized case processing and discouraged adversarial advocacy.[65] Morrison and Leith's interviews with British barristers likewise considered how they cope within the financial system they work within. Because "time is short, and pressures are constant",[66] they noted that, amongst other things, cases were often poorly prepared.[67]

In further work for the Royal Commission, Plotnikoff and Woolfson spoke to defendants and surveyed lawyers, this time on the issue of criminal appeals. Both defendants[68] and lawyers[69] noted how financial issues influenced the service provided (or whether it was provided at all). Zander then carried out a large-scale survey of the main actors (court clerk, judge, defence and prosecution lawyers, police, defendant and jury) in all cases in every Crown Court in England and Wales for two weeks in 1993.[70] Zander identified a number of concerning findings, not least of which was that 25% of defendants answered "who helped you decide your plea?" with "barrister"[71] and that 53 responding barristers suspected that their client was innocent, but pleaded guilty – scaled up, this would have meant around 1400 cases per year at the time.[72]

Two of the most comprehensive studies into practitioner behaviour and values will be highlighted next. McConville, Sanders and Leng's study of police and prosecution decision-making covered

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[64] Lee Bridges, Ed Cape, A Abubaker and C Bennett, 'Quality in Criminal Defence Services' (Legal Services Commission 2000)

[65] Mike McConville and Chester Mirsky, 'Understanding Defense of the Poor in State Courts: The Socio Legal Context of Non-Adversarial Advocacy' (1990) 10 *Studies in Law, Politics and Society*, 235

[66] John Morrison and Philip Leith, *The Barristers' World and the Nature of Law* (Open UP 1992) 91

[67] Ibid. 43-44

[68] Joyce Plotnikoff and Richard Woolfson, 'Information and Advice for Prisoners about Grounds for Appeal and the Appeals Process' (Royal Commission on Criminal Justice Research Study 18, HMSO 1993) 105

[69] Ibid. 83

[70] Michael Zander, 'The Crown Court Study' (Royal Commission on Criminal Justice Research Study 19, HMSO 1993) xi

[71] Ibid. 96

[72] Ibid. 138-139; though Zander was quick to talk down this finding, arguing that barristers had "misunderstood the thrust of the question." See also: Zander 'The "innocent"(?) who plead guilty' (1993) 143 NLJ 85

three police force areas (2 sub-divisions in each force). They examined 120 adult and 60 juvenile cases for each sub-division (6 in total). They also interviewed the police and (if applicable) prosecutors involved in these cases.[73] Whilst the findings were highly critical of the police and prosecution services,[74] defence lawyers were not immune from criticism either. In "case after case" defence lawyers unnecessarily agreed to bargains with the police and prosecution and there was "abandonment of all but the shell of adversariness".[75] McConville, Hodgson, Bridges and Pavlovic's later study of 48 defence firms[76] found numerous examples of practice by defence lawyers negatively influencing the system, most especially in pushing defendants towards guilty pleas.[77] In contrast, Travers' work, also looking at defence lawyers, took a very different view and reported positively on the lawyers' behaviour in his study.[78] We shall return to this intriguing disparity in Chapter 2.

Mulcahy, in a study of two English magistrates' courts (consisting of observation of pre-trial reviews and interviews with court practitioners), found similarly negative influences on the justice process.[79] For our purposes, an intriguing finding was that lawyers were "acutely aware" of the financial benefits (and costs) to them of a particular course of action: the trial, and that this influenced the way they themselves influenced the system. Lawyers in Mulcahy's study tried to avoid trials, in favour of negotiated settlements.[80] Again, the connection between this behaviour and the value-set of the practitioner was made; in this case Mulcahy argued that the lawyers displayed a non-adversarial, pro-police, value-set.[81] Returning to the issue of police station work, Choongh's more recent research into police practices also contained some insights into defence lawyer performance in police interviews. Of the 17 cases observed where a solicitor was present, in 10 of those cases the adviser did nothing and in the other 7 their assistance was only limited.[82] Choongh concluded: "Advisers, even when they do attend the station, do not always attend the interrogation. If they do attend the interrogation, they very rarely challenge police interrogation

[73] Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution* (Routledge 1991) 209-210
[74] arguing that their practices undermined the adversarial system 167
[75] Ibid. 168
[76] Mike McConville, Jacqueline Hodgson, Lee Bridges and Anita Pavlovic, *Standing Accused* (Clarendon Press 1994). 15
[77] Ibid. 268, 210, 160
[78] Max Travers, *The Reality of Law* (Ashgate 1997)
[79] Aogán Mulcahy, 'The Justifications of Justice: Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates Courts' (1994) 34 BJ Crim 411, 415
[80] Ibid. 412
[81] Ibid. 412 and 427. The "Crime Control model", which we shall consider in depth later.
[82] Satnam Choongh, *Policing as Social Discipline* (Clarendon Press 1997) 161

tactics, regardless of how unfair or oppressive such tactics may be".[83] This may of course have nothing to do with finance or the values of the lawyers involved, but it again demonstrates the power practitioners wield over those within the system.

Other studies have looked at the issue of how lawyers react to changes in funding more broadly. Bevan, carried out an economic analysis of the then government's claim that demand for legal aid is "supplier induced". This is an issue in any business where, due to their expert knowledge, it is the professional, rather than the customer, who (to a greater or lesser extent) decides what services are needed. For example, it is the clinician's diagnosis of the patient which ultimately determines what subsequent treatment options are available (or even necessary). Likewise, the argument runs, it is the lawyer's view of the prospects of success on a case that influences what work does and does not need to be done. Bevan concluded "the current system of legal aid enables lawyers to secure a target income rather than encourage a fair and efficient use of limited resources."[84] In the criminal context, commenting on a drop in the volume of criminal work in the Crown Court or higher, Bevan noted that the unit cost (total spend, divided by number of acts of assistance) had increased in response.[85] Bevan argued this increase was due to lawyers wishing to offset their loses from the reduced volume. Similar quantitative work by Gray et al. (and, later, Fenn, Gray and Rickman), considered the impact of a finance change on defence lawyer behaviour (the, at the time novel, introduction of fixed fees). Gray et al. predicted that "cases which would have received a fee below the standard fee will display minimum input levels under the standard fee, while cases which would have received a higher fee [under a non-standard fees system] will either display these minimum levels too or will display higher input levels under the standard fee".[86] As a consequence, they predicted a reduction in quantity or quality of work and little money being saved (due to lawyers playing the system e.g. by artificially pushing cases over the respective complexity thresholds).[87] In 2007, Fenn et al.'s paper tested whether this was correct, using data from submitted legal aid bills from 1988-1994 (before and after fixed fees). They found

[83] Ibid. 179

[84] Gwyn Bevan, 'Has there Been Supplier Induced Demand for Legal Aid?' (1996) 15(2) Civil Justice Quarterly 98, 114. Cf. Cyrus Tata, 'In the Interests of Clients or Commerce?' Legal Aid, Supply, Demand and "Ethical Indeterminacy" in Criminal Defence Work' (2007) 34(4) JLS 489, who throws doubt upon the entire premise of the supplier induced demand thesis. See: 516-518 The argument "implicitly view[s] cases through the lens of legal formalism: the true 'facts' are definitive, objectively knowable, and waiting to be found" when in fact "ccompeting ideas about what is essential and what is not, means that 'need' is a slippery concept".

[85] Bevan (n 33) 109

[86] Alastair Gray, Paul Fenn and Neil Rickman, 'Controlling lawyers' Costs Through Standard Fees: An Economic Analysis' in Richard Young and David Wall (eds), *Access to Criminal Justice: Legal Aid Lawyers and the Defence of Liberty* (Blackstone 1996) 202

[87] Ibid. 215

that "when presented with remuneration that did not reward the application of extra inputs (other than at higher thresholds), solicitors reduced their supply of such inputs in comparison with previous practice. In contrast, where fee-for-service [non-fixed-fees] continued to be in place, solicitors raised the levels of inputs supplied, apparently substituting these for those inputs where marginal cost was not covered."[88] For our purposes, the interesting finding is that, again, "solicitors do respond to financial incentives; something that economic theory recognises, and current/future reform should acknowledge".[89] Changes to finance can, and do, impact the way lawyers go about their work.

Somerland's work (published the same time as Gray et al.) throws some light on how this operated. Also examining the impact of introducing fixed fees, she interviewed lawyers from 20 firms in North England.[90] The findings were not encouraging. As one interviewee put it: "Lawyers are learning to use the standard fees system and do very little for it. Because in fact £140 for a guilty plea – if you can do it all in one hearing – then it's quite profitable."[91] Again thinking about the values held by practitioners of the future, Somerland grimly predicted "Adversarialism, involving the testing of the prosecution case and the construction of a defence to throw reasonable doubt upon that case, will become something to which only the wealthy have access."[92] This was 1996. Whether this actually happened is something that this research will address.

That is not to say that finance is the only reason for lawyers to exercise their power to influence the process. Herbert's observation, analysis of registers and 38 semi-structured interviews with magistrates court participants: (magistrates, legal advisers and defence solicitors) found more benevolent uses of it.[93] Defence solicitors indicated in interview that tactically entering a not guilty plea was often the only way to obtain information from the prosecution, in order to advise

[88] Paul Fenn, Alastair Gray and Neil Rickman, 'Standard Fees for Legal Aid, an Empirical Analysis of Incentives and Contracts' (2007) 59(4) Oxford Economic Papers 662, 678
[89] Ibid.
[90] Hilary Somerland, 'Criminal Legal Aid Reforms and the Restructuring of Legal professionalism' in Richard Young and David Wall (eds), *Access to Criminal Justice: Legal Aid Lawyers and the Defence of Liberty* (Blackstone 1996), 307
[91] Ibid. 310-311
[92] Ibid. 311
[93] Andrew Herbert, 'Mode of Trial and Magistrates Sentencing Powers: Will Increased Powers Inevitably Lead to a Reduction in Committal Rate?' [2003] Crim LR 314, 316

their client or conduct meaningful negotiations with prosecutors.[94] The key point is that practitioner power to substantially influence exists and is used.

Other research into legal aid lawyers has found issues of diminishing morale, which might also affect values and behaviour. Somerland's further research analysed 30 interviews with self-described "political" legal aid lawyers (i.e. those who do legal aid work mainly for its political impact rather than to make money) across several different geographical areas.[95] She found that the ability and will of committed legal aid lawyers to carry out the work was being reduced.[96] The titular interview quote summarises the tone of the interviews well: "I went into law because I wanted to help what I considered to be disadvantaged people in achieving their rights but I now feel disillusioned"…"I never achieve my targets." … "I used to be very committed… for years I regularly did a 60-70 hour week but now my commitment is wavering… I've lost the plot."[97] Moorhead found similar concerns voiced in his survey of 270 legal aid solicitors firms.[98] One respondent noted that "it will be too late to get young blood into criminal defence work before a desperate shortage hits". Another said that Morale was "rock bottom".[99] Moorhead also noted the existence of "escape routes" for the low morale legal aid lawyer to take, further aggravating the issue. They need not stay doing legal aid.[100] On the other hand, Moorhead notes that for those who do stay, "the economic pressure to bill more on the same rates" may incentivise "behaviour which practitioners indulge in but also recognise as distasteful, unprofessional, improper or dishonest."[101]

Two slightly more recent studies considered the impact of changes to financial arrangements (fixed fees and nationalised defence services) in Scotland on the behaviour of defence lawyers, looking particularly at the above issue of incentivising questionable behaviour. Goriely et al.'s study looked at the introduction of a public defence solicitor's office in Scotland, alongside the traditional private sector firms being paid by public funding. This represented a change in financial

[94] Ibid. 321
[95] Hilary Somerland, 'I've lost the plot': an Everyday Story of the Political Legal Aid Lawyer' (2002) 28 JLS 335, 342-343
[96] Ibid. 360
[97] Ibid. 356
[98] Richard Moorhead, 'Legal Aid and the Decline of Private Practice: Blue Murder or Toxic Job?' (2004) 11(3) International Journal of the Legal Profession, 159
[99] Ibid. 175
[100] Ibid. 180
[101] Ibid. 182

arrangement for the lawyers involved relative to the publically funded private sector. A quantitative study of 2600 cases between April and Dec 1999 was carried out, supplemented by 48 interviews with relevant actors, including private defence solicitors, public defence solicitors, defendants, sheriffs (judges), magistrates, prosecutors, court clerks and social work agencies.[102] Importantly, for our purposes, the report returned to the question of how far solicitors are influenced by economic incentives contained within the legal aid system. On the basis of their data, they again argued that practitioner values had a great influence on what went on: "modifications in behaviour will be greatest in areas of ethical indeterminacy: that is where the choice is between two courses of action, both of which have advantages and disadvantages, and where ethical practitioners genuinely differ about which is the better. In making difficult and evenly-balanced judgements, greater weight is placed on the advantages that flow from a course of action that is in one's own interests. Less weight is placed on those that flow from actions that run contrary to one's interests… One might also expect that the relationship between financial incentive and behaviour would be mediated through values." [103] They ultimately concluded that "such indeterminacy provides scope for the financial consequences of a course of action to colour a solicitor's views".[104] The researchers involved would later reflect that this had concrete consequences: public defence solicitor's office lawyers "tended to resolve cases at an earlier stage of the process than their private counterparts, usually through a guilty plea. The change in economic incentives involved in receiving a salary rather than a legal aid payment appeared to produce a change in behaviour, which, although difficult to detect in a single individual case, was measurable over comparable caseloads as a whole."[105] They concluded: "solicitors appear to have been routinely influenced in significant part (albeit not exclusively) by the incentives under which they operate."[106]

The second Scottish study considered the impact of the introduction of fixed fees in Scotland. Stephen and Tata interviewed 13 "stakeholders" (heads of professional associations, policymakers etc.), surveyed 300 legal aid solicitors firms and interviewed 62 of those surveyed, alongside 17 prosecutors. They also considered data from the Legal Aid Board from 1997/1998-2001/2002

[102] Tamara Goriely, Paul McCrone, Peter Duff, Cyrus Tata, Alistair Henry, Martin Knapp, Becki Lancaster and Avrom Sherr 'The Public Defence Solicitor's Office in Edinburgh: An Independent Evaluation' (Scottish Office Central Research Unit 2001)
[103] Ibid. 69
[104] Ibid. 81
[105] Cyrus Tata, Tamara Goriely, Paul McCrone, Peter Duff, Martin Knapp, Alastair Henry, Becki Lancaster and Avrom Sherr, 'Does Mode of Delivery Make a Difference to Criminal Case Outcomes and Clients' Satisfaction? The Public defence Solicitor Experiment' [2004] Crim LR 120, 127
[106] Ibid. 135

showing firm income and expenditure, and data from the Crown Office on case trajectories.[107] They found that, just as with the public solicitor's office change, the financial change here had influenced the behaviour of practitioners (particularly in, as before, situations of "ethical indeterminacy").[108] For example, increasing the volume of cases taken on[109], avoiding client support and care,[110] avoiding interviewing witnesses (precognitions)[111] and, because of the quirks of the system at the time, pleading not guilty initially (to ensure legal aid was granted) and then guilty later on in the process.[112] The lawyers involved knew exactly what they were doing: "almost none" said they were unaware of the most financially efficient way to deal with a case.[113] The point, again, is to illustrate the power practitioners have to influence case outcomes and their willingness to use it in response to financial changes in circumstances of ethical indeterminacy. To what extent this occurs and when, is a difficult issue. As Tata later put it: it is not that lawyers ignore finance and act only in client interest, but nor is it that lawyers always follow financial interest. Rather, finance is one factor among many other competing considerations.[114]

Outlining some of these competing considerations, Tague considered the issue of barristers in the English Crown Courts; who also had the experience of moving to a semi-fixed fee system (though as discussed earlier, the fee can "graduate" upwards in response to particular measures of case complexity, such as the number of pages of prosecution evidence). Having interviewed a number of barristers about their work, Tague concluded that it may sometimes be in a barrister's self-interest to get their client to plead not guilty in the Crown Court (for both financial and career development reasons),[115] but also sometimes advantageous to the defendant as well. Tague provides three examples of how it may be advantageous for a defendant to plead not guilty in the Crown Court: likelihood of acquittal (in that statistics suggest trying one's luck with the jury can be fruitful), comparative sanction (in that sentences at the end of trial can be lighter as more

[107] Frank Stephen and Cyrus Tata 'Impact of the Introduction of Fixed Fee Payments into Summary Criminal Legal Aid : Report of an Independent Study' (Scottish Executive 2007)
[108] Ibid. 55
[109] Ibid. 29
[110] Ibid. 38
[111] Ibid. 40, in line with similar behaviour observed in England in the past: Richard Young, T Moloney and Andrew Sanders 'In the Interests of Justice?' (Birmingham University 1992) 75-76
[112] Ibid. 66
[113] Cyrus Tata and Frank Stephen, 'Swings and Roundabouts: Do Changes to the Structure of Legal Aid Remuneration Make a Real Difference to Criminal Case Management and Case Outcomes?" [2006] Crim LR 722, 739
[114] Cyrus Tata, 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand and "Ethical Indeterminacy" in Criminal Defence Work' (2007) 34(4) JLS 489, 496
[115] Peter Tague 'Barristers' Selfish Incentives in Counselling Clients' [2008] Crim LR 3, 6, 12

mitigating evidence may emerge during the trial) and that it is sometimes conceptually harder to appeal against conviction following a guilty plea.[116] Again, the suggestion here is that practitioners have the power to influence what goes on in the justice process and that financial concerns (among other things) can influence the use of that power.

More recent studies into legal aid work have focused on the work of solicitors. Kemp interviewed 24 defence solicitors alongside exploratory observation of magistrates courts and custody suites. She also had data from structured interview surveys conducted by IPSOS MORI of 1142 court users.[117] Kemp's work highlighted that some of the issues previously discussed were clearly still live, such as demoralisation about the future,[118] the presence and use of exit routes out of the profession to more profitable work,[119] and fixed fees impacting work done.[120] It also highlighted a new problem: an increase in self-represented litigants in magistrates courts.[121] On the basis of these findings, Kemp's first recommendation was for further research to explore the extent to which changes in remuneration impacted on decision-making and working practices.[122]

A small, but focused, ethnographic and interview study was also recently carried out by Newman, looking at the behaviour of legal aid defence solicitors in three firms in an English city.[123] Newman's work was strongly critical of the lawyers examined. They "moved away from client-centeredness and towards managerial, profit centred concerns."[124] Again, we can see an example of practitioner power to influence the justice process - in this case negatively. Newman, however, sought to distance the role that finance played in explaining his particular research subjects' behaviour – arguing instead that "the values that informed these lawyers should take centre stage over and above how they coped financially."[125]

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[116] Peter Tague, 'Tactical Reasons for Recommending Trials Rather Than Guilty Pleas in the Crown Court [2006] Crim LR 23, 25
[117] Vicky Kemp, 'Transforming Legal Aid: Access to Criminal Defence Services' (Legal Services Research Centre 2010) 18
[118] Ibid. 109
[119] Ibid. 107
[120] Ibid. 115
[121] Ibid. 69-72
[122] Ibid. 9
[123] Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing 2013) 30
[124] Ibid. 159
[125] Ibid. 158

Lastly, and highly relevantly for this research, Smith carried out a written (including space for qualitative comments) survey of lawyers present at a professional association meeting in 2013 discussing opposition to the particular cuts under discussion here.[126] In this brief survey, respondents considered that standards would fall, speed and volume would take precedence over quality, difficult cases or clients would be avoided and that many lawyers would leave the profession. All of this again suggests that practitioners have significant influence over what goes on in the system and that finance concerns can play a part in how this is exercised. For Newman, as others considered have also suggested, the issue of values is also key.

Indeed, this reflects the view in a more general sense about the criminal justice process too. Noting the power of practitioners to influence the working of the system, Rutherford, who looked at the values held by a variety of persons, including lawyers, probation officers, prison officers and judges, concluded, "it is with them that hope must reside if… criminal justice is to be made a little more decent".[127] Likewise Telford and Santatzoglou argued for recognition of the power that practitioners (in their case, practitioners from across the whole of the youth justice system) have in shaping policies on the ground. They concluded that high levels of inter-practitioner "trust" were key to the significant reduction in youth custody that occurred in the 1980s, in spite of top-down policies.[128] This principle, that practitioners have significant influence and power, continues to be felt today. For example, at a recent symposium of criminal justice policymakers and practitioners, there was discussion of the concept of "healthy subversion" - where practitioners use this power for good.[129]

This is all well and good – a reduction in youth imprisonment and trust between practitioners is, at least in my opinion, a good thing. However, not only are the values of practitioners an extraordinarily influential element on how the system actually runs, they can also potentially be one of the most problematic. As much of the other research considered above suggests, not all subversion is healthy. We shall see in Chapter 3 that there are a variety of value-sets that *could* be

[126] Tom Smith 'Justice for Sale: An Empirical Examination of the Attitudes of Criminal Defence Lawyers Towards Legal Aid Reform' (2014) *Plymouth Law and Criminal Justice Review* 1
[127] Andrew Rutherford, *Criminal Justice and the Pursuit of Decency* (Waterside Press 1994) 166
[128] Mark Telford and Sotirios Santatzoglou, ' "It was about trust"– Practitioners as policy makers and the improvement of inter-professional communication within the 1980s youth justice process' (2012) 32(1) *Legal Studies* 58
[129] Harry Annison, John Boswell, Mark Telford and James Thornton, 'Penal Policymaking: a Collaborative Symposium Summary Report' (2016) 3

prioritised in the criminal justice process. However, amongst those, there are a great many values that we would *not* want to be prioritised – unless we were tyrannical fanatics.[130] It is all very well for practitioners to talk of "healthy subversion", but there are a great many value-sets, which, if prioritised, lead us to a decidedly more *un*healthy condition. The key point is that if we recognise practitioners have a great deal of power to influence what goes on in the criminal justice process, we also need to recognise that changing things can have potentially adverse effects on the use of that power. And yet, at present, there is no consideration of the effect that changing levels of funding has on value-sets. Indeed, the research considered above, (albeit that it looks at other financial and systemic changes - such as movement towards fixed fees), suggests there is potential for very negative consequences. That is why research like this is original and important; to peer into the murky depths at the potentially quite unpleasant consequences of these changes to legal aid: unhealthy subversion. Hence, the overall research question is: *what impact does reducing levels of criminal defence legal aid funding have on the professional criminal justice value-sets of criminal defence lawyers?*

1.3 The Approach Taken

The above section has introduced the subject matter of the research *question* and the rationale for this work. We will next discuss how to understand and answer that question. How should this problem be understood? How should the research question be answered? The chapters that follow provide these answers. In particular, the next chapter, Chapter 2, details the approach to going about answering the question and discusses the issues of research methods and methodology that follow from that. In other words, what will be the "data" and how can it help answer the research question? Since we are concerned with the impact that funding cuts have on the value-sets of defence practitioners working within the criminal justice process, Chapter 3 reviews the literature of criminal justice process models in order to see how the data can be analysed. Chapter 4 builds on this by explaining my own, original, approach to using these models to analyse qualitative data. Finally, applying this framework, Chapters 5 and 6 contain the findings and analysis of the qualitative empirical work, which together provide an answer to the research question.

[130] See Chapter 3

Chapter 2: How to Answer the Question

2.1 Introduction

This chapter sets out the reasons for choosing the approach taken to answering the research question: what impact does reducing levels of criminal defence legal aid funding have on the professional criminal justice value-sets of criminal defence lawyers? It will first discuss issues about data analysis (some of which are built upon in Chapter 3), before tackling the issue of which data to use, some epistemological debates and potential limitations. Data analysis is the first thing discussed, because it is, in the end, what actually answers the question and it tackles some issues that are immediately raised by the research question.

2.2 Data Analysis

There are three issues to consider here: the first two involve looking at the terms of the research question in some detail. The final issue is a more general epistemological problem that has plagued similar studies in the past that we shall seek to move beyond here.

2.2.1 The First Two Issues

The question asks what impact does reducing the levels of criminal defence legal aid funding have on the professional criminal justice value-sets of criminal defence lawyers. It is submitted that there are two principal issues raised by this question: 1) The nature of the word “impact” and 2) what exactly is to be impacted. We shall consider each of these issues in turn.

2.2.1.1 The Nature of “Impact”

There is a significant danger that, in answering a question about what the impact of something is, a short and generalised (but not particularly useful) answer is returned. Someone might simply say that the impact of a policy change was “good” or “bad” or “none”. This is not particularly useful or enlightening and does not provide a satisfactory answer to the inquiry. Almost as bad is the hyper-specific response. This would say that the impact of a change would be that “x and y

would go out of business" or even "this particular case on this particular day was dealt with badly". The trouble with this is that it does not, without further elaboration, construction or explanation, really prove very useful or comprehensive. In order to answer the question as fully, comprehensively and usefully as we can, something more is required – a way of measuring and analysing things in detail, whilst not becoming over-specific.

2.2.1.2 What it Means to be Impacted

A related issue is that the word "impact" pre-supposes that there is some "thing" that can be said to have been impact*ed* in some way. Even dictionary definitions speak of either forcefully coming into contact *with* something or having a marked effect or influence *on* something.[131] Physically speaking, for example, we would say that a kick makes a physical "impact" on an opponent. Hence, in seeking to answer what the impact of criminal legal aid reductions is, we first need to identify what the target is: what has been impacted? As discussed in the previous chapter, the "target" is the value-sets held and prioritised by defence lawyers, but how could this be measured? Ideally, we would have a large target that took into account as many potential value-sets as possible.

2.2.1.3 The Models Approach

It is submitted that the way to overcome both of these issues is to use criminal justice process models as our target for what is impacted and as our way of measuring and analysing things in more detail than "good or "bad" or hyper-specific. The starting point when considering criminal justice process models is the analytical tools first developed by Herbert Packer in *Limits of the Criminal Sanction*[132] in 1968 and developed by others since. These give us some concrete examples to evaluate and categorise different value-sets into. Packer's initial approach is not without its critics. We shall consider this and construct a detailed original approach to using this kind of theory for analysis in Chapters 3 and 4. However, we shall first consider the basics and how they can assist in overcoming the two issues just identified.

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[131] Oxford Dictionaries Online <http://www.oxforddictionaries.com/definition/english/impact> accessed 08/06/2015

[132] Packer (n 52)

Packer argued that the values underpinning the criminal justice process could be expressed as falling somewhere on the "spectrum"[133] between two polarised value-sets: *Crime Control* and *Due Process*. The two viewpoints share some "common ground"[134], such as the fact that, where a crime has been committed, the process ought to be invoked,[135] but disagree on the most paramount considerations in doing so. *Crime Control* believes this to be protection of the individual from crime; *Due Process* believes it to be protection of the individual from state abuse.[136] Both of these views are extremes – Packer considered anyone who fully subscribed to either as a "fanatic" - [137] the idea is that you plot your own criminal justice process somewhere on the scale between the two, depending on the value-sets that are most dominant.

It is submitted that using these models to analyse the available data addresses both the issues outlined earlier. First of all, it provides a workable measure (see 2.2.1.1). It takes us beyond a simplistic and unhelpful approach to the word "impact" by going beyond talking about merely "good" or "bad" impacts on values. Instead we can say that the impact of a change is a shift along the value-scale towards certain *Crime Control* or *Due Process* values; that one value-set or the other has become more dominant.

It also addresses the similar issue (see 2.2.1.2) of requiring a large target that takes into account as many elements as possible. The Criminal Justice Process Model approach encompasses a variety of values and roles in the criminal justice process, from stereotypical police views (*Crime Control*), to stereotypical defence lawyer views (*Due Process*) and everything in between. As we shall see in Chapter 3, later developments have broadened the scope of the models considerably, to include many other values-sets, such as victims and bureaucrats. Hence, the target for our analysis becomes the value-sets' position on the scale: something specific and fairly comprehensive.

2.2.2 The Final Issue: an Epistemological Conundrum

There is a specific epistemological conflict that has caused problems for those researching the behaviour and attitudes of defence lawyers. This needs to be reflected on before continuing,

[133] ibid. 153
[134] ibid. 154
[135] ibid. 155
[136] ibid. 158 and 165
[137] ibid. 154

because it has caused different research studies on this same topic to come to very different conclusions. The two studies are those of Mike McConville et al., in *Standing Accused*,[138] and Max Travers in *The Reality of Law*.[139] It is also necessary to consider Daniel Newman's recent attempt to reconcile these two camps in *Legal Aid Lawyers and the Quest for Justice*.[140]

2.2.2.1 The Conflict Between Standing Accused and The Reality of Law

The two studies can be summarised thus. At one end of the scale, McConville et al. studied 48 solicitors' firms in total, to varying degrees of intensity, but an average of 6.5 weeks per firm.[141] At the other, Travers studied one law firm in depth for 4 months.[142] McConville et al.'s conclusions were damning. In essence, at the Crown Court, "barristers evince little interest in scrutinising the evidence" and " 'the evidence' is reified, set up as a totality, and invested with a force which irresistibly points to guilt".[143] The magistrates' court was considered little better: "For the most part, solicitors do not see magistrates' courts as trial venues but as places where defendants can be processed through guilty pleas."[144] And before court, their view was: "conviction is achieved in the office of their [the defendant's] adviser through a process whose methodologies most nearly resemble those of the police themselves."[145]

Travers, in contrast, presented a rather different account of dedicated lawyers providing skilful service to clients. He focused on two episodes that took place during his in-depth study of one firm: a guilty plea in the magistrates court and a preparation for trial in the Crown Court. For the magistrates court, he noted that what at first sight appeared to be a lawyer pressurising a client to plead guilty in order to save herself and the court's time,[146] was actually, on closer inspection, an example of a lawyer getting the best sentence they could for their client when the outcome (guilty) was never really in any doubt.[147] For the Crown Court, Travers dealt with the opposite

[138] *Standing Accused* (n 75)
[139] Travers (n 77)
[140] Newman (n 122)
[141] *Standing Accused* (n 75), 15
[142] *The Reality of Law* (n 77)
[143] *Standing Accused* (n 75), 268
[144] ibid. 210
[145] ibid. 160
[146] *The Reality of Law* (n 77) 106
[147] ibid. 121

situation: where neither lawyer nor client could predict the outcome.[148] Again, he observed a dedicated lawyer looking out for their client and, in the end, securing a not guilty verdict.[149]

In his book, Travers was critical of other epistemological approaches. Indeed, the main point of the book was to test out this theory, rather than to make critical analysis of law firms.[150] The problem was, he considered, that many other studies were "full of stereotypes which allow liberal academics to advance generalised critiques, which tend to be well received by fellow liberals, without making an impact on the working practices of groups like criminal lawyers and the police."[151] Such studies do not appreciate the "moral complexity of the world around us" and attempt to preach about morals and conduct from the assumed-to-be-privileged epistemological standpoint of the academy.[152] In other words, Travers' point was that it was somewhat arrogant for sociologists to claim that they know when a lawyer has handled a case well or not, when very often, due to the uncertain nature of legal work, even the lawyers and clients do not know that themselves until after the event, with the benefit of hindsight – or sometimes never.[153] What we need to do instead is to understand how the participants themselves view the world and the incidents under discussion; only then can we start making judgements. We need to consider the various perspectives of those involved. In that regard, it is worth setting out Travers' conclusion about his magistrates court observation in detail: "There will be some readers who still feel that the episode…is all about a lawyer using her position of power to persuade a vulnerable client to plead guilty. In one sense, this is precisely what happened; but I also hope to have shown that describing the episode in these terms fails to address how a lawyer dealt with a particular situation in real time, and in full knowledge that, whatever she did, the client would still have been found guilty. In short, it fails to recognise the practical character of legal work."[154]

The particular disparity between the findings of *The Reality of Law* and *Standing Accused* was not lost on Travers; and he therefore published an article specifically criticising the approach taken in *Standing Accused* (and, to boot, McConville et al.'s similar study of police practice: *The Case for*

[148] ibid. 147-148
[149] ibid.125
[150] ibid. Preface, x-xi
[151] ibid.156
[152] ibid. 157
[153] ibid. 147
[154] ibid. 157

the Prosecution as well), developing the argument first made in *The Reality of Law*.[155] Travers bemoaned *Standing Accused*'s reliance on what he by now called the "*correspondence* theory of truth": researchers holding out their version of the police and criminal defence lawyers as *the* objective truth of what the process is actually like and describing the research as revealing "an objective reality".[156] To place this more broadly within epistemology, we might call the "correspondence theory" an example of "structuralism" – the epistemological belief that there is an overarching objective structure, which, if only we can understand it, explains social phenomena.[157] The key point is that there is something objective (the structure) out there that the academic can discover. As Newman later put it: "the academic is able to use their skills to uncover some manner of objective truth."[158] We might therefore generalise even more and call this an example of objectivism.

Travers instead argued that this might just as sensibly be viewed as a process of congruence (the *congruence* theory of truth), rather than objective truth and certainly would be painted as such by a critic of McConville et al.'s conclusions.[159] Under the congruence theory of truth, "reality is a product of the way in which the observer describes it" and there are therefore multiple realities to consider.[160] Again, to put a broad label on it, this accords with the values of the epistemological school of "interpretivism" where there is no objective truth per se – rather, truth is a product of the way individuals experience it.[161] Generalising still further, we might simply call this "subjectivism".

McConville et al. do accept this problem, albeit briefly, in *The Case for the Prosecution* when they say "research… is a process of construction".[162] However, Travers argues that the implications of this are dismissed (as nothing more than an "epistemological reality")[163] far too readily.[164] The

[155] Max Travers, 'Preaching to the Converted? Improving the Persuasiveness of Criminal Justice Research' (2001) 37(3) Brit J Criminol 359
[156] ibid. 366
[157] The extreme end of this can be seen in A.J. Ayer, *Language, Truth and Logic* (first published 1936, Penguin 2001). Ayer took the view that assertions are either verifiable by empirically observable reality, or else they are nonsense
[158] Newman (n 122) 25
[159] 'Preaching to the Converted' (n 154) 366-367
[160] ibid.
[161] Newman (n 122) 26
[162] *The Case for the Prosecution* (n 72)
[163] ibid. 13
[164] 'Preaching to the Converted' (n 154) 366-367

result, argues Travers, is that it is "remarkably easy" to criticise the way the research represents the world.[165]

It is important to note that Travers was not necessarily a critic of McConville et al.'s conclusions. His article (and to an extent, his book) was about the persuasiveness of criminal justice research generally and he therefore took issue with McConville et al.'s method of putting those views across, as an example of bad practice. His overall point was that most criminal justice research is methodologically weak (in the sense that it assumes only one epistemological approach is correct) and thus very vulnerable to attack from critics (who may justifiably say, "well, you academics just don't understand the reality of the work we have to do. You are ignoring the context" etc.) - hence, the charge of only preaching to the converted.[166]

2.2.2.2 McConville et al.'s Response

A rather furious response was published in the same journal by some of the authors of *Standing Accused* and *The Case for the Prosecution*.[167] Unfortunately, it is submitted, this was mainly preoccupied with the (understandable) wish to defend their own hard work from all and any criticism, rather than dealing with Travers' main points. The tone is extraordinarily defensive. It labels many of Travers' points not as wrong, but "strange" and even, at one point, cites a passage from their own book "because Travers seems not to have read it"…[168] The essence of their counter-argument is that their own correspondence theory of truth (as Travers would put it) was fine because, despite Travers' criticism, it nevertheless produced "illuminating" findings.[169] It also criticises Travers' own approach as having "a risk of extreme relativism… accepting at face value practitioners' own rationalisations for their (mal)practices."[170] Here is where, it is submitted, they miss the point. Travers' article was not a rallying call for cheerleaders of the congruence theory of truth; neither was he being a huge critic of the correspondence theory of truth. Travers point was that too many criminal justice studies focused exclusively on correspondence theory and dismissed the concerns of the other – with the result that their findings were vulnerable to being

[165] ibid. 367
[166] ibid 359
[167] Lee Bridges, Jacqueline Hodgson, Mike McConville and Anita Pavlovic,'Can Critical Research Influence Policy? A Response to Max Travers', (1997) 37(3) Brit J Criminol 378
[168] ibid. 378 and 380
[169] ibid. 380
[170] ibid. 379

dismissed with ease by critics. His solution was not to totally abandon the correspondence theory of truth, as the response article seems to suggest, but to "think through some of the implications of constructionism, which are raised, but not addressed" by McConville et al.[171] In other words, Travers does not necessarily think McConville et al. should abandon their correspondence theory of truth, but that they ought to acknowledge the issues raised by the congruence theory of truth. They ought to also consider the perspectives of those involved, rather than judging from an academic pedestal. Instead, McConville et al. brush it off in a couple of sentences and never acknowledge that there are "different perspectives on the criminal justice process".[172] In particular, Travers laments the irony of McConville et al. criticising the police for constructing evidence in their cases and then doing the very same thing themselves with their own data: silencing other points of view, caricaturing opponents and preaching only to the converted.[173] In basic terms, they are making moral judgments of the behaviour they have observed when they do not have an in-depth understanding of the context and that starts from what the people involved actually make of it: or what Travers calls the "practical reality" of the work.[174] Again, this is not saying the correspondence theory of truth is wrong, but that the issues raised by the congruence theory are simply not dealt with or considered adequately, with the result that the conclusion is easily dismissed by critics.

In summary, Travers has an important point, which McConville et al. unfortunately missed. This is not to say that McConville et al.'s work is not valuable and if that were what Travers meant in his paper then I would reject that conclusion.[175] McConville et al. were certainly entitled to describe the findings of *Standing Accused* as "illuminating" because in many ways they *were* illuminating: they illustrated a previously unknown problem (and reforms, such as the Solicitors Regulation Authority accreditation scheme for legal advisers in the police station, soon followed).[176] It is just a shame that, as Travers explains, it is very vulnerable to counter-attack by critics, somewhat unfairly caricatures those involved, is unlikely to be persuasive to those whose behaviour it is seeking to change, and, therefore, most unlikely to change the behaviour of those lawyers it was targeting. Indeed, as Newman's recent research suggests, the behaviour of some defence lawyers

[171] 'Preaching to the Converted' (n 84) 373
[172] ibid.
[173] ibid.
[174] ibid. 374
[175] Although, as stated above, I do not think that was what he meant in his paper. He simply lamented the fact that McConville et al.'s research was methodologically weak and hence, not *persuasive* enough to change the behaviour of the groups whose behaviour they wanted to improve (lawyers and police).
[176] Although how effective even these were in improving conduct is debatable. See Newman (n 122) 144-146

has not improved at all, even many years after McConville et al.'s work was published.[177] It was illuminating to academic readers of *Standing Accused* at the time, but rather less so to practicing lawyers.

2.2.2.3 Newman's Solution: an "Integrated Methodology"

In a recent study, Daniel Newman valiantly tried to get the best of both sides of this disagreement, by using Giddens' "structuration theory" [178] to produce an "integrated methodology" in his study of legal aid lawyers.[179] The argument is that groups have both a social structure (in that the individuals within it act in a more or less predictable way) but also socially structured knowledge, which makes these acts possible. This leads to what Newman calls a "duality" (as opposed to the dichotomy between Travers and McConville et al. that Newman originally presented) between the two perspectives, subjective and objective. This is because "all social action presumes the existence of social structure and vice versa".[180] Newman's application of this concept into his research practice (the "integrated methodology") was actually quite simple. If we imagine a scale, with McConville et al. with their multitude of firms studied for a short amount of time at one end and Travers' single study of one firm in depth at another, Newman put himself somewhere in the middle: three months of ethnographic observation and one month of interviews at *three* firms. Newman also made some presentation changes: the data was presented first with little comment, and then his commentary followed afterwards.

Whilst this was an undoubtedly sensible approach in terms of method, with respect, it is submitted that this did not solve the problem of *methodology* it set out to at all, nor move beyond the two epistemological schools of thought identified. In suggesting this solution, Newman presented the disagreement as being about methods, with Travers taking issue with McConville et al.'s large number of shallow studies and McConville et al. taking issue with Travers' deep, but impossible to generalise, single study. Therefore, in Newman's view, the dichotomy could be solved, and a duality created, simply by using research methods somewhere in the middle. In actual fact, the differing methods were part of, but only the start of the disagreement - a symptom, not the cause. The real problem, as discussed above is not so much in the method used

[177] Newman (n 122), 144-146
[178] Anthony Giddens, *The Constitution of Society* (University of California Press 1986)
[179] Newman (n 122), 27
[180] Ibid.

(though their epistemological views would have made certain methods appear more attractive than others), but the way the data is treated, the way narratives are constructed and, fundamentally, what we consider to be the nature of reality. The two approaches take fundamentally different views on what is important in conducting research and what knowledge actually is. You cannot resolve this by simply modifying research *methods*. It requires a change in perspective as to what data can realistically show us, or at least a willingness to appreciate *both* of these different perspectives that one can take of data. It requires a change in *methodology*, not simply a change in *method*. As Travers pointed out in his book, previous researchers had used the same *methods* he used, without conveying any better sense of the practical character of what went on in the phenomenon under discussion.[181] The difference was "not method, but methodology: … the different assumptions *informing* the collection *and analysis* of data"[182] (my emphasis). Newman altered his methods: data *collection*. This alone was not enough.

The result, it is submitted, is that Newman really ended up with ordinary correspondence (i.e. McConville et al.'s approach) theory, with a bit more in-depth data. He essentially produced three studies based upon the correspondence theory of truth and put them together. Such an approach does not equal congruence theory and nor does it move beyond the dichotomy between the two epistemological views. It is not quite that simple. The fact remains that there were far more than three firms operating in his local area. To claim that analysing one does not lead to generalisable results, but that analysing three does, requires justification - which Newman does not provide. The issue is not so much a matter of methods used, but about the way that data is looked at and interpreted in the first place.

Again, of course, that does not mean that Newman's research itself was not useful; as Bridges et al. and even Travers would probably accept: such data can still produce illuminating findings.[183] The trouble is that such findings are far more vulnerable to criticism and less persuasive to critical practitioners and policymakers than Travers would like. Indeed, rather proving Travers' point, I was caught off guard when one of the early practitioners I spoke to brought up Newman's study unprompted and quite emphatically dismissed it as not understanding the reality of their work. If we want research to be taken seriously by those whose conduct we are analysing (and in Newman

[181] *The Reality of Law* (n 77), 14
[182] ibid.
[183] Indeed, having read Newman's book, I would say so.

and McConville's case, seeking to change), the research must heed Travers' warning. Thinking carefully about which research methods to use is a necessary start, but is not enough on its own. We need to, even if we take the congruence theory of truth as our starting point, take account of how those involved see and experience the social world we are studying. This concern needs to permeate all areas of the work: the data itself *and* the subsequent analysis.

Hence, for this research, if it is to be persuasive and useful, we have to be aware of the danger of repeating Newman's mistake. Like Newman, the methods here are selected with care in order to accommodate both epistemological perspectives. This is why, as discussed later in this chapter (section 2.3), we set out to appreciate and inquire into the perspectives of the research subjects, whilst at the same time recognising the risk of going too far the other way and taking everything said at face value – using particular methods of questioning to mitigate that. However, unlike Newman, this work does not stop there. It does not suggest that changing methods alone can reconcile the disagreement between these two epistemological schools of thought. In order to do that, the way we look at the data, the data *analysis*, also needs to take this epistemological dichotomy into account.

Can these two perspectives ever be reconciled? It is submitted that they can, but it involves going beyond changing methods. It involves using the analytical ideas of French theorist Pierre Bourdieu, to which we will now turn. Whilst Bourdieu has not always received the warmest reception in legal academia (though he certainly has his defenders),[184] his concepts can help us move beyond this particular epistemological disagreement.

2.2.3 Pierre Bourdieu's Approach

The reason Bourdieu can help us to move beyond this epistemological disagreement is because his theory was meant to address this very conflict. The first sentence of the first chapter of Bourdieu's renowned book, *The Logic of Practice*, sets out the very same problem: "of all the oppositions that artificially divide social science, the most fundamental, and the most ruinous is

[184] Yves Dezalay and Mikael Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' (2012) 8 Annu Rev Law Soc Sci 433, 434

the one that is set up between subjectivism and objectivism".[185] Hence, if Bourdieu's ideas do indeed reconcile the above epistemological opposition, then we should be able move beyond the conflicts of McConville et al., Travers and Newman by drawing on these ideas in conducting research.

The relevant Bourdieusian concepts will be outlined first, before examining how they apply to this issue.[186]

2.2.3.1 Introduction to the Concepts

The main concepts here are *habitus*, *field, capital* and *doxa*. These concepts, whilst technically separate, can only really be fully understood in terms of how they relate to one another. They are all part of Bourdieu's attempt to explain human practices.[187] In simple terms Bourdieu's argument is that the reason people behave in the way that they do is down to the interaction between habitus, field and capital – which, together, take account of both the subjective and the objective perspectives discussed earlier.[188]

According to Bourdieu, *habitus* is comprised of "systems of durable, transposable dispositions, structured structures predisposed to function as structuring structures, that is, as principles which generate and organise practices and representations".[189] This definition requires some breaking down. We can consider the habitus as a "disposition" in the sense that it refers to someone's inherent character or qualities, which influences the way they tend to behave. This disposition is said to be durable because it can become self-perpetuating. Someone's habitus is influenced by the choices they make, but it also influences those very choices as well. This is why Bourdieu calls it a "present past"[190]: the choices someone has made in their past influence, to a large extent, not only the choices they will make in future, but also the choices they are mentally capable of

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[185] Pierre Bourdieu, *The Logic of Practice* (Richard Nice tr, Polity Press 1990) 23
[186] I do so with a reasonable amount of brevity because this work is not *about* Bourdieu per se, it is *about* legal aid and defence lawyers. I am simply suggesting that his concepts and understanding of the world are very useful when it comes to understanding the issues raised by this work and that (together) they provide a way to make sense of the issues in a way that other theoretical concepts would not. For a more detailed introductory analysis of Bourdieu, from a variety of theorists, see: Michael Grenfell (ed), *Pierre Bourdieu: Key Concepts* (2nd edition, Routledge 2014)
[187] *Logic of Practice* (n 184)
[188] ibid.
[189] ibid. 53
[190] ibid. 54

comprehending that they have. If, practically speaking, someone has choices A-Z, their habitus may mean they can only comprehend choices A-E and are pre-disposed to particularly favour choices B and C. It is a "structured" structure in the sense that, again, it is "structured" by a person's past experiences and the resulting structure is not utterly random, but based on what has gone before. This structure is itself "structuring" in the sense that it will influence a person's future decisions (which will then form part of the habitus as well). Hence, the self-perpetuating cycle continues.

In simple terms then, someone's habitus is a little bit like someone's "disposition". It is a combination of what they are inclined to do and how they tend to comprehend the social world around them. It is an individual's sub-conscious understanding of how the world works – or rather, how *their* world works. This leads us onto the concept of *field*. A person's field is simply the social environment in which they are situated. Bourdieu likens it to playing a game. When playing a game, the field is the "objective structures within which it is played out".[191] This includes the pitch or board the game is played on, the rules of the game or "doxa"[192] and the territorial limits of the field (in that, in a way, each field is its own "separate universe governed by its own laws").[193] There are many different fields and these range in size. For example, in *Homo Academicus*, Bourdieu analysed academia as a "field".[194] In *The Weight of the World*, it was contemporary society in general.[195] For our purposes, we might say that the criminal justice process is a "field" as well. The key elements being that it is more or less self-contained, that it is where a game, or "struggle",[196] takes place and that each field has its own unwritten "presuppositions" (or rules): their "doxa".[197]

Games have winners and losers and so it is also with Bourdieu's field. The final key element of a field is that individuals have *positions* in that field and that these can be thought of as varying levels of power. This leads us to the last relevant concept here: *capital*. For Bourdieu, capital is the

[191] ibid. 66
[192] ibid. 66-67
[193] Pierre Bourdieu, *The Social Structures of the Economy* (Chris Turner tr, Polity Press 2005) 7
[194] Pierre Bourdieu, *Homo Academicus* (Peter Collier tr, Polity Press 1990)
[195] Pierre Bourdieu, *The Weight of the World: Social Suffering in Contemporary Society* (Priscilla Parkhurst Ferguson tr, Polity Press 1999)
[196] Pierre Bourdieu, *On Television and Journalism* (Priscilla Parkhurst Ferguson tr, Pluto Press 1998) 41
[197] *The Logic of Practice* (n 184), 66

way power in a field is measured.[198] In doing so, Bourdieu wanted to move away from simply using money to understand power. For Bourdieu, how much money or assets an individual has is just one part of the analysis: "economic capital".[199] The other (and often more important) part of this is "symbolic capital".[200] This is sometimes broken down into sub-groups, such as "social capital" (who an individual knows), or "cultural capital" (someone's taste and lifestyle) etc.[201] but in total it amounts to the tastes, values, lifestyle etc. of the dominant group's habitus in a given field.[202] Hence, one can have a lot of capital (and therefore a powerful position) in one field, but much less capital (and therefore a less powerful position) in others. For example, whilst a senior university professor will have a very dominant position within their academic field (by virtue of their symbolic capital), such an individual would likely have a very weak position in the field of a rainforest tribe, if they were suddenly adopted into it. Some capital is more transferable than others of course (making it even more valuable). For example, if the senior university professor made a less drastic change and instead of moving to the rainforest, simply moved into another, similar, career, their position would still be weaker than before, but less so than if they moved to an entirely different field.

As stated earlier, the important thing is the interaction between these concepts. It is the interaction between habitus, field and capital that results in "practice". A crucial part of an individual's habitus is defined by reference to field: what Bourdieu calls a "feel for the game",[203] by which he means the understanding of how the world works in a particular field. One obviously cannot say that they have a "feel for the game" if they do not know what "the game" is. Hence, to talk about habitus without talking about field is rather like trying to talk about footballers, without discussing the subject of football – possible, but one would be left with the impression that you had rather missed the point.

This key interaction runs in two directions. First, the field influences a person's habitus, to the point where, very often, a field will create the very conditions that will ensure its own perpetuation, because it will be full of actors whose habitus is influenced and thus built for that

[198] Pierre Bourdieu, 'The Forms of Capital' in John Richardson (ed), *Handbook of Theory and Research for the Sociology of Education* (Greenwood Press 1986) 243
[199] *The Forms of Capital* (n 197), 242
[200] *Logic of Practice* (n 184), 119
[201] *The Forms of Capital* (n 197), 243
[202] ibid. 244-245
[203] ibid. 66

very field – it is in their interest to ensure that the field stays that way.[204] For example, an area controlled by criminal gangs could be considered a "field". Someone whose habitus is accustomed to that field may see possible actions for themselves (selling and buying drugs, using a weapon to get what they want, joining a gang etc.) that someone more naïve and unaccustomed to that environment might not even consider - or if they did, would nonetheless decide not to do. The gangster has a "feel for the game". Secondly though, the habitus can also influence the field because the field's continued existence itself will often depend on the practices of the actors within it – which, as we have seen, habitus contributes to. If the habitus changes, the field itself can change. For example, the members of the criminal gangs, using and dealing illegal drugs and weapons to get their own way, are themselves, by their conduct, making the environment criminal. If they all moved to a different neighbourhood, the original one may become lawful again and the new one may become lawless. It is, mostly, their own behaviour that creates this field and it is in their interests for that field to continue since they are accustomed to it: their habitus allows them to flourish in it (indeed, as pointed out above, such an accustomed habitus is itself a potent form of symbolic capital). As Packer wryly questioned when critiquing overuse of the criminal sanction: if there were a debate about whether to completely decriminalise a criminal trade, such as to destroy the criminal underworld's monopoly of it "which side would the underworld be on?"[205] Equally, if the field changes too much too quickly, those people with a habitus suited to the original field may be unable to cope (a concept Bourdieu called "hysteresis").[206] For example, workers dealing with the "restructuring" of the western steel industry.[207] Capital is then finally used as a measure of how much dominance an individual has in a field, but then this links back to habitus because Bourdieu defines the individuals with the most amount of symbolic capital as the ones who have the most suited habitus to the field. A habitus suited to the field, a perfect "feel for the game", is itself the ultimate form of symbolic capital for that field.

2.2.3.2 The Concepts Applied to this Issue

How does this help us move beyond the epistemological disagreement identified earlier? On one view, Bourdieu hasn't helped at all because we still have the split between objective and subjective, it is just that we can now give them an impressive-sounding Bourdieusian sheen by

[204] *Logic of Practice* (n 184) 67
[205] Packer (n 52) 354
[206] *Logic of Practice* (n 184) 62
[207] *The Weight of the World* (n 194) 6-23

calling them "field" and "habitus", respectively. However, as we have seen, that would be to misunderstand the concepts. The key point for Bourdieu is the *interaction* between them. They all influence and relate to one another. For example, as noted above, the ultimate form of symbolic capital is to have the same habitus as the dominant group in a given field; a habitus that is highly in-tune with the field and its doxa = high symbolic capital; individuals with a particular habitus will maintain a similar field and likewise a particular field will internalise a similar habitus in all individuals who are within that field for a prolonged period of time etc. Someone's practice is a combination of the *interactions* between their habitus and field, mediated by their capital. By illustrating the necessary *interaction* and *relation* between these concepts, Bourdieu's theory manages to connect the subjective with the objective in order to come to a meaningful understanding of individuals' practice and break away from the above epistemological dichotomy. Hence, we can now see that it is no longer a question of whether we take a more objective or subjective epistemological perspective. Instead, *both* of these perspectives are vital pieces of the puzzle in trying to explain why people behave in the way that they do. We cannot focus on the subjective like Travers, only look at objective structures like McConville et al., or just change methods like Newman. The way we look at our data and answer our research questions, our analysis, needs to incorporate both of these perspectives. Bourdieu's concepts provide a tried and tested way of doing just that.

Of course, whilst reconciling the McConville--Travers epistemological impasse is great, in order to solve the research problem first identified it must also translate to a change in how we actually go about analysing the data. To do so requires us to find a way of identifying what a particular individual's habitus is. Unfortunately, this has been a criticism of habitus. As Maton argues, whilst habitus is very useful in that it draws attention to something significant and offers a way of thinking about it, it can be difficult to actually define.[208] The idea of habitus allows us to look at the issues in a different (and enlightening) way, but it is tricky to pin down practically what it is – in the sense that one could say "James' habitus is X and not Y…".

Fortunately, for this research at least, we already have a way to mitigate this limitation: the criminal justice process models outlined earlier. It is obviously a simplification to suggest that the entirety of a particular individual's habitus can be completely summed up by labelling it as a "*Due*

[208] Karl Maton, 'Habitus' in Michael Grenfell, *Pierre Bourdieu: Key Concepts* (2nd Edition, Routledge 2014)

Process" or "*Crime Control*" habitus,[209] but there are a great many similarities. Habitus is about how an individual comprehends their social world; models are about how a hypothetical individual comprehends the criminal justice process. For example, *Crime Control's* view that "the failure of law enforcement to bring criminal conduct under tight control" leads to the breakdown of public order[210] carries with it an implicit understanding about the world: that the criminal sanction is capable of controlling crime. This in turn could mean that when called to make a decision regarding the criminal justice process, they may be more likely to pick option A, than option B and be unable to even understand or think about option C. Equally, just as we might say that a person with a particular habitus will have a perfect "feel for the game" if their habitus is perfectly aligned with their field. So too would a *Crime Control* adherent have a perfect "feel for the game" if the criminal justice process were drawn up entirely along *Crime Control* lines.

Looking at habitus in this way is not necessarily an entirely *accurate* equivalent to habitus, nor would it always necessarily be appropriate. However, for this particular research field, to do so does go some way to dealing with Maton's issue of definition. The models give us a pre-defined yardstick, by which we can measure an individual's values and dispositions. Depending on what sort of model the field favours, we can also analyse how much of a "feel for the game" they have. Of course, this is not the whole story. There is more to someone's habitus than the model and to look at the issue in this way is to simplify the concept somewhat, but, as will be argued repeatedly in the next chapter, simplicity can also make something more useful. By distilling someone's habitus down to a simple question of what model they most adhere to, we can mitigate Maton's issue of definition, whilst retaining the key strength of the Bourdieusian approach: the understanding of the relationship/interaction between habitus and field. Is it inaccurate to view habitus so? To an extent yes, but one might equally (and quite correctly) argue that the London Underground map is "inaccurate", however that does not mean it is not useful![211] In fact, it is this very inaccuracy that allows it to be useful in helping you find your way around the area and understand how it works.

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[209] or any other criminal justice process model, see Ch 3

[210] Packer (n 52), 158

[211] I am indebted to Michael Grenfell for providing this example in his (recorded) workshop on Bourdieu: Michael Grenfell and Karl Maton, 'The use, misuse and abuse of Bourdieu' (Department of Sociology and Social Policy, University of Sydney, 26th November 2013)
Vidcast available: <http://sydney.edu.au/arts/sociology_social_policy/about/news/index.shtml?id=2380>

In summary, the conflict set out first between Travers and McConville et al. can be reconciled by acknowledging that both perspectives are in fact necessary in order to understand the issues at hand. This is because of the interaction between the subjective: the habitus, and the objective: the field. For this research, a convenient way to conceptualise the habitus is by using criminal justice process models. The details of this approach will be set out in the chapters to come, but we now at least understand the outline and underlying principles of the data analysis. Later, Chapter 3 will analyse the models in more detail and Chapter 4 will explain how these are to be used in data analysis - including a split between systemic and subjective value-sets, which takes account of the split (but also the relations) between habitus and field. For now though, we can turn our attention to the sources of data used to answer the research question.

2.3 Sources of Data

We have now established the analytical construct to analyse the issues and answer the research question. I now turn to consider the data we ought to input into this analytical construct.

2.3.1 Doctrinal Analysis

The obvious starting point, particularly for a legal researcher, would be to analyse the statutes, regulations and other technical documents that describe and implement the changes on paper. This is no bad thing and as a starting point is important, however it is submitted that it is not enough on its own. In order to ascertain what the impact of changes are, we need to have more than simply our own hunch as to what effect the changes on paper, logically, would lead to in terms of defence lawyer value-sets. That alone will not answer the question. For one thing, doing that sort of research comprehensively would require certain skills in, say, macroeconomics that legal researchers would tend not to have. Hence, we cannot judge the macro effect of these changes on small businesses. All we can do is look for changes in systemic-values exemplified by the changes and plot these on the criminal justice process model scales or apply knowledge of the criminal law and see if there are any particular problem areas that would be made worse. All of that is very useful of course, but even the most thorough and comprehensive analysis of that kind is still inadequate. No matter how comprehensive the black-letter-law analysis, the fact remains that there can be a world of difference between the law on paper and the law in reality. A purely

doctrinal account would be a well-informed, useful and illuminating account of what *might be*, but it would still leave questions about what *is* or *could be* somewhat unanswered[212]

2.3.2 Quantitative vs Qualitative Methods

Having established that some kind of empirical data is desirable, we will now consider what kind of data is appropriate. At first glance, this kind of inquiry might be considered a study suited to a "positivist" approach - the sort of thing that might lead to quantitative research, for example, one could look at the change in guilty plea rate over time. However, it is submitted that, when thought about more, our approach to the issue of "impact" (see section 2.2 above) makes it unsuitable for quantitative research. Our view of "impact" can hardly be expressed as a percentage or as numbers on a chart. Rather, it is something that demands an understanding of the main participants' views, experiences and feelings - particularly when the method of data analysis is considered: it focuses on dominance of value-sets.[213] There are also practical difficulties in establishing cause and effect at such a macro-level. Suppose that we observed a statistically significant increase in the level of guilty pleas? How could we know that this is down to the legal aid cuts having an effect on value-sets? It might equally be possible to blame changing police detection rates, cuts to police funding, or changes in the usage of the criminal sanction. Others have recently suggested some even more intriguing reasons for increases in guilty pleas, such as judicial conspiracy.[214] The point to be noted here is that, at such a macro-level of analysis, it is very difficult to pin down causes. Unfortunately, causes are key when talking about impact. As we saw earlier, "impact" pre-supposes that there is something that is influenced by another (the *kick* on the *opponent*). If a source of data cannot satisfactorily tell you the relationship between these,

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[212] And in professing this view, I inevitably align myself with the so-called "empirical turn" in legal research, rejecting pure study of doctrinal sources alone
Stewart Macaulay and Elizabeth Mertz, 'New Legal Realism and the Empirical Turn in Law' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (2nd edition, Hart Publishing 2013) 195-196

Though it must also be emphasized that to rely purely on empirical sources alone would be just as much a mistake. In my view, in order to best understand the empirical data, one needs to, as a starting point, understand the law that forms the backdrop to it – in this case, the changes to legal aid. The classic socio-legal observation, for example, that the law in reality is different to the law on paper cannot be made without knowing what the law on paper *is* first. Practically speaking too, you cannot engage with your research subjects quite as well if you don't know what you are talking about (see also 2.3.6 below)

[213] That is not to say that all quantitative approaches to this issue are necessarily invalid etc. it just means that the concept of "impact" we considered at section 2.2 could not be analysed by them adequately, particularly in regards to having a wide "target" of the impact.

[214] Mike McConville and Luke Marsh, *Criminal Judges* (Edward Elgar 2014) 254

it is submitted that it is inappropriate for the questions of impact that we are concerned with here. Only more detailed, qualitative, approaches can tell us that. Of course, that is not to say that qualitative approaches are capable of conclusively revealing *the* relationship between these two either (*the* objective "truth", if there even is such a thing within social science), rather they can reveal what research subjects themselves feel is the relationship between these. This is very important when we consider that interviewees' feelings partly make up their value-sets (in the sense of what they *feel* are the most paramount considerations in doing their job) and it is their value-sets, or rather, the change in value sets that is measured by the criminal justice models discussed earlier, which form our tool of analysis.

2.3.3 Interviews vs ethnography

Interviews are only one tool in the qualitative researcher's arsenal. They have their flaws and their advantages, as does every other tool available, such as ethnography. However, they are the best qualitative tool available for this research question. This section will explain why.

As just stated above, a significant issue in assessing the "impact" of anything is how to show cause and effect. In fact, even showing correlation is a little bit problematic. As noted above, if one were to take, say, a positivist, statistical analysis of the number of guilty pleas or the number of convictions overturned before and after implementation of the cuts, it would be most difficult indeed to establish that the cause of this was the legal aid cuts. Changing detection rates caused by budget cuts to police, for example, could be equally to blame.

Diving into ethnography, observational methods, would suffer from the same problem. Suppose I spent some time in a police station, court or law firm and observed lawyers pressurising clients into pleading guilty and snowed under with work? What exactly could this establish in terms of impact on value-sets? With no previous ethnographic work to draw upon, there would be no way to compare and thus no way to assess what impact the cuts had had, if any. "Impact" presupposes that there is something to compare things to – that we have moved from A to B, or C, or D etc., or no change: A to A. Indeed, previous ethnography suggests that poor treatment of clients was a problem long before these cuts.[215]

[215] See *Standing Accused* (n 75) and, much more recently, Newman (n 122)

Why are interviews the solution then? Well, criminal justice process models, as we saw earlier, are largely about the value-sets that are dominant in the process and interviews are a method of establishing what interviewees' value-sets are.[216] Probing interviews can establish how views and values have changed and, at least to an extent, why. Probing interview questions can tell the interviewer things about values and behaviour that could never be observed, either from statistics or ethnography. Even where, as here, the interviewee has an interest, sensible questioning can entice the details out. The best example is the "abstract question", where an interviewee is asked what they think other people, or hypothetical people in a particular position might do: "Do you think others in your position might be tempted to do [the socially frowned upon behaviour]?" As Berg and Lune point out, "this makes the issue more abstract" and removes the sense of "personal risk" for the interviewee.[217] In practice, this worked well with this research – with interviewees quite happy to criticise and speculate about others, even if they considered themselves to be fine. As we shall see, another, similarly fruitful approach is to say something along the lines of: *Some other people I spoke to brought up x".* Where x is something controversial, this again makes the issue more abstract by deflecting the focus onto "other interviewees", allowing the current interviewee to speak more freely as it is no longer necessarily about *them* personally, but is building upon what others have already told you.

Of course, the trouble with the "do you think *other people* would do this?" approach is the danger of being too cynical: if John Smith QC says Joe Blogs QC is a *Crime Control* fanatic, it may well be that Joe Blogs QC really *is* one and John Smith QC is not indirectly confessing his own views at all. The way to resolve this, it is submitted, is to bear in mind the purpose of the research. We are not seeking to throw blame around at any particular practitioners; rather we are looking at the impact in terms of dominance of value-sets. In that sense, it does not particularly matter whether it is John Smith QC indirectly confessing to having, say, extreme *Crime Control* values, or Joe Blogs QC who actually has them. The interesting research point is that *someone* does. Once we consider that, the only danger really left over is interviewees then saying things about others that simply aren't true and don't secretly reflect their own feelings either. That is very tricky to prevent. The only thing to do is to be alert to it and to try to avoid asking questions about actual competitors -

[216] Neil Stephens, 'Collecting Data from Elites and Ultra Elites: telephone and face-to-face interviews with macroeconomists' (2007) 7(2) Qualitative Research 203, 205
[217] Bruce Berg and Howard Lune, *Qualitative Research Methods in the Social Sciences* (8th edition, Pearson 2012) 125

to try to keep the abstract question… *abstract*. That goes some way to mitigating the issue, - indeed, most of the time (as it turned out) interviewees were quite happy to keep things abstract, the tone was more like "I know of a few people who do that" rather than "that dastardly fiend, Joe Blogs QC, does that all the time!" It is of course accepted, however, that this is a risk that cannot be entirely eliminated - only mitigated.

Another, similar, example is simply changing how a question is worded – to indirectly rather than directly address the issue. As Presser and Stinson discovered back in the 90s, there is a world of difference between the results of asking a direct question, such as "how often do you attend religious services?" and an indirect one, such as "I would like to ask you about the things you did yesterday – from midnight Saturday to midnight last night. Let's start with midnight Saturday. What were you doing? What time did you finish? Where were you? What did you do next?"[218] In that study, Presser and Stinson compared the results of several pieces of research done into church attendance from 1992-1994, as an example of participants misreporting what they perceive to be socially desirable behaviour. They found that asking about this *indirectly* (in the manner above) led to 29% saying they went to church, whereas, when asked *directly*, 37-45% said they attended church![219] As Bernard points out, this amounts to a 28-50% difference in reported behaviour, simply because a question is asked in a different way.[220] The point to take away, it is submitted, is that, whilst interviewee misreporting is a clear hazard, it is one that can be mitigated with some forethought and therefore interviews remain the most suitable choice.

2.3.4 How Many Interviews is Enough?

Having established that interviews are a useful source of data for this research, the immediate question that follows is how many to do. There is no easy answer to that. A recent review paper, which collated the views of twenty different researchers (15 "experts" and 5 early career researchers) concluded: "it depends"![221] What exactly it depended *on* gave a variety of responses.

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[218] Stanley Presser and Linda Stinson, 'Data Collection Mode and Social Desirability Bias in Self Reported Religious Attendance' (1998) 63:1 *American Sociological Review* 137, 139

[219] ibid. 140

[220] H. Russell Bernard, *Social Research Methods Qualitative and Quantitative Approaches* (SAGE 2000) 219

[221] Sarah Baker and Rosalind Edwards (eds), 'How Many Qualitative Interviews is Enough? Expert Voices and Early Career Reflections on Sampling and Cases in Qualitative Research' (2012) National Centre for Research Methods Review Paper. Published Online: <http://eprints.ncrm.ac.uk/2273/4/how_many_interviews.pdf>, 42

Many suggested that it must depend on resources (including time), how important the question is to the research and (more instrumentally) how many are required to satisfy your viva committee and epistemic community norms.[222] Adler and Adler pointed out the issue of pool sizes: if your subjects are split into different sub-groups, then you ought to consider doing more interviews than you otherwise would have.[223] Many[224] suggested that, in theory, one interview could be enough. If you just want to show that something is possible; to illustrate "the operation of a set of cultural understandings"; then one will do and others are a bonus.[225] On the other hand, others (whilst agreeing that a small number, around 12, is sometimes all that is necessary to find out interesting things about the views of a homogenous community)[226] pointed out the need for respect. Particularly where the topic is controversial, the findings are surprising, analysis is complex and professional credibility is sought, Charmaz suggested that more than 12 would be preferable in order to give research more credibility.[227] Others suggested an exhaustive approach: keep going until you reach saturation - until you stop discovering anything new.[228]

It would therefore appear there are three broad considerations that most agreed ought to be borne in mind:

1. Resources
2. Expectations of research community and others
3. Nature of research question and subjects

Two other respondents, Les Back and Howard Becker, took a less prescriptive approach. Back took the view that "how much we need depends on what we want to make with it"[229] and Becker similarly thought that there was no "magic number" to get you out of danger.[230] The only safe answer, Becker suggested, was to have "enough interviews to say what you think is true and not to say things you don't have that number for"[231] Becker complained about the fact that, in his view, many studies had gone well beyond that, making claims based on interview data which they were unjustified in making. The better view is to continually look at things from the other

[222] ibid. 3
[223] ibid. 9
[224] Most forcefully, Norman Denzin, ibid. 23
[225] ibid.
[226] ibid. 21
[227] ibid. 22
[228] ibid. 34
[229] ibid. 13
[230] ibid. 15
[231] ibid.

perspective: how many will it take to satisfy any potential critics?[232] Hence, Becker argues, it is impossible to know how many interviews will be required until you start formulating conclusions – at which point you can then start thinking about what critics might say. Thus, the number you want will change day to day as you start analysing the data you have got so far and thinking about what it tells you. Equally, there is no particular place to stop research at (often, Becker wryly remarks, it will be down to something arbitrary like running out of resources), only that, when you do, you must be careful not to let conclusions go beyond the data you have ended up with.

For our purposes, this approach is certainly sensible. However, whilst instructive as a starting point, it provides no real guidance on how many interviews to actually do. It simply reminds us not to overemphasise what the number we do end up with can tell us. As to how many to actually aim to do though? A consideration of the three issues above is required…

First, resources. For a PhD, there is one researcher working on their own; on the other hand, there is a fairly large amount of time. Hence, in terms of resources, a fairly large number of interviews could be contemplated.

Secondly, research community expectations are hard to pin down. Bryman noted that views on the minimum number ranged from 20-30, to 60-150.[233] Ragin considered "tradition" to dictate 20 for an MA thesis and 50 for a PhD - though in the end argued you should just go on until saturation.[234] "Tradition" is a practically unreliable guide here. For example, Professor Andrew Rutherford did not reach Ragin's traditional PhD number of 50 (he managed 28) for his distinguished book, *Criminal Justice and the Pursuit of Decency*, yet still received critical acclaim from as diverse a group of reviewers as the *Law Quarterly Review,* the *British Journal of Criminology* and the *Sunday Telegraph* – alongside a commendatory foreword from the former judge, Lord Scarman.[235] The expectations of the research community would thus appear to show little consensus: a minimum of 20 to a possibly infinite number. All we can really conclude is that there seems to be an understanding that at the very least, a PhD-length work ought to go beyond 20.

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[232] ibid. See also the discussion on persuasiveness at 2.2.2, above
[233] ibid. 18
[234] ibid.
[235] Rutherford (n 126), 7 (accolades are found on the back cover)

Finally, the nature of the research question and subjects is quite instructive. In terms of pool-size, as Adler and Adler pointed out, the more sub-groups, the more interviews you ought to consider doing. Our interviewees are formed of two distinct sub-groups: solicitors and barristers: two kinds of lawyers who may have very different views on the impact of cuts on their work. Hence, rather than saying "we are doing 10 interviews with lawyers" it would be more accurate to say "we are doing 5 interviews with solicitors and 5 with barristers". Had we considered 10 the necessary number to do, under Adler and Adler's approach, we would need to do 10 *per sub-group*. In addition, Charmaz's comments on credibility are relevant here too. As pointed out in the previous chapter, the subject matter of this research has been controversial. Hence, Charmaz would likely suggest a larger number of interviews would be ideal.

Overall then, subject to time and resources constraints, a fairly large number is called for. Community expectations are so varied as to be unhelpful and in any case a rather arbitrary measure. In order to increase respectability and take into account sub-groups though, a fairly large number is required. Indeed, provided you are still discovering new and useful insights, it makes logical sense to continue interviewing unless and until lack of resources puts the brakes on or the research question is answered. Therefore, this research sets no arbitrary target number, beyond accepting that a fairly large number is needed.

2.3.5 Means of Interviewing

It is not just the quantity of interviews that is important, but also the means of organising and doing those interviews. For this work, some (indeed, most) were done over the telephone and some in person, depending on convenience, so this section will also consider the issue of conducting interviews over the telephone vs in-person.

Solicitor participants were recruited by way of an invitation letter and information sheet sent out to criminal legal aid firms in the South. This information was obtained via the LAA's published (and frequently updated) list of firms undertaking criminal legal aid work. These interviewees were further encouraged to nominate colleagues whom they thought may be willing to participate as

well. One interviewee referred to a large Facebook group of practising criminal lawyers, whose administrators very kindly allowed a post asking for interested participants.

Based on the comparatively much smaller pool of practising Criminal Barristers,[236] a slightly different approach was taken for the Criminal Bar. Letters were sent to the treasurer's of each of the four Inns of Court (every barrister must be a member of an inn in order to qualify as a barrister) explaining the research and the need for interested participants. Three of the inns replied to this letter and advertised the research to their members, both formally and informally. A similar approach was taken with the Criminal Bar Association, who agreed to advertise the research in their weekly newsletter for several months. Further willing interviewees were located by the endeavours of personal and professional contacts working at the Bar. I am very grateful for the help of these various people who gave up their time to publicise my work.

As to the issue of telephone interviews vs in-person, telephone interviews certainly have their advantages. As Edwards and Holland point out, they can be more acceptable to participants when discussing sensitive topics and more convenient for fitting into busy or complicated lives.[237] This was particularly true for this research. Many of the interviewees had very fluid diaries indeed and so the convenience provided by a telephone interview was invaluable. There were other, less obvious, practical benefits too. For one thing, the recording quality provided by telephone is usually excellent. Even in noisy areas (in one case, outside a Crown Court near an airport's flight path) the fact that you effectively have a microphone right next to the interviewee's mouth means that quality is usually very good. To expect an interviewee to put on a similar microphone in-person would have seemed awkward and intrusive and (speculatively) may well have led to less frank responses as a result. In contrast, talking on the telephone is such an instinctive action in today's modern world that there seemed (to the best of my knowledge) to be no such issue when the "microphone" in question was the interviewee's own phone. The other advantage is that phone interviewees tended to avoid noisy public places anyway. There is something about the telephone that seems to make people generally want to talk in somewhat more private and quiet

[236] The Bar Standards Board estimated for the MoJ that around 5000 barristers specialise in criminal law (compared with 2,262 solicitors firms, which equates to well over 10,000 people) – Ministry of Justice, *Litigators Graduated Fees Scheme and Court Appointees Equality Statement* (2017) 3
[237] Rosalind Edwards and Janet Holland, *What is Qualitative Interviewing?* (Bloomsbury 2013), 48

spaces. The above aeroplane example was an exception and unplanned - due to poor signal.[238] In contrast, those interviewed in person sometimes preferred meeting in cafés etc.

Some argue that telephone interviews have disadvantages. Edwards and Holland highlight the issue of lack of face-to-face contact meaning that you miss information about your interviewee, such as appearance and non-verbal communication.[239] This may well be a legitimate concern, particularly for those involved in discourse analysis-esque approaches, but it is submitted that it is not a problem for this study. We are concerned with what is said, rather than how it is said; the information and opinions expressed and what this tells us about changes in the values of defence lawyers. Unless qualified in psychology, the amount that an analysis of body language etc. can contribute to that would appear to be negligible. Others have even argued that this lack of non-verbal communication can be a strength. Holt, in her analysis of the views of parents of young offenders, found that the absence of visual cues and body language can make both interviewee and researcher articulate their thoughts more to compensate and you therefore end up with an enhanced text.[240]

At the other end of the interviewee social standing scale (compared with parents of young offenders), Stephens conducted research with senior macroeconomists, some in person and some by phone and he found his telephone interviews to be "largely successful".[241] Stephens did, on the other hand, identify several problems that are worth considering:

1. interruption (due to lack of physical cues, out of turn utterances became interruptions)
2. topic control (small inflections could undermine the fluidity of the conversation),
3. lack of visual communication,
4. articulation (need to articulate questions clearly in the absence of visual cues),
5. holding the phone (taking notes was difficult),
6. controlling the environment (respondent may not have control over theirs) and

[238] Coincidently, having previously interned at the court in question, I can confirm that this is unfortunately very much true…
[239] Edwards and Holland (n 236).
[240] Amanda Holt, 'Using the Telephone for Narrative Interviewing: a Research Note', (2010) 10(1) *Qualitative Research* 113, 116
[241] Neil Stephens, 'Collecting Data from Elites and Ultra Elites: telephone and face-to-face interviews with macroeconomists' (2007) 7(2) Qualitative Research 203, 209

7. preparatory materials (no opportunity to provide physical materials for interviewees to discuss).[242]

However, with a little forethought, these are not really insurmountable problems. Two of these are not relevant to this research: No materials needed to be examined (7) and a hands-free telephone was used(5). 6 was solved quite easily in the same way Stephens solved it, ring (or text/email) to check if the interviewee was ready before calling. Sometimes the interviewee replied saying they were ready and sometimes they said they needed some more time to get to a suitable environment. Being flexible with timing, ensured interviewees had control over their environment.

1-4 need not be disadvantages if they are adapted to, which Stephens did. Avoiding certain words (such as "OK" which, in my experience, sometimes signified that the conversation or topic was over), or even just talking less and listening more, prevents interruption and topic control problems and we have already seen how lack of visual communication and articulation has its advantages.[243] The importance of listening more and talking less cannot be overemphasised. Sometimes interviewees stop talking for a while. This could be interpreted as the time for the interviewer to ask another question or probe. In actual fact, it often turned out that the interviewee was just gathering their thoughts and still had more to say on that topic. Silences potentially awkward at the time often turned out (when transcribed) to be relatively short and just a time for both parties to process everything that had just been said.

Stephens also suggested a slightly more structured approach to get around these issues, with a number of questions written in advance to ensure they are clearly spoken as well as using explicit "turn taking" devices to make the respondent aware that a new question is coming and they should stop speaking.[244] Hence, despite several initial objections, with a little planning, many of the problems associated with telephone interviews can be easily mitigated, to the point where it is at least of equal value to in-person ones, possibly better in some cases. It is obviously a *different* experience and may well lead to different data, but it seems that that data ought not to be considered inferior. In that sense, doing a mixture of both in-person and telephone interviews

[242] ibid. 209-211
[243] Holt (n 239), 116
[244] Stephens (n 240), 211

(like this research did), is probably the best approach. It may well be that the "unquestioned assumption"[245] (if there is one) that face-to-face interviewing is better might be due to Luddite concerns rather than logical ones.

There is of course also a middle ground: video conferencing. Unfortunately, that takes a little bit more technology and pre-planning to set up and so begins to lose one of the main benefits of telephone interviews: convenience. The aforementioned interviewee next to the airport flight-path court could not have video-conferenced from outside and with low signal. Neither could another, who was interviewed on his drive home from work, with a hands-free system. You also lose the benefit of increased recording quality (unless you can persuade your interviewee to wear an aeroplane-pilot-style headset) and informality of the telephone interview. Apart from where geographically impossible, it seems that if you are willing to go to all the effort of organising a videoconference call, you might just as well organise a meeting in person instead.

2.3.6 Power Relations

The choice of interviewees raises interesting questions about potential power issues in the research. Whilst the lawyers interviewed were not exactly hugely influential political elites, nonetheless, they were not a repressed and powerless group either. Like anybody, they would have had their own agenda to pursue and their own ideas about what exactly the research should say. In such a situation, the researcher is considered to be involved in something of a "power game"; with the researcher fighting to follow their own research agenda rather than the interviewee's.[246] The first way to mitigate this potential problem is to have an "in-depth grasp of the key issues", ideally to the extent that the researcher becomes "someone who can be considered equal in terms of situated knowledge".[247] Some, such as Ross, have also argued that a good way to redress this balance is to emphasise common ground, thus building a relationship of trust between interviewer and interviewee.[248]

[245] ibid. 114
[246] Edwards and Holland (n 236) 83
[247] ibid.
[248] Karen Ross, 'Political Elites and the Pragmatic Paradigm: Notes from a Feminist Researcher – in the field and out to lunch' *International Journal of Social Research Methodology* 4(2) (2001) 155, 162

This was mitigated with these two points in mind. First, an in-depth grasp of the key issues was obtained by reading as much as possible about the legal aid cuts, how the criminal legal aid system works[249] and getting on the mailing list of the professional associations active in discussing the cuts (Criminal Bar Association, Criminal Law Solicitors Association, the London Criminal Courts Solicitors Association etc.) This is also partly why, as emphasised in the Introductory Chapter, it is so important to understand the proposed 2015 contracts, even though they were eventually shelved. Finally, there was also a one-to-one discussion with a criminal law practitioner trainer. This meant that interviews could be approached with the confidence that I knew what I was talking about to a similar level to that of my interviewees – in terms of legal aid system – and could direct questions accordingly.

Secondly, ways in which common ground could be found were considered. This turned out to be surprisingly easy. On reflection, the interviewees and myself have significant common-ground in terms of interest and expertise. As a law graduate myself, I had a similar educational experience to many of those interviewed and, by virtue of the nature of the work, many shared an interest in criminal law and access to justice. A connection perhaps not immediately obvious from Ross' experience is that shared knowledge of the key-issues itself also leads to common ground. All this in combination helped *construct* me as someone who could not have the wool pulled over their eyes too easily, but at the same time understood and was sympathetic to where they were coming from - mitigating the power game. The obvious comparison would seem to be with a journalist, who would have difficulty in building such a rapport. It should be noted that this idea of "*construction*" is something that cannot really be avoided and is always somewhat dynamic.[250] It is not optional. Consciously or subconsciously, the interviewer's identity is always going to be

[249] The principle primary sources being:
Legal Aid, Sentencing and Punishment of Offenders Act 2012
The Criminal Legal Aid (Remuneration) Regulations 2013, SI 2013/435, **as amended by,**
The Criminal Legal Aid (Remuneration etc.) (Amendment) Regulations SI 2015/1369

For an explanation of the scheme, see the introductory chapter of this work and in addition:

Vicky Ling, Simon Pugh and Anthony Edwards, *LAG Legal Aid Handbook* (2011-12 ed, 2013-14 ed and 2015-16 ed Legal Action Group)
Legal Aid Agency, *Criminal Legal Aid Manual* (April 2015);
James Richardson, *Archbold Criminal Pleading, Evidence and Practice* (2015 edition and later, Sweet and Maxwell 2015) Ch 6, Costs and Legal Aid;
Martin Hannibal and Lisa Mountford, *Criminal Litigation Handbook* (2014-15 edition, Oxford University Press 2014) Ch 9, Funding of Criminal Defence Services and First Appearance Process

[250] Suruchi Thapar-Björkert and Marsha Henry, 'Reassessing the Research Relationship: Location, Position and Power in Fieldwork Accounts' *International Journal of Social Research* (2004) 7(5) 363, 375

constructed by the interviewee.[251] All you can do is to try and predict what the assumptions might be and then take them into account when analysing.

2.3.7 Interview Design

This section will discuss how the interviews were designed. We will first look at how structured the interview ought to be before looking at the final interview schedule.

2.3.7.1 How Structured Should the Interviews Be?

More structured interviews have some advantages over less structured ones. The chief advantage is that they can return more reliable data - in the sense that the same responses could be more easily reproduced if the research was repeated. However, it is submitted that in the end, for our particular research question's needs, having interviews that are only partially structured is a better choice. Semi-structured interviews are used in this research instead of structured ones for several reasons. First, as Bernard points out, generally, unstructured interviewing is useful for discussing more sensitive issues.[252] It is easier to get around to discussing sensitive topics slowly, naturally and casually, after building up a rapport. It is also easier to get at those sensitive issues and avoid interviewee misreporting if you can use probes etc. to follow up questions.[253] Simply asking a formulaic set of questions makes this more difficult. Clearly, enquiring about issues that could possibly involve the loss of an interviewee's job (because of lack of finance) or about morally questionable behaviour of defence lawyers is a sensitive topic.

Another problem is the nature of the research question. Understanding the impact something can have on somebody's work is a fairly in-depth analysis of their views. As Charmaz points out, what she calls "intensive interviewing" permits an in-depth exploration of a particular topic.[254] Such an approach involves encouraging the interviewee to respond and allowing them to do most of the

[251] ibid.
[252] Bernard (n 219) 193
[253] See 2.3.3, above
[254] Kathy Charmaz, *Constructing Grounded Theory* (SAGE 2006) 25

talking, through the use of open questions and targeted follow-up.[255] In particular, Charmaz noted several advantages of this approach, including: [256]

- Going beneath the surface of the described experiences
- The opportunity to stop and explore a topic
- Getting extra detail or explanation following an answer
- Asking about the participants' thought, feelings and actions.
- Keeping the participant on subject
- The ability to return to an earlier point for more discussion

Charmaz is of course, discussing grounded theory in particular, but the merits of interviewing in a somewhat unstructured manner remain, regardless of the analysis eventually done.[257]

There is also the difficulty of concocting a useful set of structured questions to ask in the first place. At the start, we cannot necessarily know what particular issues are important to defence lawyers as they go about doing their jobs, such that a set of structured questions or surveys can be designed that covered everything relevant. One could get *some* idea from looking at the legal aid reform documents and reports in detail, and gain more and more of an idea as more interviews are done and the research becomes closer and closer to being finished, but by then of course, it is too late – though this does represent an opportunity for future work.

On the other hand, a completely unstructured interview would have problems too. Bernard quite correctly suggests that the strategy for an unstructured interview should be to "get people on to a topic of interest and get out of the way".[258] This is all very well, but the research question deals with quite a small and focused issue: the impact of legal aid cuts on the value-sets of defence lawyers. In terms of the criminal justice system, this is a significant part of the story, but it is definitely not all of it. There are countless other issues involved in criminal justice which are tempting to discuss. Even within the theme of legal aid finance, there are several similar (but

[255] ibid. 26
[256] ibid.
[257] See Chapter 4, where some elements of grounded theory are included in the approach to the analysis
[258] Bernard (n 219) 195

irrelevant) issues, such as the means test and merits tests for legal aid,[259] increased charges for convicted defendants to pay (e.g. the criminal courts' charge), or the new Better Case Management scheme.[260] There has to be some structure of some sort to keep the discussion on topic. Hence, the final interview schedule contained several very general questions targeted at the legal aid cuts, supplemented by an additional set of more specific ones that were updated as the research went on. This was as close as possible to the best of both worlds - neither constricted by a rigid structure, nor chaotically unstructured: semi-structured.

2.3.7.2 Composing an Interview Schedule

Appendix 1 contains the final formal interview schedule. Obviously, this is just a guide - semi-structured rather than structured interviews were done, but it details the rough strategy. This section will provide a brief guide as to how it was constructed.

The interview schedule was initially written following training in Qualitative Methods provided by the Doctoral College, Southampton University. In addition, to ensure that the schedule was broadly consistent with other social science interview schedules (and on the recommendation of the upgrade panel), the schedule was also compared with that of a colleague who had done qualitative interviews in the course of their own research as well.

The schedule is split into two sections: General Topics and Specific Questions. It also includes an introduction where the interviewee is given the opportunity to ask questions and a finishing off section where the interviewee is given a final opportunity to add anything they think has been missed in the interview. The reason for this structure is to allow for more detailed questions to be asked once a rapport has been built up. That is not to say that the initial section is not important though. General, open-ended, questions allow interviewees to frankly discuss their thoughts on an issue without there being much risk of the question asked influencing the answer given. It is a

[259] i.e. the problem of some defendants not being granted legal aid at all. See: Penelope Gibbs, 'Justice denied? The Experience of Unrepresented Defendants in the Criminal Courts' (Transform Justice 2016)
[260] A change to criminal procedure practice. For an example of the sort of complaints defence lawyers have of it, see: Kerry Hudson, 'PTPH -or Please Try Preparing Harder' *The Tuesday Truth* (10 May 2016) <https://www.lccsa.org.uk/tuesday-truth-ptph-or-please-try-preparing-harder/> accessed 1st May 2016.

vital way of gaining new insights. Indeed, sometimes, the discussion can develop (whilst staying on topic) entirely from those initial general questions. In that situation, the later ones are almost unnecessary. There is also a need to be careful of trying to ask all the questions and rigidly following the guide. It is only a guide.[261] That said, the general principle was to initiate with very safe questions, such as about the interviewee's current practice area and experience, to build a rapport before tackling more complex issues later. Hence, issues about financial incentives (and leading questions or phased assertion probes) etc. are saved for later.[262]

Finally, the schedule also makes mention of the use of probes. Probes are a key tool of the semi-structured interviewer.[263] They allow initial responses to be enriched with more data and explanation and they also allow earlier points to be re-visited in more depth. The main probes made use of for these interviews were as follows:

1. The "silent probe". After an interviewee has answered a question, simply saying nothing and waiting for the interviewee to break the silence can lead to them saying more in order to fill the silence. This turned out to be a very fruitful probe and is also an important way to ensure interviewees are not interrupted inadvertently. Similar probes, such as repeating or summarising what an interviewee has said or using a phrase such as "I see" can also elicit further details.
2. The "long question probe". This was particularly useful at the start of an interview, as a way to get the interviewee talking and feeling comfortable. This probe actually involves asking several questions. For example, *So, first of all, perhaps you could generally tell me a bit about your work? What career stage are you at and how did you get here? What are your day-to-day duties etc.? What areas do you chiefly cover?* Although quite long, this question substantially amounts to asking very little at all beyond "tell me about your job", but it provides the interviewee the freedom to discuss anything they like on the topic, builds rapport and can result in quite useful discussion. An alternative, equally important,

[261] Charmaz (n 253) 29
[262] Bernard (n 219) 199
[263] See Bernard (n 219) 197-201, for a summary of literature on this as far back as 1945

use of a "long question probe" is for asking questions that are more controversial. The actual controversial question can be very short at the end, but the long build up helps prepare the interviewee and softens the impact. E.g. *There has historically been some discussion about how defence lawyers' go about their work. In the 90s there was some work done on this by academics and even more recently some of the responses to Transforming Legal Aid talked about how the legal aid structure might have an effect on this. Do you think there is anything in that? Does the level or structure of rates paid impact the way defence lawyers go about doing their jobs? Are there financial incentives to do things in a certain way?* This is a much less personal and blunt way of asking "do you think financial incentives influence the way defence lawyers do their job?" and, in combination with abstract phrasing,[264] resulted in some useful insights.

3. The "phased assertion". This involves deliberately making a statement. This might be partially correct, or something you want verified or something you know to be false. The important thing is the reaction this generates. For example, if one was to say *So, basically, the real problem is x then?* The interviewee might confirm this, or (more likely) they might jump in to correct this in some way. The lawyers' professional instinct to do just that turned out to be particularly strong for many interviewees and this obviously resulted in more details as well as ensuring no there were misconceptions.
4. The "tell me more probe". This is the most natural and obvious probe of all, but incredibly important. This is where the interviewee gives an answer and the interviewer asks for more details or clarification directly.

Finally, it is important to note that the schedule was refined as more and more interviews were done. In particular, section II was added to in order to try and triangulate claims between different interviewees. Hence, if one interviewee made a claim, this could be tested out in later interviews by asking other interviewees what they thought about that issue too. Of course, most

[264] see 2.3.3, above

of these probes are common sense and the kind of thing we do naturally when talking to people in our day-to-day lives without thinking, but thinking through the probes in this way is useful when constructing the interview schedule.

2.3.8 Potential Limitations of the Research Location

There are two elements to this: first, location in terms of geography and secondly in terms of the environment where the interview took place.

2.3.8.1 Geographic Location

The interviews were carried out in primarily one particular part of the country: The South – specifically, Hampshire and London (albeit there were also some from outside this area). Such an approach, of course, has its limitations. The findings cannot allow estimation of the *distribution* of the phenomena obtained across the country, they do not allow us to say "this *must* be happening elsewhere" - as Webley points out, only a quantitative approach could try to do that[265] (and with consequent loss of depth). What they *do* show in relation to the rest of the country, however, is that the phenomena analysed are *possible*. As Peräkylä put it when describing conversation analysis of professionals doing AIDS counselling sessions: the results *were* generalizable not in the sense of what those professionals who were not included in the study *actually do*, but they are generalizable in the sense of what they *could* do - given that those professionals have more or less the same tools available to them as the ones studied.[266] Similarly here, the interviews analysed are not necessarily representative of how lawyers everywhere experienced or thought about the changes, but they are representative of a way that lawyers elsewhere *could* be experiencing the changes, given that the structural set-up is not hugely different around the country. Indeed, when the occasional interviewee outside of Hampshire and London was spoken to, no obvious disparity in views was discerned. In any event, there is an opportunity for future researchers to look at

[265] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kiritzer (eds) *The Oxford Handbook of Empirical Legal Studies* (Oxford University Press 2010) 934
[266] Anssi Peräkylä, 'Reliability and Validity in Research Based on Naturally Occurring Social Interaction' in David Silverman (ed), *Qualitative Research: Theory, Method and Practice* (2nd edition, Sage Publishing 2004) 297

other areas and see if changes have had that affect there too and, more generally, the different workplace culture present among defence lawyers working in different parts of the country.

Quite apart from that, the in-depth study of these small areas also allows us to view the range of variation of the phenomenon in these particular areas – something that a larger, necessarily shallower, study would have missed. In this sense, the findings can be valid and dependable, even if not generalizable in the same way that large-scale quantitative research is.[267]

This is far more useful than doing a countrywide approach. Given that there was only a limited amount of resources (in the sense that there was only one researcher), there were only a certain number of interviews that could be done. Hence, it is submitted that it was far more useful to get a deep understanding of the effect of changes in one area, rather than going wider and risking getting fragmented results – results which would then not capture the variation of the particular phenomenon, but only minor snapshots. Approaching the matter this way also allows for a certain amount of triangulation between interviewees. As Chan points out, comparing "different accounts of the same phenomenon" and questioning of respondents about others' accounts can be a useful cross referencing tool in itself.[268] It is submitted that this would not be so useful if we were attempting to cross-reference across large swathes of the country.

In simple terms, the research does not establish that the cuts will have the observed effects everywhere, but they do establish that, on close and deep examination, the found effects are very much possible in areas with a legal aid set up like[269] that of the South. Only a deep and focused study in a small area, such as this one, could have picked this up.

[267] Webley (n 264), 934-935
[268] Janet Chan, *Doing Less Time: Penal Reform in Crisis* (Institution of Criminology, Sydney 1992) 19
[269] In terms of legal aid rules, area sizes and geography. The similarities and differences (if any) between other things, particularly the different working-cultures of different areas (for example, anecdotally it seems that The North and, rather intriguingly at the opposite end of the country: Devon, is a little more militant than others) is a complex issue deserving of detailed research in its own right. Certainly it is beyond the scope of this piece.

2.3.8.2 Environmental Location

As was pointed out earlier, particularly for telephone interviews, the interviewees spoke from a variety of places. Some from their home, some from outside the court they had been working in that day and some from their office. This is not something that could be controlled. The interviews were entirely voluntary. If an interviewee insisted on being interviewed in somewhere strange, then one had to take it or leave it. However, it is important to consider whether this would have had any effect.

Somewhat unconventional interview locations are not unusual. For example, Bernard recalls spending a great deal of time in a Greek "taverna" restaurant interviewing local sponge divers. According to Bernard, "with plenty of retsina wine and good things to eat" the atmosphere was relaxed and conversation was easy![270] Ethical concerns aside, it does not take a great deal of imagination to conclude that interviewees, with their bellies stuffed full of good food and wine in the local taverna, might well provide different responses than would have been got in an office. The issue is more complex than this though, as location can also influence the power game between researcher and researched. As Edwards and Holland point out, one's position in a hierarchy is "experienced, created and enacted in *places*".[271] They use the example of interviewing children as part of research into the views of young people at school. Such a setting, they argue, makes it very difficult for the interviewer to not be seen as a teacher or at least allied with the child's teachers.[272]

Similarly, offices in general, as an interview location, have been found to be problematic. Elwood and Martin, interviewing neighbourhood organisation staff about their experiences of their local neighbourhood, found that they received different answers depending on whether the location was done in the interviewee's office or their home.[273] In the office, interviewees presented themselves as knowledgeable participants, whereas at home they were more anxious and unsure whether they were providing the "right answer".[274] In Elwood and Martin's view, it also made them reluctant to express negative opinions about their organisation when in that organisation's

[270] Bernard (n 219) 195
[271] Edwards and Holland (n 236) 44
[272] ibid.
[273] Sarah Elwood and Deborah Martin, ' "placing" Interviews: Location and Scales of Power in Qualitative Research ' (2000) 52(4) Professional Geographer 649, 655
[274] ibid.

office.[275] Of course, what Elwood and Martin do not consider is the possibility that the causation may run in the opposite direction. It might just as likely be the case that those who are more confident and consider themselves to be knowledgeable are *consequently* more likely to demand an interview at work (rather than the work environment making them consider themselves more knowledgeable). Similarly, those who do *not* have dissenting views from that of their organisation might just as likely be more keen to be interviewed at work for that very reason: they like the way it is run and feel comfortable there. It seems just as likely that the person influences the environment choice as the environment choice influences the person. Both of those views are arguably a little simplistic though. The reality may be that it is a mixture of both: the environment influences the person to an extent and the person's existing views influence the choice of environment to an extent as well. In that sense, Bourdieu's concept of habitus is a useful way to view this issue too: an interviewee's habitus impacts on the decisions they make (such as where to be interviewed), but their habitus is itself also influenced by a person's experience (which would include their environment). Hence, the causation could run in both directions.

This means that if an interviewee chooses a particular place, it can be quite instructive as to their feelings towards it. In Elwood and Martin's case, some interviewees suggested a particular neighbourhood organisation's offices for the interview (there were a total of four organisations). This usually turned out to reflect an allegiance by that individual to that one organisation, at the expense of the other three.[276] Such a phenomenon was also borne out in this research. For example, a few interviews were conducted with some barristers who all happened to be part of the same set of chambers. A trend developed in that many of these interviews took place *outside* chambers - whether that was in court conference rooms, outside the court, in the car, or at home. Sure enough, whenever the discussion moved towards the structural nature of chambers, it became apparent that there had been some quite significant changes (following the legal aid cuts) that many members felt quite unhappy about. Hence, whilst it is wrong to read too much into interviewee's choice of location on its own – to do so is pure speculation and could be explained by convenience or chance as much as anything else - interviewees' choice of location *can* sometimes provide a useful signal or sign-post that some issues might be worth probing further.

[275] ibid. 656
[276] ibid. 654

Elwood and Martin also point out how extra things can be learnt from interview locations alone. Being in a certain place allows insights to the topic under discussion that may not be found elsewhere.[277] For example, one of their interviews was conducted at the interviewee's home around the kitchen table. They were talking about neighbourhood activism. Prior to the interview, the interviewer was introduced to the interviewee's daughter and granddaughter, whom she was then able to bring up later on in the interview itself.[278] She could also be physically shown the house where an infamous local drug dealer used to live. In Elwood and Martin's view, this allowed the words spoken into the tape-recorder to "come alive": essential details explaining the interviewee's activism were "conveyed as much by the location of the interview as by the tape-recorded words of the interview itself."[279] To an extent a similar thing occurred for this research, even for telephone interviews. Lawyers interviewed straight after work, outside a court, would usually bring up details of the case they had done that day if it was relevant. Much like Elwood and Martin's interviewee pointing at the old drug dealer's house or introducing their daughter, the fact that these things were staring an interviewee in the face as they spoke may have been the reason they mentioned it at all. Of course, if not in the location yourself, the text cannot "come alive" in quite the same way. On the other hand, courts are better known than some random housing estate; particularly for a law student. I was familiar with many of the courts my interviewees were speaking from, so for me this issue was perhaps less relevant. The text could still come alive.

To sum up, different interview locations might well give different answers, but this is largely outside a researcher's control. Apart from practicality issues (some locations are just plain bad because you cannot get a decent recording etc. e.g. a busy café vs an empty café) there are positives and negatives to every potential location. This means we should be very slow to dismiss an interview as "not useful" simply because of its location. Rather, we ought to bear in mind when analysing interviews that a respondent not being particularly forthright may be explained by, for example, the fact that this particular interview was done when their boss was just next-door. We should also note that the causation trail may run both ways in these situations: an interviewee may prefer particular locations precisely because of their views, rather than their views about the topic being influenced by their location and vice versa. This also means that an interviewee's choice of location can sometimes tell us something else about their views, though of course we

[277] ibid. 653
[278] ibid.
[279] ibid.

must be careful not to read too much into this, since choice of location may be explainable by other reasons: such as convenience or sheer chance. However, it can provide an indication that further probing of an issue is a good idea.

2.3.9 Ethics

It is also necessary to briefly outline the approach taken to research ethics. Whilst this was not a case of carrying out intrusive medical experiments on interviewees or dealing with vulnerable groups, nonetheless there are important ethical issues to consider here. As with any research, it was very important to ensure that participants provided informed consent. Hence, potential interviewees were given an information sheet (approved by the faculty ethics committee) beforehand, outlining what the research was about and what their participation would involve. This was accompanied by a consent form, which stated explicitly that: 1. The interview would be recorded 2. This recording would result in a full transcript and 3. They may be (anonymously) quoted from that transcript. This was reinforced at the start of each interview, where it was checked whether the interviewee had read and understood the information sheet and had an opportunity to ask questions. The sheet provided to participants also made clear how their data was to be kept: in accordance with the Data Protection Act and the University's policy on data protection. A brief description of what this practically meant for them was given: their data would not be shared with others (except as anonymous quotes) and it would be stored securely.

The other aspect is confidentiality. This is important because it allows interviewees to speak freely and not be in danger of negative consequences if they criticised someone. Obviously, full confidentiality is impossible here. Unlinked anonymity is only possible where even the researcher themselves does not know whose data they have. For interviews, this is practically impossible. Equally, it was necessary to reveal some details about interviewees' work and level of seniority, as this could have an impact on why they said what they did and was necessary for a full analysis. A compromise position was thus arrived at: interviewees names would not be used (rather, they were called "Barrister A", "Solicitor A" etc.) but details about their seniority and the kind of work that they did would be. This was in general terms only. For example, no particular workplaces were named. Most crucially of all, again, this was communicated fully to the interviewees via the information sheet. Only those happy with this level of anonymity gave interviews.

Research ethics is not just important from a moralistic point of view. It also allows for a more complete set of data. Making clear that responses are anonymous and ensuring that everyone understands how exactly the data is to be used allows interviewees to speak more freely. Some, for example, expressed opinions they said were “unpopular” among their peers and that they would not usually reveal them. Others said that if it weren’t anonymous they might have been sacked for what they said! Dealing with research ethics sensitively and thoroughly leads to a more complete data set as well as being the right thing to do, as a research professional.

2.4 Conclusion

This brief chapter has set out the general approach taken to answering the research question, in terms of data analysis, data to use and epistemological concerns. In summary, data from semi-structured interviews with legal practitioners is analysed in order to establish changes in values. In Chapters 5 and 6, this data is used to plot our criminal justice process’ movement along the criminal justice process model scale and thus establish what the impact of these changes are in that sense. In epistemological terms, the data, following Travers’ warning, takes into account the perspectives of those involved, whilst at the same time not entirely giving them the benefit of the doubt, by making use of Bourdieusian concepts to move beyond the epistemological disagreements discussed. The next two chapters will consider these issues in detail. Chapter 3 will review the criminal justice process model literature and build a foundation for the argument as to how these can be used. Chapter 4 will then discuss the original framework for using these models and how they can be used to analyse the empirical data and answer the research question.

Chapter 3: The Utility of Criminal Justice Process Models

3.1 Introduction

In 1968, Herbert Packer published *Limits of the Criminal Sanction,* a book setting out his argument that contemporary American society vastly over-estimated the capability of the criminal law to solve its problems.[280] In constructing this argument, he used a unique way of conceptualising the criminal justice process. Packer's idea was that the values in the criminal justice process could be expressed as a scale, with one extreme model at each end. The general idea was that every justice system, from Nazi Germany to your own, incorporated something of both and is therefore somewhere on this scale overall.

Criminal justice process models are very useful tools for analysing data and answering research questions, however they need to be understood in detail if they are to be used well. Equally, as the previous chapter noted, Packer's approach has been subject to criticism. This needs to be confronted before we can start to analyse data. If critics identify problems, any data analysis approach will have to accommodate those problems. Hence, for this chapter, we will consider Packer's criminal justice process models, their criticisms and the suggested alternatives. We will then return to the substance of the research in the following chapter: where a unique approach to using this kind of theory to both analyse data and to answer the research question will be set out.

In basic terms, this chapter's argument is that criticisms of Packer tend to falsely equate simplicity (which the models do have) with fundamental flaws (which they do not have). Issues of simplicity are problems that will inevitably exist with any attempt to create simplified analytical constructs of a complex system - like the criminal justice process. It is of course true that when you simplify something in order to make it easier to understand and analyse, details will be lost. However, it does not inevitably follow from this that simplified analytical constructs cannot *nonetheless* be a useful way to analyse the criminal justice process. On the contrary, Packer's models, *because of* their simplicity allow us to make sense of a complex system in a way that other approaches do not. In just the same way that, whilst the official map of the London Underground is a

[280] Packer (n 52)

simplification of London's subterranean geography, it nonetheless helps us to navigate a very complex system of tunnels in a way that a "to scale" map does not. Just like Packer's models, it is *because of* this simplicity that it is a useful way to help us understand how to get from Waterloo to Chancery Lane.

This chapter is structured as follows: sections 3.2-3.3 outline how we ought to understand Packer's approach and its uses. Section 3.4 then considers five very different critiques of Packer's approach. In doing so, we shall see why these do not amount to fatal flaws with Packer's approach, but also explore how each approach nonetheless provides its own unique insights when trying to understand and analyse contemporary issues in the criminal justice process. Hence, the broader implication is that Packer's approach remains an important tool of analysis - neither instead of, nor at the expense of, more recent approaches. The following chapter, will then outline a new approach to using these tools: a "toolbox approach".

Before we begin, there is a terminology issue to be clear on. For some, the term "model" has become almost as contentious as Packer's ideas themselves,[281] and in any case it suggests a distinctly Packer-esque approach to the problem. So, to be clear, the term "model" is used here in a sense perhaps wider than Packer originally did. One dictionary describes it as: "A simplified description… of a system or process, to assist calculations and predictions".[282] This idea of "models" having an element of *simplicity* (in comparison to the real thing) that can be of *assistance* in making calculations and predictions is the key element in this discussion.[283]

[281] Stuart Macdonald, 'Constructing a Framework for Criminal Justice Research: Learning from Packer's Mistakes' (2008) 11 New Crim. L. Rev. 257, 269

[282] Oxford Dictionaries Online <http://www.oxforddictionaries.com/definition/english/model?searchDictCode=all> accessed 12th January 2015

[283] Of course, the argument could be made that not *all* models are like this. Some models (for example, some mathematical models) arguably manage to overcomplicate what are, in reality, fairly simple phenomena. For the avoidance of doubt, we are not concerned with those kinds of models here. We are dealing with analytical tools that try to simplify something complex in order to aid analysis, rather than those which try to complicate something simple to aid analysis.

3.2 Packer's Approach and its Uses

Although Packer had floated these ideas before, as a "sketch",[284] the following approach was not put to use until it appeared in *The Limits of the Criminal Sanction*[285] a few years later. Packer argued that the values underpinning the criminal justice process; from arrest to charge, charge to guilt determination and reviewing errors[286] (i.e. reviewing factually incorrect trial verdicts); could be expressed as falling somewhere on the "spectrum"[287] between two polarised viewpoints: *Crime Control* and *Due Process*. As a very general rule of thumb, *Crime Control* values incorporate much of what might today be described as "authoritarian" values, *Due Process* is more "libertarian" in nature. Each model is extreme: Packer considered anyone who became a committed zealot for either to be a "fanatic".[288] Even so, there is some "common ground" shared by both models.[289] For example, both reflect different views on the criminal justice process' *operation*, not on whether it ought to exist or not. By definition they both ought to reject the hypothetical viewpoint that there is no need for a criminal justice process at all i.e. an abolitionist approach with no criminal sanction at all or the opposite, with no limits at all on the use of the criminal sanction: instantaneous summary execution. Both of these are extremes to which neither of Packer's two models would go. We shall consider this common ground first, before moving on to the particulars of each model.

3.2.1 Assumptions/"Common ground"

This common ground is best expressed and understood as a series of five rules:

Rule 1: the "No Punishment Without Law" Rule

The function of defining what is criminal is a matter dealt with prior to that of identifying and dealing with those criminalised.[290] In other words, the agents of the *process* do not make up the *substance* as they go along. It is decided beforehand.

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[284] Herbert Packer, 'Two Models of the Criminal Process' (1964) 113(1) *University of Pennsylvania Law Review* 1
[285] Packer (n 52)
[286] ibid. 174-175 - though note Packer's assertion of "some confidence" that the models could apply beyond these three settings too.
[287] Ibid. 153
[288] Ibid. 154
[289] Ibid.
[290] ibid. 155

Rule 2: the "Separation of Powers" Rule

There must be "a means of definition that is in some sense separate from… the operation of the [criminal] process."[291] In other words, the agents of the *process* ought not to be the same people who decide the *substance*; it is a job for the legislature and (to a lesser extent) the senior courts.

Rule 3: the "Legislative Supremacy" or "Limited Discretion" Rule

Where it appears a crime has been committed and there is a reasonable prospect of catching and convicting the perpetrator, the criminal process ought to be invoked.[292] One element of this is that police and prosecution discretion cannot be limitless. The wider implication of this rule is that there is, contrary to what many critics have claimed, a general aim of the process contained within the ground rules: to pursue criminal conduct, as defined by the legislature.

Rule 4: the "Rule of Law" Rule

"There are limits to the powers of government to investigate and apprehend persons suspected of committing crimes".[293] Both value-systems agree there must be "*a* degree of scrutiny and control" on security officials.[294] Packer only refered to *a* degree and not what the degree is. This is therefore a weak assumption - In Packer's view, even Nazi Germany "never quite reached" doing away with it.[295]

Rule 5: the "adversarial system" Rule

The alleged criminal is an "independent entity" in the process, who can force the other side to demonstrate to an independent tribunal that he is guilty.[296] A generous interpretation of this might suggest Packer was incorporating a presumption of innocence. For Packer though, this is another "minimal assumption."[297] The common-ground is merely that the process has the *potential* to become an adversarial struggle.[298] To what extent the accused can play an active role, or how equal both parties need to be is a matter of debate between the models.

[291] Ibid.
[292] Ibid.
[293] Ibid.
[294] Ibid.
[295] Ibid.
[296] Ibid. 157
[297] Ibid.
[298] Ibid.

Most of these reflect what might be described as constitutional values, rather than criminal justice ones. Packer could well have summarised it as: "the democratic common-law legal system, as I know it". It is true that these are quite generalised. Packer could have provided more detail about each one, but having such a generalised set of ground rules does have the advantage of them still making sense when discussing other common law criminal justice systems today, rather than them being specifically about the USA in the 1960s. There is nothing in the common ground, for example, that a modern-day British lawyer would not find familiar.

3.2.2 Model Particulars

Each model is a value-system: a unique set of values that lead us to run the criminal justice process in two different ways. Again, it is easiest to take a similar approach to thinking about the models as we did with the ground rules. Each model can be summarised as a series of symbiotic values. Taking this approach, the *Crime Control* model values are:

1. Freedom of the individual from crime
2. Efficiency of the process
3. Presumption of guilt and faith in administrative/police fact-finding reliability

These values are not grouped together randomly. They are all inter-related and somewhat hierarchical. Value 1 is considered the "high purpose" of the model.[299] Hence, the second value, "efficiency" has no value to the model "in a vacuum";[300] rather it is a value in so far as it helps "achieve this high purpose [i.e. Value 1]".[301] Hence, the *Crime Control* model is concerned with "efficiency" in the very limited senses of 1) suspect screening efficiency,[302] minimising what we might call false negatives – the factually guilty being acquitted – and 2) speed and finality.[303] Efficiency concerns about convicting the innocent (false *positives*), whilst relevant to the idea of "efficiency" in the general sense of "not being wasteful", are irrelevant to the *Crime Control* adherent's more narrow and specific use of the word.

[299] Ibid. 158
[300] ibid.
[301] ibid.
[302] ibid.
[303] ibid. 159

Value 3 concerns the factual beliefs about the way the world works that underpin Value 2. Put crudely, high speed and disregard of false positives is acceptable because the police and other administrative fact finders "provide adequate guarantees of reliable fact-finding".[304] Once the administrative fact finders arrest and charge a suspect, we can safely presume that they are guilty.[305] Hence, false positives will be seen to be almost unthinkable for the *Crime Control* zealot anyway. Those rare occasions where mistakes might be made can always be justified by reference to Value 1 – protecting citizens from *crime*, not from collateral damage by the criminal law, is our most important consideration. Hence, we can see that these values all influence and depend on one another.

Again, *Due Process* is a value-system, just like *Crime Control* is. The particulars are therefore set out as a series of values. A hierarchy is not so clear for *Due Process* though. Whilst Value 1 is certainly supreme, the rest are more or less equal, though still intrinsically related nonetheless. E.g. mistrusting the police (part of Value 2) leads directly on to the question of whom we *can* trust - Value 3 tells us that the answer to that question is: the adversarial courts.

The *Due Process* model values would be:

1. Freedom of the individual from state oppression
2. Administrative/Police Fact-finding is not to be trusted
3. Quality control
4. Legal guilt and presumption of innocence
5. Equality
6. Scepticism about the morality and utility of the criminal sanction

Just as *Crime Control* had its supreme value or goal, so too, it is suggested, does *Due Process*. For *Due Process*, "primacy of the individual and the complementary concept of limitation on official power" are supreme – the other values of the model being "only the beginning of the ideological difference between the models".[306] That is not to say that *Due Process* encourages us to not care

[304] ibid. 162
[305] ibid. 160-163
[306] Ibid. 165

about protecting the innocent from crime .[307] It is just that, when asked to choose between that and state oppression of innocents, the *Due Process* model would dictate that more crime is preferable – better to be free and unsafe, than safe and oppressed.[308]

The rest of the values can be seen to have this symbiotic relationship just as the *Crime Control* ones do. For example, a belief that administrative fact finders cannot be trusted, "stresses the possibility of error"[309] and leads us to a strong emphasis on quality control (i.e. ensuring no false positives) and the legal presumption of innocence (treating the person the administrative fact finders say is guilty as if they were not guilty, until a court has adjudicated on the matter).[310] The value of "Equality" enhances Value 1 by ensuring that as many citizens as possible are protected from state abuse, not just those with the most financial means.[311] The value of "Scepticism" is an important underpinning for many other viewpoints that *Due Process* holds. The view that, even for the factually guilty, the criminal sanction is often inappropriate partially accounts for the model's indifference towards false negatives (the factually guilty being acquitted), for example.

Does this mean *Due Process* takes issue with the very ground it is built upon - in particular Rule 3 (that criminal conduct, as defined by the legislature, ought to be pursued)?[312] It is submitted not. *Due process* is sceptical as to the use of the criminal *sanction* to deal with offenders, rather than the use of the criminal *process* to pursue crimes. Ground Rule 3 is in favour of the *process*, not the *sanction*. Whilst it is the process that often provides the gateway to the sanction; the process can also greatly inhibit use of the sanction (vs for example, an extreme justice system with no process at all: instantaneous summary execution). In the same way that a traveller who gets a train to somewhere with unpleasant weather may not particularly look forward to arriving at the *destination*, it does not necessarily mean they dislike the train journey itself: the *process*.

[307] Ibid. 163
[308] Similarly, for *Crime Control*, *Due Process* Value 1 is not *wrong*, it is simply not as important – a secondary consideration. Preventing crime is far *more* important.
[309] Ibid. 163
[310] Ibid.166-168
[311] ibid. 168
[312] Macdonald makes a similar point in relation to the values of the *Crime Control* model – see section 3.4.2.1 below

In summary, the differences between the two boil down to a question of what the paramount consideration in running the criminal process is: eradicating crime or minimising collateral damage. What is the the greater of two evils: punishing an innocent (i.e. a false positive), or letting off a perpetrator (i.e. a false negative)?

3.3 How are the Models Used and What Advantages do they Have?

It is important to be clear about what Packer was and was not intending to do with his models. One way to use models is in an "is and ought" fashion. For example, using Weberian ideals[313] or a "rights based" "framework of values"[314]. This kind of analysis is evaluative. It is not used to explain what the process *is*, but to say what the writer thinks the process *should be* and compare the present to that. Packer was not using his models in this way. His discussion of is and ought was about how much the criminal sanction *was* and *should* be used, rather than whether *Crime Control* or *Due Process* was the best model to base your system upon. Instead, he was using his models to understand how the criminal justice process was working (for Packer, it was that the criminal justice process of his time was moving towards *Due Process*)[315] he could then use this understanding in advancing an argument that the criminal sanction was being overused.

Just before considering the criticisms of Packer's approach, it is also important to note its unique benefits that other approaches do not have. First, Packer's models have the benefit of great simplicity. By reducing something as complex as the criminal justice process to just two value-sets and some ground rules, Packer's models allow us to more easily analyse what the impact of a policy change is. It is very easy to look at a change and say "this shows a move towards a *Crime Control* approach" The use of a dichotomous scale assists even more so by forcing us to choose which side a particular change might suit.

Secondly, Packer's models are based upon an actual, albeit very generalised, common law criminal justice process (by virtue of the common-ground) so have the benefit of providing a certain amount of realism. Packer was using his models to represent value-systems he believed

[313] Macdonald (n 280) 268
[314] Andrew Ashworth & Mike Redmayne, *The Criminal Process* (3rd edn, Oxford University Press 2005) 45
[315] Packer (n 52) 239

were present at the time. Other approaches, such as Weberian ideal-types,[316] are not based upon an actual system. The models provide the advantage of being easily relatable to the situation that is being analysed.

Thirdly, as there are only two models, with several inter-related values in each (as opposed to many isolated values), we can examine the relationship between each value within a value-set (*Crime Control* or *Due Process*) using Packer's approach. The various values of *Crime Control* have a symbiotic relationship (as do those of *Due Process*).[317] In terms of analysis, this is useful because it allows us to look at a change to the criminal process, see which cause it furthers (i.e. asking whether the change would please the hypothetical fanatic of either model) and, in doing so, we see what other values such a point of view might indicate.[318]

As we shall see next, these unique advantages also come with unique disadvantages. However, because of these advantages, Packer's approach can show us things that other approaches cannot – even if, by the same token, other approaches can show us things that Packer's approach itself does not. Unless criticisms establish fundamental flaws with Packer's approach, it ought to remain an important analysis tool - neither instead of, nor at the expense of, more recent approaches.

3.4 What are the Identified Flaws of Packer's Approach and the Suggested Alternatives?

In this section we will look at some of the critiques of the Packer approach, their suggested alternatives and whether this is fatal to using Packer's models today.

[316] See 3.4.2, below

[317] E.g. *Crime Control* value 1 justifies 2-3 and 2-3 feed off each other. In that sense, the models avoid the charge of relying on guilt by association. We do not judge someone's views on placing blind trust in the police as being *Crime Control* simply because the *Crime Control* model happens to agree with them, but because blindly trusting the police is an integral part and bound up symbiotically with all the other parts of the model.

[318] See Ch 4 for a detailed example of this

3.4.1 Ashworth and Redmayne

Whilst, as noted above, Ashworth and Redmayne do not seek to use models in the same explanatory way Packer does,[319] they do say a little bit about their problems with such an approach. They list five:[320]

3.4.1.1 Relationship between the models is not explained

Packer failed, they say, to give a clear explanation of the relationship between the two models.[321] *Due Process* is not the true converse of *Crime Control* (because they agree on some things: the common-ground), and therefore the relationship between them is uncertain. They then suggest two potential ways to solve this: 1) having *Crime Control* as the purpose of the system, but qualified out of respect to *Due Process* or 2) that *Crime Control* AND *Due Process* should be the two main objectives.[322] However, this ignores the way both models are situated against the background of the common ground. True, both models agree with Rule 3 that the objective of the process is to pursue crime as defined by the legislature.[323] I.e. the legislature is sovereign and its criminal laws must be enforced. The disagreement is what our paramount consideration ought to be when pursuing this goal. This disagreement is perfectly clear. *Due Process*, considers it to be protecting citizens from state abuse: punishing an innocent is a greater evil than letting off a perpetrator. *Crime Control* considers it to be protecting citizens from crime: letting off a perpetrator is a greater evil than punishing an innocent person. The fact that the two models agree that the purpose of the process is to try and enforce the legislature's criminal laws does not mean the two models are not nonetheless in clear opposition on the points that matter to them. In the same way that two boxers mutually accepting the ground rules and purposes of the game before fighting does not mean the relationship or nature of their opposition is in any way unclear once they enter the ring.

The alternative suggestions are similarly flawed in this respect. To have *Crime Control* as the goal of the system, with *Due Process* as a qualification (a sort of accelerator vs brake situation) would entail re-writing the ground rules in order to prevent the construct collapsing. To have both *Crime*

[319] See section 3.3, above
[320] Ashworth & Redmayne (n 315) 39-40
[321] Ibid.
[322] Ibid.
[323] Packer (n 52), 155 and see above, "Rule 3"

Control and *Due Process* as equal main objectives of the process would be conceptually impossible because their two supreme values: freedom from state oppression and freedom from crime are inevitably going to conflict at some point. The two views represent fundamentally different approaches to pursuing criminal conduct, with different paramount considerations: protecting the citizen from crime and protecting the citizen from state abuse respectively. Within the system as we know it (i.e. within the ground rules) there will always be occasions where we are faced with a choice of which is the lesser of two evils: increased state oppression or increased crime. In making this choice, one must, in that instant, commit to one value over the other. If we are faced with a choice between the security benefit of increased police powers to deal with a crime outbreak or the libertarian benefits of reducing (or at least not increasing) them, saying that both considerations are equally important would not assist.

A third view of the above issue would say that there is no substantial relationship between criminal justice measures and crime and therefore increased police powers makes no practical difference. In one sense, such a view is irrelevant. The purpose of examples like the above is to gauge someone's values. Quibbling over how factually accurate the available choices are is just dodging the question. Much like in the philosopher's "Trolley Problem" thought experiment,[324] you have to assume that the assumptions underpinning it (in this case about the criminal process having an effect on crime) are true. Nonetheless, even this "third view" would reject Ashworth and Redmayne's formulation. Either it would take issue with the ground rules and so have no position on the spectrum at all (and thus be choosing not both *Crime Control* and *Due Process*, but neither of them), or it would come within the extreme end of *Due Process* (thus nonetheless making a choice between *Due Process* and *Crime Control*) on account of its scepticism as to the utility of the criminal sanction. One would still be choosing to side with the *Due Process* or *Crime Control* camps (or neither) rather than both, as Ashworth and Redmayne would have us set out the models. It is conceptually impossible to have both as the main objectives of the process.

3.4.1.2 Assumption that Pre-Trial Justice System is Capable of Affecting Crime Rate

Building on the "third view" above, this criticism rests on the idea that there is insufficient evidence of a causal relationship between police powers and the crime rate. Variations in the rate may be influenced more by social and economic factors than police powers. It suggests instead

[324] See: Judith Thomson, 'The Trolley Problem' (1985) 94(6) *Yale Law Journal* 1395

that Packer's "*Crime Control*" model should instead be based on convicting the guilty rather than controlling crime. It is submitted that this criticism too is unfounded. Firstly, this is to miss the impact of the common ground. The common ground already has the aim of convicting (or, rather, "pursuing") the guilty within it (Rule 3) and thus, so does the *Crime Control* model (and the *Due Process* model too). The *Crime Control* model is based on the more general paramount consideration of protecting the citizen from crime.

Even ignoring that though, whether increased police powers help control crime or not is irrelevant. The *Crime Control* model represents a common mind-set. It describes the values embodied by actors and measures within the criminal justice process. It is a value-set, not a "program for action".[325] Hence, whether the values are rational or based on evidence or not is unimportant. What is important is whether some actors commonly hold them or not. Ashworth and Redmayne's later discussion of research literature on "cop culture" suggests that they are indeed commonly held by some.[326] A *Crime Control* adherent does not care about economic or social causes of crime, because in their eyes, the administrative fact finders catch the right person nearly all the time (Value 3) and with speed (Value 2). Even in enunciating Value 1, Packer tells us that the *Crime Control* adherent views "failure of law enforcement to bring criminal conduct under tight control" as the reason for crime.[327] Rightly or wrongly, the *Crime Control* adherent blames "failure to apprehend and convict"[328] (not economic and social issues) for crime. It is this viewpoint that is important – even if one thinks it is a flawed view to hold.

3.4.1.3 Importance of Resource Management Underestimated

Ashworth and Redmayne point out that the models should also "take account" of the impact of targets, performance indicators and bureaucracy on the agencies involved. Arguably, this is already done by Value 2 of the *Crime Control* model, but even if a more detailed consideration aids analysis, this is a problem of simplicity rather than a fatal structural flaw.[329]

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[325] Packer (n 52) 154
[326] Ashworth and Redmayne (n 315) 66. What they call element "(a)": "support for colleagues' decisions and the inappropriateness of close supervision" for example, correlates rather well with Value 3 of *Crime Control*
[327] Packer (n 52) 154
[328] Ibid.
[329] See below discussion of King's bureaucratic model, at 3.4.3.4

3.4.1.4 No Allowance made for Victim-Related Matters

This argument is that *Due Process* is not concerned with victim's rights (it is concerned with protection of the individual from state oppression) and *Crime Control* does not really consider victims' rights either. One could argue that *Crime Control* does respect victims' rights, in a way, by virtue of its supreme value to free the individual from criminality. The best way to vindicate victims' rights, the *Crime Control* adherent may say, is to repress as much crime as possible. The *Due Process* model might also claim to provide the best protection for victims, with its focus on the primacy of the individual and limitation on state power. The adherent may draw our attention to claims that victims are "used" by the system and then "left alone with their grievances and losses".[330] The best way to protect victims' rights, they may say, is to limit state oppression. The state is the real enemy here and only the *Due Process* model can stand up for individuals' (be they victims or defendants) rights. Hence, depending on context a new model may not be needed because victims may self-identify with the *Crime Control* or *Due Process* model. That said, as we shall see when we consider Roach's victim models later, there is more that could be said about victims' interests, beyond what is contained within Packer's models. Hence, we can again see this as highlighting the simplicity of Packer's models ("they do not include x, y and z"), rather than a fatal flaw. The fact that Packer's models would not necessarily highlight all victim-related issues does not mean they cannot highlight other useful things.

3.4.1.5 Internal Inconsistencies

Their final point is that there are problems of inconsistency within the models. For example, speed is a value of the *Crime Control* model, but delays cause anxiety, inconvenience and sometimes loss of liberty to the defendant. Hence, *Due Process* should value speed too. It is submitted that Values 1 and 6 of *Due Process* (freedom from state oppression and scepticism about the criminal sanction) lead us out of such a dilemma. When these are examined, speed is actually not of great concern to the *Due Process* model. The *Due Process* model takes issue with the imposition of anxiety, inconvenience and loss of liberty by the state entirely, *in principle*. Speed might improve matters, but it cannot satisfy the *Due Process* adherent who, properly understood, subscribes to Values 1 and 6. Value 1 says individuals must be protected from state oppression. Hence *Due Process* does not want *speedy* state oppression, but no state oppression at all. Value 6 then clears up any doubts the adherent may have about the wisdom of letting

[330] Lode Walgrave, 'Restoration in Youth Justice' [2004] Crime and Justice 543, 552

potentially dangerous criminals loose before trial: the criminal sanction is probably a bad idea anyway, so we should avoid pre-trial sanctions (remand custody, inconvenience, anxiety) being imposed by the state entirely if we can. Obviously, such a viewpoint is extreme, but that is the nature of Packer's approach. It is built on two extreme viewpoints.

In any case, there is another point to bear in mind about such criticisms. They ignore the hierarchy to the values of each model. Provided that *Due Process* continues to focus on freedom of the individual from state oppression as its main goal, it does not matter a great deal if, on some occasions, speed is used as a means to further that end.

3.4.2 Macdonald

Macdonald argues that there are "fundamental flaws" with the whole Packer-esque analysis and produces an alternative approach based upon Weberian ideal-types.[331] There is much to be said for this approach. The ideal-types[332] Macdonald comes up with are very useful analytical tools in their own right. The problem is it sets the issues out as an absolute: we can either use the ideal-types or Packer's models. In other words, whilst the tools Macdonald comes up with to solve his alleged problems with Packer's models are useful in themselves, this does not mean that Packer's models should be abandoned. Instead, both Packer's original models and Macdonald's ideal types have their own unique uses and drawbacks by virtue of the fact that they are both different simplified analytical constructs.

Macdonald's article identifies three main issues with Packer's approach:

1. Packer's models have no clear structure. This causes the models to collapse.
2. Packer tried, but failed, to construct ideal-types
3. Packer's models falsely reduce all criminal justice issues to a simple conflict between due process and crime control

We shall consider each of these in turn.

[331] Macdonald (n 280)

[332] And Weberian ideals, as well as Macdonald's further comments on empirical vs evaluative work – none of which is discussed here because we are only dealing with using the models in an empirical way – i.e. understanding the world as it is, just as Packer did.

3.4.2.1 Packer's Models Have No Clear Structure

Macdonald's first complaint is that the models have no clear structure. The common ground assumptions, broadly speaking, reflect rule of law concerns, which are rooted in the liberal values of the *Due Process* model.[333] Hence, he argues, the *Crime Control* model ought to take issue with the very ground it is built upon. The model then either implodes because it seeks to destroy its own foundations, or the content of it becomes unclear: to what extent is the common ground to be ignored?[334]

On its face, this looks like a substantial problem with Packer's approach. It cannot work because the common ground is not neutral – it subtly favours *Due Process*. To make this point, Macdonald gives the example of what we introduced as Ground Rule 4: the principle that there ought to be some kind of limit and scrutiny on the state's ability to investigate and apprehend suspects. Macdonald argues that this is contradicted by the *Crime Control* model's assertion: "it is enough of a check on police discretion to let the dictates of police efficiency" decide how long someone should be held for – and therefore the common-ground is at odds with *Crime Control*.[335] However, closer inspection of Rule 4 reveals it is not liberal in a way that would put it in conflict with the *Crime Control* model. What exactly are we told that this rule requires? Merely "a degree of scrutiny and control".[336] *A* degree. Not a useful degree, but *a* degree. Indeed, we should recall that Packer considered that even the likes of Nazi Germany did not quite reach the stage of doing away with this assumption.[337] With that in mind, there is no conflict. Rule 4 requires *a* degree of scrutiny and control. The *Crime Control* model provides *a* (in any sensible person's view practically inadequate, but nevertheless sufficient for the purposes of the common ground) degree of scrutiny and control in the form of the dictates of police efficiency.[338] Macdonald's mistake is to attribute Rule 4 with more substance than Packer, with his references to Nazi Germany, intended it to have.

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[333] Ibid. 262
[334] Ibid. 263
[335] Ibid.
[336] Packer (n 52) at 156
[337] Ibid.
[338] The word "efficiency" can have a variety of meanings, which, as we shall soon see, has led to problems. In this case, we mean efficiency in two senses: of "catching the right offender" and of "getting things done quickly and cheaply". Both of these would place scrutiny and control on police action – the former because police would only interfere with those who were in fact guilty and the later because it would mean suspects are not held in custody for a long time before trial, hugely oppressive (but also expensive) blanket stop and search expeditions would likely be avoided etc.

Bearing this in mind, all we are left with is the issue that the common ground is a little simplistic/very general or, in the words of Packer, "may not appear to have much in the way of positive content".[339] There are disadvantages to having such a generalised common ground (in the sense that each particular legal system and time has its own unique characteristics which could not be easily summed up in 5 rules, as we have here) but these are not fatal in the way that Macdonald's article suggests, to the models being useful. A simple common ground does not cause the spectrum to implode, or for the particulars of the *Crime Control* model to become murky. In other words, what at first seemed like a substantial, fatal, problem is simply an issue of simplicity, which is not fatal to our making use of Packer's approach.

3.4.2.2 Packer Tried, but Failed, to Construct Ideal-types

Macdonald's next criticism flows from the same problem: a wish for Packer's approach to be a little bit more specific and complex – except this time applied to the two models rather than the common ground.

An "ideal type" is an analytical tool formed by "one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasised viewpoints into a unified analytical construct".[340] Put simply, you identify a point or points of view, take this point of view to its extreme and apply it to the facts or system you want to look at. Macdonald argues that what Packer meant to do was create *Crime Control* and *Due Process* "ideal-types" rather than models, but failed due to not accentuating the features of each model to their purest form.[341] We will consider Macdonald's critique of each model individually, because the criticisms are slightly different for each one.

[339] Ibid. 156
[340] Max Weber, *"Objectivity" in Social Science and Social Policy* in Edward Shils & Henry Finch (eds and trans), *The Methodology of the Social Sciences* 97-98 (Free Press 1949)
[341] Macdonald (n 280) 268

Due Process

Macdonald argues that Due Process itself cannot be an ideal type because the values of the model pull in different directions, or none at all – hence it cannot be fully accentuated to a pure form.[342] Macdonald says that *Due Process* Value 6 (scepticism about the criminal sanction) is no use because the range of concerns about the use of the criminal sanction are so diverse as to provide no general guidance. He uses the example of a person sceptical about increased use of the criminal sanction on practical grounds: someone who believes there is no point expanding the criminal sanction unless procedural safeguards are reduced.[343] It is submitted that this is not what the scepticism value of *Due Process* is really about. The scepticism described by Packer was a particular kind of "mood of skepticism about *the morality and utility of* the criminal sanction",[344] rather than general scepticism about expanding the use of the criminal sanction, as Macdonald's example is. Packer's discussion of this value focuses on how immoral the sanction is and how the sanction *itself* (in *principle*) is of questionable utility *in terms of* rehabilitation, deterrence etc.[345] In contrast, Macdonald's hypothetical person is not morally or practically opposed to the use of the criminal sanction *in principle*, they just think it is *practically* pointless expanding its use *until* other changes are in place. Hence they would not be, unlike the *Due Process* adherent, ideologically anti-criminal sanction. They are inconsistent with the specific kind of scepticism that Packer had in mind. Bearing in mind this mistake, it is indeed possible to construct an ideal-type from *Due Process* Value 6. It would simply have us drastically reduce[346] the scope of the criminal sanction's use. Of course, this is not particularly helpful (at least for our purposes of analysing the system) and illustrates one potential weakness of the isolated "ideal-type" approach. The use of Value 6 comes from the way it affects how the other values are held: its relationship with the other values. Macdonald's splitting up of the other values from this one therefore creates something different to Packer's model.

Macdonald was more satisfied with the other *Due Process* values: reliability (Value 3), equality (Value 5) and prevention of abuse of state power (Value 1 and supreme value). However, he argued that they did not always pull in the same direction.[347] He gives the example of a confession obtained by torture, later verified as true by legitimate evidence, discovered as a result of that

[342] ibid. 270
[343] ibid.
[344] Packer (n 52) 170
[345] ibid.
[346] Packer argued it would always have some role to play, ibid. 366
[347] Macdonald (n 280) 270

confession.[348] He argues that reliability, as a value of the *Due Process* model, demands we do not exclude the torture evidence, whereas prevention of abuse of state power demands we exclude it. Such conflict is artificial. The better analysis is that reliability is silent on the issue of admitting this hypothetical torture confession. The value of a torture confession alone in reliability terms is arguably zero – the classic, but forcefully simple argument being that people will say anything to stop the pain.[349] It is the later evidence that is relevant. In the sum 1+0=1, the 0 (representing the confession) is not required. The 1 (discovery of, say, the murder weapon in the suspect's house) is what reliability requires. Requirements of reliability alone leave the question of how to deal with the torture evidence unanswered. Quite the opposite of being in conflict, the values have a symbiotic relationship as they are answering different questions. Only the other values of the *Due Process* model, Values 4 and 1, tell us what to do here.

Macdonald identified a problem of lack of detail (in that dictates of reliability do not always tell use how to deal with torture evidence - other than that it is not reliable). That problem is not fatal, provided we consider the other values to understand what to do. When we do, the simplicity of value 3 of the *Due Process* model (quality control) is not such a problem. Again, this is an example of a problem of simplicity being mistaken for a problem of substance.

Crime Control

Next, Macdonald outlines his problem with the *Crime Control* model. This focuses on the meaning of the word "efficiency" as a value of the *Crime Control* model. For Macdonald, Packer uses the phrase "efficiency" inconsistently.[350] Macdonald points out that Packer sometimes uses efficiency to mean speed (what Macdonald calls "operational efficiency") and other times to mean efficiency at discovering the truth ("investigative efficiency").[351] He then goes on to examine a quote from Packer about how the system, for *Crime Control*, is reliable *because* it is efficient. As Macdonald rightly points out, what Packer means is that a system is more "efficient" in another

[348] Ibid. 270-271
[349] See Danny Friedman, 'Torture and the Common Law' [2006] EHRLR 180, 185-186, quoting Sir John Fortescue in *De Laudibus Legum Angliae,* written circa 1460:
"who is so hardy that, having once passed through this atrocious torment, would not rather, though innocent, confess to every kind of crime, than submit again to the agony of torture already suffered, and prefer to die once, if only death be the end of terrors"
[350] Macdonald (n 280) 272
[351] Ibid. 272-273

sense (that of deterring others from committing crime) if it is reliable at finding guilt.[352] Hence, Macdonald identifies a third kind of "efficiency": "deterrent efficiency".[353]

Unfortunately, Macdonald makes a substantive error here. The very first example Macdonald gives of inconsistency is Packer saying, "It is enough of a check on police discretion to let the dictates of police efficiency determine under what circumstances and for how long a person may be stopped and held for investigation".[354] Macdonald argues that this is an example of how Packer used the word "efficiency" inconsistently in describing the *Crime Control* model, because efficiency here can only mean "efficient at discovering the truth", rather than in the sense of speed, because speedy justice alone would not mean the innocent have nothing to fear.[355] Macdonald says "speed" is what Packer meant when he first used efficiency as a value of the *Crime Control* model and Packer is therefore being inconsistent in using the word "efficiency" if it means something different here. This is one way, but not the correct way, of reading it. At this point, Packer was writing *as if* he were an adherent of the crime control model, rather than neutrally describing the particulars of his models. This style can be seen immediately following the heading on the previous page: *The Crime Control Model*. Packer suddenly starts discussing the relevant issues in very absolute terms, e.g. "anyone who behaves in a manner that suggests he is up to no good should be subject to arrest for investigation".[356] The same, but opposite is done a few pages later, under a *Due Process Model* heading: "no one may be arrested except on a determination that a crime has probably been committed and that he is the person who probably committed it."[357] Hence, Packer is "playing a part" here in order to explain his models, rather than explaining his models in a detached style. In those circumstances, it is possible for the word "efficiency" to have the specific *Crime Control* meaning of "speed and not acquitting the guilty". If Packer were speaking *as a Crime Control adherent*, then the phrase "the innocent have nothing to fear" would be a simple statement of fact (because of the model's sincere faith in administrative fact finders and presumption of guilt), rather than something that needed backing up by a later statement. If that is so, then we must interpret the section Macdonald quotes as actually saying "the innocent have nothing to fear." *and therefore* "It is enough of a check on police discretion to let the dictates of police efficiency determine under what circumstances and for how long a

[352] Ibid. 274
[353] Ibid. 276
[354] Ibid. 272, quoting Packer (n 52) 177
[355] Ibid. 272
[356] Packer (n 52) 177
[357] Ibid. 179

person may be stopped and held for investigation", rather than, as Macdonald does, "The innocent have nothing to fear." *because* "It is enough of a check… [etc.]" Because the first sentence does not rely on the second one for authority (instead it relies on Value 3, faith in administrative fact finders etc.) then the second one can stand on its own. The sentence still makes sense if we use the dictates of police "efficiency" in the *Crime Control* model sense (speed and not acquitting the guilty) because, as pointed out above,[358] operating at maximum speed (in an environment of limited resources) would place some minimal limits on how long a person may be stopped and held for investigation (as short as possible). It does not matter that those minimal limits would be deemed to be inadequate by any sensible person because the *Crime Control* adherent is not supposed to be a sensible person, but a fanatic.

Macdonald also misunderstands the particular use of the word "efficiency" that the *Crime Control* model adherent makes. If sincerely based on the *Crime Control* model, what Macdonald calls "investigative efficiency" (police correctly identifying both the guilty and the not guilty) ought to be split into false negatives and false positives, because the *Crime Control* model is not altogether concerned about false positives (i.e. convicting the innocent) even though this makes the process technically investigatively inefficient (in that an innocent person being convicted suggests an inefficient filtering system). We must therefore bear in mind that the ideal-type constructed from this is not strictly a *Crime Control* one because it also places emphasis on preventing false positives – something the *Crime Control* adherent would not care about. The disregard for false positives (a vital part of context, spawned from other values of the model) has been lost. The logical conundrum such an analysis creates for Macdonald becomes apparent immediately afterwards, when he argues that Packer says the *Due Process* model rejects the *Crime Control* efficiency described. Macdonald argues that this is misleading because *Due Process* accepts both investigative and deterrent efficiency. It is only operational efficiency (speed) that it rejects.[359] Had Macdonald considered the two elements of "investigative efficiency", he would have noted that *Crime Control*, with its "high purpose" of protecting the individual from crime,[360] is actually only partly in agreement with investigative efficiency (as to false negatives, with *Due Process* also only partly in agreement: as to false positives). Both models favour different elements of "Investigative Efficiency". By bringing them together, isolated from the high purposes of both models, the ideal-type Macdonald creates is entirely new and something neither *Crime Control*,

[358] See earlier discussion of Ground Rule 4, 3.2.1
[359] Macdonald (n 280) 275
[360] Packer (n 52) 158

nor *Due Process* would entirely agree with. This provides a useful original perspective, but it is not necessary for Packer's models to work and doing so does come at a cost: we lose the important context that the other values of each model provide. Macdonald's ideal types are still useful because, by focusing on efficiency in a wider sense than Packer did, they provide an intriguing alternative perspective. It does not follow from this that Packer's original models are not also useful though. On the contrary, as discussed above in terms of false negatives and positives, the limited definition of efficiency allows us to look at criminal justice issues from a unique perspective not accounted for in Macdonald's ideal types (just as, by the same token, the ideal types also give us a unique perspective not accounted for in Packer's models). Criminal justice process analysis is not a zero-sum game where only one analytical tool is correct.

3.4.2.3 Packer's Models Reduce all Criminal Justice Issues to a Conflict Between Due Process and Crime Control - and How Macdonald's Ideal-types Avoid This

The final alleged "fatal flaw" with Packer's approach is that Packer's models reduce everything to a conflict between *Due Process* and *Crime Control*, when the reality is more complex. In order to illustrate this, the article provides a hypothetical example and applies Macdonald's ideal-types, before doing the same with Packer's models. Hence, we first need to consider the four ideal-types Macdonald constructed: *Investigative Efficiency; Operational Efficiency; Adversarial Reliability* and *Administrative Reliability.*

Investigative Efficiency

This ideal-type is constructed by isolating one element from the *Crime Control* model: absolute faith in administrative fact finding[361] (i.e. police and prosecutors always get it right, 100% of the time). The innocent have nothing to fear, as they will be identified by the experts and released. Neither should we fear that the police will waste their time using questionable methods or pursuing personal vendettas.[362] As pointed out earlier, this refers to efficiency in the wider sense of "not being wasteful" (and would thus include concerns about convicting innocent defendants) rather than the narrower *Crime Control* model sense of "ensuring no guilty defendants are acquitted" (which would not care about innocent defendants). [363]

[361] Macdonald (n 280), 278
[362] Ibid.
[363] See 3.2.2

Operational Efficiency

This ideal-type is constructed by isolating the *Crime Control* model's emphasis on speed. The process can be sped up. No issues of guilt need be determined - only a suitable sentence.[364] In order to sensibly apply this in reality, the assumptions of the *Investigative Efficiency* ideal-type would need to be true.

Administrative Reliability

This ideal-type attaches primacy to reliability, without the blind trust placed in administrative fact finders of *Investigative Efficiency*.[365] In other words, it isolates Value 3 of the *Due Process* model (quality control). Like *Investigative Efficiency*, this ideal-type provides for no limits to administrative fact-finding techniques, but without faith in the police, strict regulation is required. Divorced from their context, these values take on new seniority. In both models, they are a means to an end (each model's supreme value); here finding the truth is the end itself.

Adversarial Reliability

Finally, we have an ideal-type that isolates the faith in the courts system (as opposed to faith in administrative fact finders) from the *Due Process* model i.e. Values 2, 3 and 4.[366] Because this ideal-type has no faith in the administrative fact-finding: those charged are considered a random group of individuals. Hence, the tribunal must focus on testing the case against them.[367]

Use

Macdonald's example is a hypothetical government policy decision to direct courts to speed up the turnover of cases, with no change in resources allocated to them.[368] Looking at where the demands of ideal-types conflict tells us something unique about the issues.[369] In this example,

[364] Ibid. 279
[365] Ibid. 279-280
[366] Ibid. 282
[367] Ibid.
[368] Ibid. 285
[369] Ibid. 286

Macdonald notes the similarity between the emphasis on speed in the policy decision and the emphasis on speed in his *Operational Efficiency* ideal-type. He then points out that, since we know the administrative fact finding process is not faultless, the background in that arena more closely matches the *Adversarial Reliability* ideal-type's premises (faith in the courts, not in administrative fact finding), rather than that of *Operational Efficiency* (predicated on *Investigative Efficiency*'s perfect administrative fact finding process). There is thus conflict between these two ideal-types in this situation. The government is suggesting *Operational Efficiency*-esque speed, whilst the system is factually based upon *Adversarial Reliability*-esque premises instead.[370] In other words, the policy decision will have consequences due to the premises that *Operational Efficiency* is based upon not being there and these ideal-types help us see this.

Macdonald then applies Packer's models in order to showcase their flaws. The models would attribute the increased focus on speed as a move towards *Crime Control*.[371] Macdonald says there are two flaws here. First, it fails to question whether reliability has indeed been diminished in this case, simply assuming that the adversarial process ought to be devoted to reliability.[372] This is a re-deployment of his earlier criticism about the *Due Process* model's inconsistencies: in being concerned with preventing abuse of state power, but not reliability, at the administrative fact-finding stage. As argued above[373] this point is unfounded because preventing abuse of state power is bound up with reliability.

Secondly, Macdonald argues that reducing the reliability of the adversarial process has only one explanation (that is, one aim, by the policymaker) under the models: to increase the speed at which cases are handled, thus furthering the *Crime Control* model.[374] Macdonald argues that this need not be so; it might equally have been done to deter abuses of state power.[375] Macdonald gives no example, but a suitable one might be that longer trials can mean longer time in remand custody and thus more scope for abuse. This point has some force to it, but as a criticism only goes so far as showing an issue of simplicity rather than fundamental flaws. The issue is due to the

[370] Ibid.
[371] Ibid.
[372] Ibid.
[373] 3.4.2.2, above
[374] Ibid. 286-287
[375] Ibid. 287

different phenomena being analysed. One being to evaluate the subjective values a particular individual or policy-maker has and the other being to analyse values that a system embodies.[376]

First, subjective values. The policy-maker in this hypothetical example is clearly, by their concern about state oppression of the individual, somewhere along the scale towards *Due Process*. Macdonald would of course argue that one cannot advocate speed and yet be *Due Process*-minded, but Macdonald gives speed far too much prominence here. As we have seen, "speed" as a part of the *Crime Control* model cannot be looked at in a vacuum. It is only valued by the *Crime Control* model as part of a broader approach to "efficiency" and even then, it is only relevant in so far as it supports the "high purpose" of *Crime Control*: protecting the citizen from crime.[377] Hence speedy justice in the abstract is not really characteristic of either model. It is only when placed in the context of other values that it can become *Crime Control*. There is thus no inconsistency with a *Due Process*-minded person valuing speed as a way to avoid state power, although it is an indication that they are not near the fanatic stage – a *Due Process* fanatic must, in the final analysis, reject speed as the sole solution because[378] they would hold that the defendant should not be placed in a situation (such as remand custody) where state oppression is possible at all. They do not want quick state oppression (or risk of it); they want no oppression at all. Speed would fade into the background when you reach the extreme point on the spectrum.

Second, analysing the values a system embodies. This is a bit like asking "what would the hypothetical *Crime Control/Due Process* fanatic think about this measure?" This tells us what values the system, for all the intentions of its policy makers, actually embodies. Thus, having established that Macdonald's hypothetical policy maker was subjectively more *Due Process* than *Crime Control*, we would look at the practical outcome – increased speed and inevitably less scrutiny by the courts – and see what the hypothetical fanatics would make of it. Given that this measure values speed, at the expense of the adversarial process, we can conclude that, contrary to the aim of the policymaker, it would make the *Crime Control* fanatic very pleased indeed. Hence, the system moves along the spectrum towards *Crime Control*. Once we are clear exactly what phenomenon we are analysing, the models provide useful analysis: this conflict between

[376] We shall revisit this important distinction in much greater detail in the next chapter
[377] Packer (n 52) 158
[378] as pointed out above in relation to Ashworth and Redmayne, 3.4.1

intent and outcome is an intriguing finding in itself, which Macdonald's ideal types do not show us.

That is not to say that Macdonald's ideal-type analysis is not useful either. In terms of analysing unintended consequences of changes, as per his example, it is very useful indeed. It highlights the assumptions that certain policy measures require to logically work. This kind of thinking could be lost, or inhibited if we looked at matters entirely from a Packer-esque perspective, on the other hand, the fact that such a policymaker is misguided would be lost if we only looked at things from a Macdonald-esque perspective. Both approaches are useful when it comes to analysing the criminal justice process. What they do is give a different perspective; they let us look at it in different lights and from different angles. This allows for maximum reflection and analysis. When we see something from a different angle, we sometimes notice things we may have missed from other angles. Again, we can see an issue where a problem of detail is equated with an irreparable problem of substance. The fact that the ideal-type approach reveals some things going on here which Packer's spectrum misses does not mean that Packer's spectrum cannot provide us with useful and unique insights in itself. Both approaches can fill in blanks that the others miss; there is no need to use only one at the expense of the other.

The rest of Macdonald's article deals with evaluative tools: ideals, not ideal-types.[379] i.e. something to aim for, rather than to use as a tool for analysis. This is evidently not what Packer was doing, [380] so this concludes our consideration of Macdonald.

3.4.3 King

King's book, *The Framework of Criminal Justice*[381], set out to give a "coherent analysis of the workings of the criminal justice system".[382] He was to use this in an examination of guilty pleading in the magistrates courts and how this reality conflicted with the romanticised view of criminal law.[383] Drawing on Packer's work, he constructed an original analytical approach of his own.

[379] Macdonald (n 280), 287
[380] See above, Section 3.3
[381] Michael King, *The Framework of Criminal Justice* (Croom Helm 1981)
[382] Ibid. 3
[383] Ibid. 1, 3

King started his construction of a framework by looking at six "ideological perspectives" on the social function of the criminal process - which people either might hold or would at least offer "useful insights into [its] operation":[384]

1. Justice
2. Punishment
3. Rehabilitation
4. Management of Crime and Criminals
5. Denunciation and Degradation
6. Maintenance of Class Domination

Kings translated these ideologies into some, partially familiar, models:

1. Due Process
2. Crime Control
3. Medical
4. Bureaucratic
5. Status Passage
6. Power

These correspond to six different hypothetical people. King gives the example of the serious crime victim and court administrator as practical examples of 2 and 4: "one looks to the magistrates to avenge his loss… while the other looks at his watch".[385] We will consider and discuss the particulars of these 6 models individually:

3.4.3.1 Due Process

King's view of the Due Process model is slightly unique, by virtue of it being based upon the ideology of "justice". For King's *Due Process* model, the primary function of a court is to resolve conflicts between citizens (and thus prevent vigilantism) and conflicts between state and citizen.[386] Packer's *Due Process* model on the other hand placed primacy of the individual and limitation of state power as ends in themselves. Hence, King has altered the classic model. This changes its perspective; making *Due Process* a bit more tame: *Crime Control* would likely have no problem with "resolving conflicts between state and citizen" - they may differ in their views of how exactly to go about that though. This allows us to examine the issue from a different

[384] Ibid. 9, 12-13
[385] Ibid. 14
[386] Ibid. 15

perspective, which may be useful, but it also means the perspective provided by Packer's classic approach remains uniquely informative.

3.4.3.2 Crime Control

Similarly, there are some apparent expansions from what might be called "Classic *Crime Control*." King states the *Crime Control* adherent's belief is that the function of the courts is to punish offenders and *therefore* control crime.[387] Packer put control of criminal conduct alone as the "high purpose" of *Crime Control*.[388] Retributive punishment is given new prominence in King's version of *Crime Control* – as an equal, to repression of crime.[389] The same comments as to tinkering apply as for *Due Process*. The relationship between retribution and repression of crime values are interesting and might aid analysis, but it certainly changes the perspective. Packer's classic approach remains uniquely informative.

3.4.3.3 Medical

This model rejects ideas of guilt and punishment as meaningless.[390] Since criminals cannot really control their actions, "crimes" are simply an occasion for social intervention in order to control future behaviour and convert criminals into law-abiding citizens.[391] The court process resembles a medical clinic, with diagnosis, prognosis, treatment and (hopefully) cure.[392] This does not mean defendants get an easy ride. Much like medical treatments, criminal justice "treatment" may be unpleasant.[393]

3.4.3.4 Bureaucratic

This model is based upon the capitalist system, as a "legitimating principle of the liberal state."[394] What this model has in mind is a process akin to an apolitical and neutral machine, which is

[387] King (n 389), 16
[388] Packer (n 52), 158
[389] King (n 389), 17
[390] Ibid. 19
[391] Ibid.
[392] Ibid. 20
[393] Ibid. 21
[394] Ibid. 21

predictable and rational.[395] Defendants must be treated equally, in accordance with pre-determined formal rules.[396] Bureaucratic adherents are also, of course, concerned with speed and efficiency (in the sense of eliminating wastage and making economic use of resources).[397] As King remarks, part of this bears a striking resemblance to the *Due Process* model, in that there is concern for equality and formal rules[398] (and speed can also be accepted by a *Due Process* adherent).[399] However, he recognises that they differ in the important respect of their supreme goals.[400] In other words, they are doing the same thing, for different reasons. As noted above in relation to Macdonald in regards to speed being able to be within *Due Process*, these shared values cannot be looked at in a vacuum. They are only valued by the *Due Process* model in so far as they support the supreme goal of protecting the individual from abuse of power. Hence, equality etc. in the abstract is not really characteristic of either model. It is only when placed in the context of other values that it can become *Due Process*. The focus on speed and efficiency might also be considered as having a home in the *Crime Control* model – though the same caveat applies. Again, a different perspective is provided, but Packer's classic approach would still be a useful unique perspective of its own.

3.4.3.5 Status Passage

This model has the function of the courts as reducing the social status of the defendant and in doing so strengthening the community's solidarity.[401] In other words, fostering an "us and them" attitude. The ritual aspects of the process become a key part of this "status degradation" ceremony.[402] Obviously, this would meet with approval from the *Crime Control* adherent, who would see this as another way to fulfil the "high purpose" of protecting the law-abiding citizen, so one way to interpret this is as an isolated part of the *Crime Control* model. Again, this is a useful unique perspective for analysis, but a classic Packer analysis would still provide a different and useful perspective of its own.

[395] Ibid. 22
[396] Ibid. 22
[397] Ibid. 23
[398] Ibid. 22
[399] See above discussion at 3.4.2.2, "*Use*"
[400] King (n 389) 22
[401] Ibid. 24
[402] Ibid. 25

3.4.3.6 Power

Finally, the *Power Model* sees the system as promoting the interests of the ruling class and maintaining its dominance over, for example, the working class, ethnic minorities or (in Northern Ireland) Catholics.[403] Key to this is the strategy to have "formal rationality" but not "substantive rationality" – in other words, looking fair on the surface (preventing the system being overthrown by popular consensus), but not being fair in practice.[404] Given that the *Crime Control* model is concerned with protecting the *law-abiding* citizen, this might just be another (much-isolated) part of the *Crime Control* model. It depends what interpretation one puts on "law abiding", but (especially, bearing in mind that *Due Process* and *Crime Control* are meant to be a dichotomy, given *Due Process* Value 6's concern with the system punishing the weak by the strong) one could construe the *Crime Control* model as defending the status quo. This keeps the ruling classes (the law-abiding) in power at the expense of the weak, poor and downtrodden.

3.4.3.7 Overall Criticisms

Hence, overall, King tweaks the *Due Process* and *Crime Control* models and adds some new models. Generally, he also at the end argues against a "uni-dimensional" approach like Packer's alone.[405] Again, this is about the simplicity of Packer's approach i.e. "Packer shows x, but not y, and my new approach shows y". As we have seen however, new approaches do not necessarily show "x". Packer's approach is not fatally flawed - it just won't tell us everything, much like any other approach used in isolation. King accepts this because he also rejects his own model of status passage alone.[406] He says that the process is all of this at once and more.[407] The picture presented by models individually is only a partial picture and the only way to get a full (or as full as possible) one is to apply several different models in order to see the system from several different perspectives.[408] King (although his overall selection was still fairly limited), in saying so, was well ahead of his time: it is not about saying your own set of tools is the correct one, it is about recognising the inevitable limits of every analytical tool (by its nature a simplification), but also the different benefits that the different perspectives of such varied tools bring. King's models,

[403] Ibid. 26-27
[404] Ibid. 27
[405] Ibid. 123
[406] Ibid.
[407] Ibid.
[408] Ibid. 30

Packer's classic models, Macdonald's ideal-types and everything in between all provide unique perspectives that would be lacking if we were to rely on one approach alone.

3.4.4 Walker and Telford

Walker and Telford's approach is somewhat different in that it was done as part of a practice-based enquiry into the criminal justice system in Northern Ireland, as agreed under the Good Friday Agreement.[409] Walker and Telford's paper was one of 18 research reports that contributed to this review. In constructing a model, they therefore had a particular use in mind for it, in a way that the likes of Ashworth and Redmayne did not: the model constructed was to be one that was "best suited to the needs of the present study".[410] This is sensible, useful models will always need to be adapted somewhat according to what they are analysing. For Packer, this was 1960s America, for King, it was English magistrates courts, for Macdonald, it was (originally) the introduction of the ASBO.[411] Doing so will often aid analysis of the area under discussion. However, just like with these, the approach ought to be treated with some caution. Concerns relevant to Northern Ireland in the wake of the Good Friday Agreement may not be quite so prominent to the criminal process under discussion today. Thus, in critiquing the approach, we should not be afraid to say something is no longer relevant. To do so is not a criticism, but an update.

3.4.4.1 Packer Criticisms

Walker and Telford's main problem with Packer's approach is that it is "unduly *selective*", providing only a partial picture of the values and objectives within the criminal process.[412] They argue that King's approach is laudable, but does not go far enough: "many other perspectives" could conceivably be added beyond King's extra four models.[413] They ultimately reject such a solution though, since these only amplify the "lack of appreciation of conceptual depth."[414] The

[409] Neil Walker and Mark Telford, *Designing Criminal Justice: The Northern Ireland System in Comparative Perspective* (Review of the Criminal Justice System in Northern Ireland, Research Report 18, Criminal Justice Review Group 2000)
[410] Ibid. 6
[411] Stuart Macdonald, 'Analysing Criminal Justice Policy: The Anti-Social Behaviour Order and the Pervasive Effect of Packer's Two Models of the Criminal Justice Process' (PhD thesis, University of Southampton 2004)
[412] Walker and Telford (n 417), 4
[413] Ibid. 5
[414] Ibid.

problem, they say, is that the values of *Crime Control* and *Due Process* are on different levels of abstraction. They argue that, whilst *Crime Control* could be said to be an ultimate objective of the system, *Due Process* could not. *Due Process* is a means to an end, not an end itself. Hence, comparable analytical tools are not being used – the likes of King, make the same mistake.[415] The other criticism they make is that the models are "value laden", in that the choice of perspectives one uses to analyse the process will be influenced by their values and priorities. The more limited the selection, the worse this gets.[416]

Unfortunately, the above view is not entirely right. Whilst limiting the range of tools used to analyse the process is indeed a bad idea, the criticism of Packer's models being on different conceptual levels is misguided. They say that *Crime Control* could be thought of as the goal of the process, but even under the classic Packer analysis, we are told that the goal of the process in that regard (under the common ground) is to *pursue* criminal conduct - that is, to invoke the process where it appears a crime has been committed.[417] The two models do not have competing "goals", but competing paramount considerations (freedom of the individual from crime vs freedom of the individual from state oppression). They both agree on the goal of pursuing crime, as defined by the legislature.

Duff offers a solution to this issue that it is worth briefly considering, however it does not solve the problem either. Duff suggests that the problem is one of terminology; that "crime control" is being used in two different senses by commentators: 1) the overall purpose of the system (repressing criminal conduct) and 2) a set of values that influence the system.[418] We can solve this confusion by renaming the *Crime Control* model as the "efficiency model".[419] This would allow us to distinguish the goal of the process (repressing crime) from the value-set that is the *Crime Control* model. Unfortunately, this suffers from the exact same problem: the goal of the *process* is not to *control* crime. For some people it may be the most important consideration (including the *Crime Control* fanatic), but not all. To appreciate this, we must distinguish between the specific goal of the criminal process and the endgame goals of criminal justice in the abstract. These

[415] Ibid.
[416] Ibid. 6
[417] Packer (n 52), 155. See also 3.2, above
[418] Peter Duff, 'Crime Control, Due Process and "The Case for the Prosecution"' (1998) 38(4) Brit. J. Criminol. 611
[419] Ibid.

models concern the criminal justice process. The goal of this (under Packer's two models and ground rules) is not to *control* crime, but to *pursue* crime: to invoke the criminal process where it appears a crime has been committed.[420] The various models provide different approaches of how to go about doing that.

What happens at the end of that process is a separate and more controversial issue: the endgame goal/s. There are many potential *endgame* goals of the process: protecting the innocent from crime, protecting the individual from vigilantism, enforcing existing power structures etc. These can also be found within the models, but to use them is this manner is moving into Weberian ideal territory: using them as something to aim for, rather than analysis. The point is that there is no overall and agreed upon *endgame* aim of the process, as Duff would have us believe that there is – Duff would say it is to control crime, but others would not: King's *Due Process* fanatic would say it is to resolve conflicts between citizens and conflicts between state and citizen. It rather depends who you ask. Changing the name to efficiency makes, at best, no difference and at worst distracts us from other key values of the *Crime Control* model: such as faith in the police or the belief that protecting the innocent from crime is our most important consideration in running the criminal justice process.

Hence, in spite of Duff's attempts to fix matters, the argument that *Due Process* is the means to an end, whereas *Crime Control* is not, remains inaccurate. Both *Crime Control* and *Due Process* are means to an end, in the sense that they disagree over how the process' end (pursuing crime, as defined by the legislature) ought to be pursued. They disagree on what values one ought to prioritise in pursuing this overall purpose, not on what the overall purpose of the system is. For *Due Process*, the prioritised value is protecting the individual from state oppression, for *Crime Control*, it is protecting the individual from crime. Hence, comparable analytical tools *are* being used and therefore the Due Process-Crime Control scale can still provide a useful analysis – albeit that Walker and Telford's approach also provides another unique perspective on criminal justice issues.

[420] Packer (n 52), 155. See also 3.2, above

3.4.4.2 Approach

What is this approach? Walker and Telford propose a "meta-model".[421] Their solution to the value-laden and allegedly conceptually shallow models was to adopt a "model *about* models".[422] It is meant to be comprehensive, covering the range of all possible objectives a criminal justice system might have.[423] To do this, they split values up into two tiers: at the top, "Ultimate Objectives" (those values which are ends in themselves - though causally related to one another)[424] and at the bottom, "Institutional Values" (mechanisms by which the ultimate objectives are achieved).[425] The six Ultimate Objectives are:[426]

1. Security
2. Equity
3. Equality
4. Economy
5. Participation
6. Political Legitimacy

The ten institutional values are:[427]

1. Audit
2. Discovery/Clear Up
3. Appropriate Disposal
4. Due Process
5. Individual Redress
6. Lay Involvement
7. Public Accountability
8. Representativeness
9. Professionalism
10. Reflexive Coherence

A short glance at this reveals that this is something of an expansion of what Packer was doing, though (as they wished) to a very wide extent. As we have seen, Packer's models each seemed to have had something of a hierarchy already, but they only had one value at the top of each model. Walker and Telford give us six superior values. No doubt this is useful as a way to analyse a justice process, but we must also consider the limitations. Packer's *Crime Control* and *Due Process* models have one value at the top of each model. We therefore know, for example, that if there is a conflict between efficiency and crime eradication, we prioritise crime eradication because this is

[421] Walker and Telford (n 417), 6
[422] Ibid. 7
[423] Ibid.
[424] Ibid. 9. For example, they say Equity enhances Security as it means people are more likely to have confidence in the system.
[425] Ibid. 7
[426] Ibid. 8-11
[427] Ibid. 11-15

the "high purpose" of the model – efficiency is only a value because it is (usually) a necessary end to that high purpose. Packer's models are about value-judgments. They are about asking: "what is the lesser of two evils here?" The *Due Process* and *Crime Control* adherents have different answers to those questions - answers that are possible because they have one supreme value. Walker and Telford's model on the other hand does not provide answers to this issue because there is no overall aim that the meta-model can identify with. It does not tell us what each value-set might do in each situation. If there is, say, a conflict between Economy and Security, the meta-model will not provide a way to resolve this: both ultimate objectives are apparently of equal importance. Of course, there are many situations where, rather than being in conflict, the ultimate objectives are related to each other. There are undoubted benefits to such an approach in understanding the criminal process, but we also lose something: in trying to avoid being value-laden, the resulting meta-model can struggle to illustrate what different value-sets would do in a particular situation: the opposite problem. Of course, this is exactly what Walker and Telford seemed to have intended to do and for their purposes - to construct a strategic aid for designing a system blueprint for criminal justice in Northern Ireland - [428] it works well. Here again, we can see that whilst there are things that Packer's approach may miss due to its simplicity, which the meta-model would show us, the complexity of the meta-model also means there are things which Packer's models (with their hierarchies) can show us that the meta-model cannot.

The other issue is that Walker and Telford do not give a great deal of justification for the relationship between their Institutional Values and Ultimate Objectives. For example, Walker and Telford tell us that Institutional Value: Appropriate Disposal impacts upon the Ultimate Objective of Security. Hence, we might expect a measure that sets back Appropriate Disposal to set back Security - and this is indeed sometimes true. For example, if a dangerous individual is found guilty of a serious crime, the most appropriate disposal (arguably) is a sentence that incapacitates that defendant from committing further crimes. Not doing so here (thus setting back Institutional Value: Appropriate Disposal) is indeed likely, as Walker and Telford's link suggests, to also set back the Ultimate Objective of Security. However, consider a criminal justice measure that results in a non-dangerous and one-off offender going to prison for an extended period of time for a very minor, non-dangerous offence. This measure clearly sets back the Institutional Value of Appropriate Disposal: prison is inappropriate here. However, it does not set back the Ultimate Objective of Security – contrary to what the meta-model suggests. Sending someone to prison who doesn't need to be there is an inappropriate disposal, but it does not make the community

[428] Ibid. 3

any more or less "secure". Hence, when applying the meta-model (and this will be seen at times during the interview analysis) it is necessary to be aware of and point out any situations where the links are an inaccurate measure because of the nature of the particular facts/datum/measure/policy etc. being considered.

3.4.5 Roach

The final alternative is Kent Roach's victims' models. Roach, like King, believed "it is not possible or desirable to reduce the discretionary and humanistic systems of criminal justice to a single truth" - multiple; side by side; models are the solution.[429] He then set about creating two models to take into account victims - though again, he emphasised that these were intended to be added extras, rather than to exclude others.[430] These new models of victims' rights were: 1) the *Rollercoaster* Model, a punitive model relying on criminal sanction and punishment; and 2) the *Circle* Model, a non-punitive model stressing crime prevention and restorative justice.[431] It is not clear whether Roach meant for these two models to be complete opposites like *Crime Control* and *Due Process*, but substantially they are at odds on many issues. They agree (perhaps as an addition to common ground) that victims' rights ought to be championed, but they disagree on the means of achieving that. In other words, Roach has given us an alternative dichotomy for analysing victim issues. We will now examine each of these models in detail.

3.4.5.1 Rollercoaster

Whilst *Crime Control* and *Due Process* were represented by, respectively, an assembly line and an obstacle course, this model's metaphor is a rollercoaster. The model holds the justice process to be in a constant state of crisis, due to the fact that punitive approaches do not adequately protect and serve victims – as revealed by victimisation studies; each new one confirming the failures of the existing system.[432] Essentially, for Roach, the proponent of the *Rollercoaster* model doesn't know what is good for them: they want to reduce crime and make sure that victims are not badly treated in the system, but their tools of choice: further criminalisation and greater punishment cannot achieve this.[433] Not only that, but the rollercoaster proponent often rejects the very alternative methods that might well end up reducing crime and helping victims; such as social,

[429] Kent Roach, 'Four Models of the Criminal Process' (1998-1999) 89(2) J. Crim. L. & Criminology 671-672
[430] ibid. 673
[431] ibid. 699
[432] ibid. 700
[433] ibid. 703

economic or cultural reforms; as they are "less symbolically satisfying and more difficult to achieve."[434] The difference between this and *Crime Control* becomes clear when it comes to the treatment of the police and prosecutors. Whilst *Crime Control*, under Value 3, would place great trust in the administrative fact finders, *Rollercoaster* would place them under great scrutiny and in particular reject the *Crime Control* model's focus on guilty pleas.[435] Guilty pleas and plea-bargaining, whilst good for efficiency, do not include victims or meet victim expectations.[436] Hence, the model enjoys a rollercoaster-esque "bumpy ride" which employs the (ineffective) "same old crime control routine", without fixing the problems that it perceives.[437]

3.4.5.2 Circle

The *Circle* model represents the non-punitive face of victims' rights. Instead of relying on the "inadequate criminal sanction" It looks "towards the prevention of crime and restorative justice once crime has occurred."[438] Hence, the "circle" represents the process of prevention and restoration, such as the successful neighbourhood watch or self-policing of communities. It also represents the process of healing, compensation and the needs of victims rather than their "rights".[439] The proponent of the *Circle*, in contrast to the *Rollercoaster*, views high levels of crime as failures of social policy rather than failures of the justice system.[440] Victims who decide not to invoke the criminal process ought to be respected, as sometimes this is because they have found a better way of dealing with the issue: such as apologies or informal restitution.[441] Roach places great emphasis on the virtues of restorative justice, which forms a significant part of his *Circle* model.[442] He concludes, "The disadvantaged must not be left to rely on the false promise of crime control and to fight new political cases to defend a criminal sanction that unfortunately does not control crime."[443] Restorative justice is instead the only way to truly hand decision-making power back to victims.[444] Like the *Rollercoaster* model with *Crime Control*, this does share some characteristics with the *Due Process* model, in particular the concerns about the morality and

[434] ibid. 700
[435] ibid. 701
[436] ibid.
[437] ibid. 706
[438] ibid. 707
[439] ibid.
[440] ibid.
[441] Ibid.
[442] Ibid.709-713
[443] Ibid. 715
[444] Ibid. 716

utility of the criminal sanction (Value 6) and distrust of the police (Value 2), but the focus on restorative justice and victim concerns makes it clearly very different nonetheless.

3.4.5.3 Comments

Of course, as we saw earlier[445] separate models are not always needed for victims' rights. Some victims may self-identify with the values of the *Crime Control* or *Due Process* models and using Packer's dichotomy could provide intriguing insights of its own in such a case that Roach's would not.

However, the *Rollercoaster* model does have significant differences to the *Crime Control* model, chiefly in the form of a rejection of faith in administrative fact finding. The *Circle* model also differs substantially from the *Due Process* model, even if it may share some of its concerns. Hence, Roach's approach can provide a unique insight into punitive and restorative victims' views that Packer's approach alone would miss. Equally, as Roach accepted, Packer's approach provides insights, both about victims and the criminal process more generally, which Roach's models alone would miss. The simplistic character of Packer's models not providing for all punitive or restorative justice victims can be mitigated by using Roach's models *as well as*, rather than instead of Packer's approach.

3.5 Conclusion

Understanding something as complex and variable as the criminal justice process is not easy. The various approaches considered in this chapter are very helpful in assisting us in this difficult task, however there are gaps in what each approach can realistically show us. For example, whilst Macdonald's ideal types provide an instructive understanding of various isolated values in the criminal justice process, there is more to the operation of the criminal justice process – even the small part of it represented by legal aid policy - than the isolated concerns of *Investigative Efficiency*, *Operational Efficiency*, *Administrative Reliability* and *Adversarial Reliability*. The same criticism could be made of each of the approaches considered here, including Packer's. This is not, however, a fatal criticism. It is a natural limitation that comes with using simplified analytical constructs.

[445] See 3.4.1.4

How could it be any other way? If something simplifies the real thing, there are always going to be flaws and discrepancies between what the model says and the reality, because the model does not account for absolutely everything that goes on in the system it is looking at. Simplification, by nature, involves cutting things out and smoothing over complex edges. This obviously limits how useful these approaches are as a tool of analysis, but at the same time simplicity is the very thing that makes them useful at all. Just as with a "not to scale" London Underground map, it is simplicity that allows us to see things we might otherwise miss in analysing the criminal justice process. We see details that might otherwise be hidden amongst the mass of other pieces that make up the criminal justice process. Of course, all the pieces matter, but we can't begin to make sense of them without separating them out first. Each approach is a different way of doing that. Each approach has their own gaps that other approaches do not have, but by the same token, they also provide their own unique insights that other approaches lack. That is a reason to conduct further analysis from many different perspectives; not to abandon the unique insights provided by one approach in search of an alternative oxymoronic perfected simplified construct, as some critics have suggested. Critiques of Packer's work, which equate inevitable simplicity issues with fundamental flaws, miss this point and take us further away from a more complete understanding of the criminal justice process. The next chapter will outline a multi-dimensional analytical approach to using all of these tools in order to analyse research data and answer the research question, in a way that avoids this mistake.

Chapter 4: Using Criminal Justice Process Models to Analyse Data

4.1 Introduction

This chapter sets out an original technique for using criminal justice process models (discussed in chapter 3) for analysing data and in order to answer the research question. The previous chapter provided a great deal of criticism, both of Packer's approach and the criticisms of others. At the same time though, as we have seen, all the approaches discussed in it have much to recommend. They all bring something to the table - from the simplicity of *Due Process*----*Crime Control* to the wide perspectives of the meta-model. This chapter therefore suggests a wider approach to criminal justice process analysis. That approach is this: not to treat one or the other discussed models or tools as being best, but to recognise the inherent (as simplifications from the real thing) flaws and unique advantages in each and then use a variety of appropriate tools (rather than just one) for the task in order to provide a more comprehensive picture of the criminal justice process. We shall call this a criminal justice analysis "toolbox". We will first examine exactly how this method works in general, including how to decide which tools to use. Then we will explore in detail how the toolbox can assist with analysing qualitative interviews and answering the research question.

4.2 The Toolbox Approach in Outline

4.2.1 Theoretical Basis

Essentially, what is meant by a toolbox approach is quite simple. It can be expressed in three steps:

1. You need to analyse the current state (or a change in state) of the criminal justice process – in our case, the impact of a policy change: cuts to criminal legal aid.
2. You select a number of different tools to use - such as the ones discussed in Chapter 3 (Packer's dichotomy, King's models etc.) in order to provide a variety of different perspectives on the situation.

3. You apply each of your tools to the situation. Different tools give different perspectives on the issue and you are therefore provided with a variety of insights that may have been missed if we had (as is usually the case) used one approach alone.

Hence, the toolbox approach does not entail using only one set of models; instead it embraces the range of perspectives provided by using multiple tools for criminal justice research. Packer's dichotomy is flawed, but so are all the other approaches - by their nature as simplified constructs. They are all useful, however, in the sense that they can uncover illuminating insights. Therefore, these models, ideal-types, etc. are all tools in our toolbox - each having their uses, advantages and disadvantages. Each has their place in criminal justice research. Any discussion that focuses in on one way of doing things, as so many have, risks skewing the perspective and hindering potential analysis. This is the essence of a "toolbox" approach.

In terms of different perspectives, another helpful way to conceptualise this (apart from a toolbox) would be to think of it as a set of camera filters. Each filter gives a different perspective on the image and will help us spot things that might otherwise be missed when using a different filter. Of course, there is a difference between the idea of a toolbox and that of a camera filter set: tools tend to try and fix things, whereas camera filters observe things. This approach exists somewhere in the middle. The toolbox approach goes a little beyond mere *observation*, like one would with camera filters, and helps *analysis* or *understanding*. At the same time, this falls short of the tools completely fixing anything – obviously, one cannot change a policy found to be lacking simply by using tools of analysis alone – but that analysis *does* take the first step towards fixing things if needed. When trying to analyse anything, from a medical patient's query, to a car, the first step is one of diagnosis. You need to find out whether anything is wrong and if so, what. Very often, *tools* (such as a stethoscope to listen to a patient's heartbeat, or a jack to enable you to have a look under the car) are necessary in order to do that. We can then either confirm that everything is fine, or understand and analyse what is wrong. That is what the toolbox approach provides: tools that provide assistance in analysing a situation.

It is important to recognise, however, that the tools provided are products of their context, use and the time that they were produced. Packer's common-ground incorporates the Anglo-American common-law adversarial system. King's models were made for the magistrates courts of

1980s England. Walker and Telford's meta-model was for post-Troubles-Northern-Ireland. In order for these tools to be used today, it may be sometimes necessary to make some (explicitly stated) alterations to bring the models up to date. This of course depends upon what is being analysed – pleasingly, the tools prove in many situations to be surprisingly timeless. The user of the toolbox approach should not shy away from such modifications though, if they think it would make the tools more useful. To stick with the toolbox metaphor, the design of a drill has been improved since the Stone Age, whilst still staying true to the same underlying mechanical principles.

4.2.2 The Subjective and Systemic Elements of Analysis

This has been touched upon in previous chapters,[446] but it is important to explicitly reiterate the different elements of analysis of criminal justice process models/tools here. Ignoring it risks confusing the issues. There are two ways that criminal justice process models can be used: subjectively and systemically. Both are concerned with, as Packer originally conceived it, "value-systems",[447] but they target quite different things.

First, systemic analysis. This is concerned with the value-set that a particular *system* embodies or represents. Obviously, the system itself is not a conscious being capable of having values of its own, but it is made and experienced by conscious beings and hence, can be more or less appealing to particular value-sets. This is what is meant by systemic. For example, in our case, we might say that changes to the legal aid system now mean that the criminal justice process embodies a value-set where *Crime Control* values are dominant. The best technique of ascertaining which value-set a system *embodies* is to simply ask "what would the hypothetical model's adherent make of this?" For example, looking at changes to the legal aid system, what would a *Crime Control* adherent make of it? What would a *Due Process* adherent say? Would a proponent of Roach's *Rollercoaster* victims' model be satisfied or not? To what extent? Etc.

[446] In discussing Macdonald's hypothetical, well intentioned, but wrong policy maker in Ch 3 and as a consequence of the habitus-field relationship in Ch 2.
[447] Packer (n 52) 153

Systemic analysis represents the conditions of the *field* element of Bourdieu's habitus-field construct. For example, in such a case, we might classify the conditions as "*Crime Control* conditions". This is useful in itself in analysing the kind of criminal justice process we want to have: what values does it prioritise and are we, as a society, happy with that? It is also useful in that knowing what the various value-sets of the tools would make of these conditions is the first step to determining which habitus would be most dominant in that field/would be of high social capital to have. Because of the relationship between habitus and field, whenever the conditions are "*Crime Control*", that immediately means that having a "*Crime Control*" habitus bestows a high level of symbolic capital on the individual. Of course, that is only the start. To get the full picture, one would need to consider the subjective analysis too.

Subjective analysis, on the other hand, is concerned with the particular value-set that a particular *person* has (or even, generally/roughly, what a particular group has) or is incentivised to have. For example, in our case, we might say that a particular lawyer or group of lawyers' value-set was changed (or incentivised to change) in a particular way as a result of changes to the legal aid system and analyse this in terms of *Due Process*/*Crime Control* models etc. Subjective analysis represents the *habitus* element of Bourdieu's habitus-field interaction outlined in Ch 2. A subjective models analysis gives us both a convenient (albeit simplified) way of classifying what an individuals' habitus is and, when saying that a field condition (such as a change to legal aid) has *incentivised* someone's value-set to change, it is also the second step in ascertaining what the dominant habitus in that field is/the one of highest symbolic *capital* to have.

Although fairly simple to explain, it is important to note that Packer did not originally use his models in this way. Although he must have appreciated the fact that these could be used to describe individuals' views (hence the use of hypothetical fanatical *individuals* that represent *Due Process* and *Crime Control*), they have not been used to analyse subjective viewpoints directly through lengthy qualitative interview transcripts before.[448]

[448] Though see Tom Smith, 'The Zealous Advocate in the 21st Century: Concepts and Conflicts for the Criminal Defence Lawyer' (PhD Thesis, University of the West of England 2010) who constructed his own model on "zealous" defence lawyers and applied this to interview transcripts discussing fictional vignettes

For our part, we will make use of both. In analysing the qualitative interviews, a subjective analysis of the interviewees' views will of course be made, but it will also be interesting to make a systemic analysis of what the system embodies, based upon what they have said of their own experiences and things they have witnessed. Obviously, the systemic analysis must be treated with some caution, as it involves, effectively, taking interviewee accounts at face-value. It might still lead to useful insights though – particularly given the opportunity for cross-referencing with other interviewees and the precautions in terms of how to phrase questions etc. outlined in Ch 2. Another useful element of this is that, in some cases, these claims made by interviewees about how the world is and, specifically, how the system is operating, might allow greater insight into their own subjective value-set as well. Care needs to be taken to avoid reading too much into what is said, but if claims are overt, safe conclusions about their subjective-value set can be drawn. For example, if someone says "I'm pretty sure the police beat the suspect up, because I saw x, y and z", this most certainly does not suggest a *Crime Control* value-set and might instead indicate a more *Due Process*-minded scepticism (backed up by their own personal experience) as to the trustworthiness of the police.

In summary, such an analysis ought to give us:

a) An indication of the field conditions resulting from (or relevant to) changes to legal aid, which individuals within the field find particularly influential/important (systemic analysis)

b) An understanding of the dominant habitus in the field, as a result of changes to legal aid by:

    i. A classification of the value-sets that those field conditions are most appealing to (systemic analysis) in order to:

        - Judge the state of the field itself. Is this an acceptable criminal justice process to have? Are *these* the value-sets we want to prioritise (potentially at the expense of others)?
        - Indicate which habitus might be of high social capital to have in such field conditions

    ii. An understanding of which value-sets are incentivised by the broad field condition/field change, of legal aid cuts. (subjective analysis)

iii. As a result of (i) and (ii): the dominant habitus of the current criminal justice process in this area, as a result of legal aid changes.

c) As a result of (a) and (b), an understanding of the likely *practice* of those with the most symbolic capital (best-suited habitus) in the field, both now and in future.

4.2.3 Which Tools Can we Use? Criteria for Selection

It must be recognised that not every tool ever envisaged (and a glance at the literature will reveal far more than is covered here) will be useful all of the time. As said first, stage 2 of the approach means that researchers need to have their own box, for their own tasks. It is not a case of using any old tool simply because we feel like it. The tools used need to be considered carefully. The tools used to fix a plumbing pipe are different to those used to fix an engine. In criminal justice terms, the tools used to analyse the over-targeting of ethnic minorities by police stop and search, for example, are not necessarily going to be the same as those used to analyse an increase in the UK's prison population. Hence, this section will consider the various criteria and considerations for accepting or rejecting a tool in the toolbox. In other words, this is our meta-tool. This is how you write the shopping list you bring to the shop.[449] Each researcher's "shopping list" will be slightly different. The following criteria are tailored to the research question.

In terms of the practical business of choosing which tools to use, there are some initial practical considerations, as well as what we might call "top-down" and "bottom up" considerations:

4.2.3.1 Practical Considerations

This concerns time and resources. It would usually be impractical to use every single criminal justice tool ever devised every time somebody wanted to analyse a policy change. There needs to be a balance struck between increased perspectives and time/space. Hence, it is not suggested that our eventual (see below) selection of tools is inherently superior to a different selection someone else might come up with; it is just a case of selecting a varied mixture of approaches that will fit within the time and resources you have got and the purpose for which you are using them.

[449] Or, sometimes, the schematic to construct new ones – see 4.2.3.4, below

It is also important to bear in mind that, as Walker and Telford recognised,[450] inevitably, the selection of tools a researcher makes will still be a little bit subjective or biased towards their own view of what is important or most relevant to the research topic and indeed the objectives of the research – the choice is never purely arbitrary. This is unavoidable when the time and resources constraints above are considered. You simply cannot use every tool ever devised and when making judgments about what to include, the researcher runs the risk of letting their own subjective bias influence their choice of tools. Walker and Telford's response to that problem was to try and minimise the risk by attempting to make their meta-model as wide and comprehensive as possible.[451] We shall adopt that philosophy as equally sensible here too. It is also important to bear in mind the origin of the toolbox approach. Whilst the toolbox approach may not be perfect in this regard, it is undoubtedly better than previous approaches' track-record - which would have us pick just *one* tool, such as Packer's models, and one tool only. The important thing is to be transparent about which tools you are using, why you are using them and aim to ensure a wide array of perspectives.

4.2.3.2 Top-down

This involves looking at the research question before starting data collection and deciding which tools are most useful for the task. This is inevitably a subjective question, so it is important to be overt. There are three considerations/criteria here:

1. Will this tool assist in providing a wider range of perspectives on the issue?

One of the main strengths of the toolbox approach (as opposed to the traditional approach of just using one tool) is the ability to look at an issue from a variety of perspectives rather than just one. Hence, it would be pointless to use several tools that were all very similar in perspective. There are two sub-elements to this. Firstly, tools can directly overlap. For example, there is a perfectly sensible set of tools devised by Rutherford. Rutherford was looking at the values that

[450] Walker and Telford (n 417) 6
[451] ibid.

practitioners within criminal justice hold.[452] He identified three "working credos" that we could categorise the values and beliefs of these criminal justice workers into:[453]

1. Punitive degradation of offenders
2. Management, pragmatism, efficiency and expediency
3. Liberal and Humanitarian

There is nothing wrong with this approach; however, when we look at the list of tools already discussed in Ch 3, it is easy to see why this might just end up repeating what other tools have found - Credo 2 accords strongly with King's *Bureaucracy* model; Credo 1 with the values of *Crime Control* and Credo 3 with those of *Due Process*. There would be very little point in using these when one is already using a set of tools that take these perspectives into account. To say so is not to say that Rutherford's tools are less useful, it is just that they overlap. They are no more or less useful than King's or Packer's etc.

The other reason to reject a model under this head would be where, even though the tool does not directly overlap, with others, it does so indirectly. For example, a tool may take a different approach, but it substantially deals with the same subject matter in the same (or sometimes less detailed) way. For example, it is submitted that there is little to be gained by using Ashworth and Redmayne's general victims' concerns approach alongside Roach's models. Use of Roach's models would appear to give us the same increased perspective only with greater detail, due to him tackling the important issue of there being no general victim: victims are all unique individuals with differing wants and expectations.

2. Is the tool out of place or out of time?

As already discussed, this is an important criterion.[454] Many of the models may be designed with other jurisdictions or legal systems in mind. For example, Packer was looking at the American legal

[452] Rutherford (n 126) 7
[453] ibid. 11-24
[454] See Ch 3

system. Similarly, some models may be based on very old and no longer relevant legal systems. Having said that, this need not be an absolute bar. As we shall see, Packer's models are quite transplantable to the UK legal system despite being based on the American system from the 1960s, because they are so generalised. However, this criterion would likely exclude all but the most general models designed by theorists analysing, for example, Civil Law systems or historical legal systems. The Common Law vs Civil Law issue is especially problematic where legal aid is concerned because the defence lawyer (our subject of analysis) has a significantly different role in an adversarial system compared to their role in an inquisitorial system.

3. Is the tool relevant to the research question?

There is very little point using tools that do not assist with answering the research question. For example, the research question asks *what impact does reducing levels of criminal defence legal aid funding have on the professional criminal justice value-sets of criminal defence lawyers?* This question would therefore exclude tools of analysis that focused purely on what those professional value-sets *ought* to be rather than what those professional value-sets *were*. For this reason, we must reject some of the tools that Macdonald devised: those based upon Weberian *ideals* rather than Weberian *ideal-types*. This is because Weberian ideals are theoretical constructs based upon ideas of what a system ought to be: evaluative tools i.e. something to aim for, rather than to use as a tool for analysis.[455] Similarly, we must reject Ashworth and Redmayne's "Framework of Values". As with Macdonald's tools based upon Weberian ideals, their suggestion of a framework of values is using theory in an "is and ought" manner,[456] whereas here we are using theory to analyse the way the world is – albeit within the limits of the research methods and conceptual analysis used.[457]

4.2.3.3 Bottom-up

This second component of the selection process comes later and involves elements of a "grounded-theory" approach to analysing data. Grounded-theory would have us generate theories that are "grounded" in the data.[458] What this practically, at its most basic, means is that you sort your early data into codes: labels attached to segments of data that describe what each

[455] Macdonald (n 280) 287
[456] See Ch 3, section 3.3
[457] ibid.
[458] Charmaz (n 253) 2

segment is about. As you gather more data, you reflect on these codes and begin to construct "tentative analytical categories". These categories become more developed as your research goes on until they can eventually be formed into a theory: an "abstract theoretical understanding of the studied experience".[459] The theory is "grounded" because it starts from and is created by the data, rather than being imposed on the data. It is the general principle rather than the strict prescriptions of grounded theory that we rely on here: the principle that your data itself can and should be allowed to influence your theory. That does not mean that your data necessarily *must* be used to create an entirely new criminal justice process model to add to the toolbox (though it certainly could be, if that is useful). What it *does* mean is that, at the very least, a consideration of how well an existing tool fits the current data ought to be an on-going element of data analysis process – in addition to the "top-down" considerations just discussed.

4.2.3.4 A New Tool? The Rational Self-interest Model

As just indicated, although the data needn't necessarily have to be used to create an entirely new criminal justice process model, if this is useful, then it is perfectly legitimate to do so. Sometimes, the tools in your toolbox have got you nearly all the way there, but you still need a different tool to properly finish the job. In this case, that is exactly what happened when it came to analysing the interviews. The tools just described turned out to be very useful and lead to many illuminating insights.[460] The most illuminating insight of all, however, was that sometimes the tools didn't provide a full answer to what was going on. They would reveal part of the problem, by illustrating that a great deal of value-sets were set back, but there was no value-set that really stood out as being enhanced. It was at this point, that those principles of grounded theory just considered became important. The data helped to construct a suitable model to explain and analyse what was going on. This new model is called the *Rational Self-interest* model. Its construction is based upon a large amount of the data and it explains a great deal of the findings. Hence, it will be outlined here at some length.

The *Rational Self-interest* model has its theoretical basis in game theory and evolutionary biology.[461] The rather uncomfortable premise is that, without more, it is in an individual's best

[459] ibid. 3-4
[460] See Chapters 5 and 6
[461] The use of game theory in criminal justice research is well established, though not in terms of making a new process model in the way I do so here - though see: Robert Birmingham, 'A Model of Criminal Process:

interests to cheat and betray other people when given the chance. The classic example of this is Albert W Tucker's "Prisoner's Dilemma". In this hypothetical experiment, two guilty suspects are arrested. The prosecutor makes a deal to each of them: if they tell the prosecutor everything (which would necessarily involve implicating the other suspect) the prosecutor will drop the charges against them, but use this information to ensure that their accomplice is convicted and sent to prison for three years. The catch is that if they *both* do this, then the prosecutor can convict *both* of them of a serious offence (but with credit for pleading guilty) and ensure they serve 2 years each. If they both remain silent, then the prosecutor will only be able to convict them both of a much lessor offence, equating to just 1 year in prison. Hence, the following diagram can be constructed to illustrate the available choices:

		Prisoner A			
		Cooperate		**Betray**	
Prisoner B	**Betray**	Prisoner A: 3 years	Prisoner B: free	Prisoner A: 2 years	Prisoner B: 2 Years
	Cooperate	Prisoner A: 1 year	Prisoner B: 1 year	Prisoner A: free	Prisoner B: 3 years

Cooperate = stay silent i.e. "cooperate" with your accomplice

Betray = tell the prosecutor the truth i.e. "betray" your accomplice

Note: the particular number of years varies by example, but the general principle is the same: having four outcomes; one the best, another the second best, third the third best and fourth as the worst.

The twist here is that a "purely rational" individual will *always* pick betray. If we want to get the best possible individual outcome, no matter what our counterpart chooses, betray is the best choice. To understand this, we must imagine we are in the position of Prisoner A. If Prisoner B chooses betray, our best option is to also betray, to minimise our loss: 2 years in prison rather than 3. If prisoner B chooses cooperate, our best choice is still to betray because this ensures we

Game Theory and Law' (1970) 56 Cornell L. Rev. 57, for a penological model analysing individuals' choices to commit crimes and the state's corresponding decision of whether to impose sanctions on them.

spend no time in prison at all, as opposed to one year. Of course when both prisoners do inevitably take this view they both end up in a much worse position than they would have been in had they just cooperated: spending twice as much time in prison. The real winner of this game is the prosecutor.

Applying this to criminal justice process modelling, the adherent of the *Rational Self-interest* model is simply someone who, in going about their work in the criminal justice process, would choose betray every time. If we asked them what the paramount consideration is in running the criminal justice process, they would answer something along the lines of: "whatever brings me most personal advantage". In other words, it represents the most crude and instinctive rationality behind some human behaviour. Much like Packer's hypothetical adherents, it would be difficult (though perhaps not impossible) to find someone who behaved like this all the time: a self-interest fanatic. Nonetheless, it must be acknowledged that there is a bit of the betrayer in all of us. Just like most would probably accept *some* level of *Crime Control* state oppression (such as, say, the *existence* of a police force) to ensure public safety, it would be naïve to suppose that everyone is a wholly selfless saint all of the time either. Indeed, Dawkins argued that this was an inevitable matter of evolutionary genetics: historically, those individuals who were selfish were generally also the ones who ended up surviving long enough to pass on their genes. Hence, as a matter of simple biology, genes giving people the propensity to be selfish, to "betray", have always been more likely to be passed down and become dominant, whilst more altruistic ones are less likely to do so.[462]

Of course, that doesn't mean that the prisoner's dilemma theory's outcome (that both individuals will always betray) is inevitable. The rational or natural response may well be to betray all the time, but it doesn't have to be that way – people can override this for the greater good of, say, Walker and Telford's honourable Ultimate Objectives. There is much more to human decision making than self-interested logic. Many participants in empirical tests of the dilemma have demonstrated much more altruistic behaviour than the theory would suggest: real people *do not* always pick "betray".[463]

[462] Richard Dawkins, *The Selfish Gene* (Third Edition, Oxford University Press 2006)
[463] Toko Kiyonari, Shigehito Tanida and Toshio Yamagishi, 'Social Exchange and Reciprocity: Confusion or a Heuristic?' (2000) 21(6) *Evolution and Human Behaviour* 411

Dominance of the *Rational Self-interest* model is what would occur if the natural inclination to betray were to take over. In many ways, it tells us what happens when other models fail: when someone decides that the principles and values conventionally understood to be important in running the criminal justice process are not important anymore and return to instinctive ideas of personal survival at all costs. We shall examine to what extent this state of affairs is impacted by legal aid finance in Chapter 6.

4.2.3.5 Final Selection of Tools

This section will consider the final selection of tools (in addition to the new *Rational Self-interest* model just discussed) for this work. The chosen tools and reasons are as follows:

1. Packer's Dichotomy

We have already seen the enduring merits of Packer's original approach in the previous chapter. It is undoubtedly a useful analytical tool, but should it be used as part of the toolbox for this research? It is submitted that it should. In terms of criterion 1 (whether the tool would assist in providing a wider range of perspectives) it is submitted that Packer's models certainly do that. As we saw in Chapter 3, they are unique in the sense that they incorporate several values into each model which all have a somewhat symbiotic relationship with one another. Doing so, whilst still limiting the overall analysis to just two models, provides a unique and useful approach to the analysis.

In terms of criterion 2 (not out of place or out of time), there may at first sight be some difficulties. Packer designed his models in 1960s America and things may have changed since then that makes them unsuitable for use today. It *is* fair to say that Packer's dichotomous solution itself, as an all-encompassing method of understanding the criminal justice process, is somewhat out-dated. As Roach puts it: Packer's original models "cannot comprehend the new political case which pits due process claims not against the community's claims to enforce morality but against the rights claims of crime victims… Packer's models thus cannot make any sense of contemporary debates about pornography or hate speech".[464] However, the fact remains that the principal

[464] Roach (n 437) 674

values underpinning the models are themselves timeless. The fact that there is more to add does not mean that the remainder are necessarily historical relics – hence why both King and Roach writing many years later still spoke in terms of *adding to* Packer's models, rather than replacing them. The two models may not be the whole story anymore, but the values they contain are timeless. The models are not void under criterion 2 for lack of relevance.

Finally, criterion 3 asks whether the models are relevant to the research question. It is submitted that they are because the value-sets are directly concerned with making choices about what is most important in running the criminal justice process. With public funds being inevitably somewhat limited, questions about legal aid will similarly always involve making choices of what is most importance in the criminal justice process: in terms of where to spend the limited funds. Hence, the subject matter and Packer's model approach fit together quite naturally because they deal with the same issues.

2. King's Four Further Models.

King's re-imagining of the *Crime Control* and *Due Process* models are rejected for reasons of overlap (i.e. the first criterion described in the meta-tool) and (as discussed in Ch 3) they are not necessarily an improvement on Packer's original conception of these. However, the remainder of King's models are used, subject to an enhancement of the *Power* model. The *Medical*, *Bureaucratic*, *Status Passage* and *Power* models all fulfil criterion 1 – they do indeed assist in providing a wide range of perspectives for analysis, by virtue of each having a very different perspective on the issues. They are also (criterion 2) neither out of place (because King devised them when researching the English courts), nor especially out of time because the general ideological perspectives each model is based upon (Rehabilitation; Management of Crime and Criminals; Denunciation and Degradation and Maintenance of Class Domination) are enduring concerns. Finally, this tool is directly relevant to the research question in the sense that, again looking at the ideological basis for each model, each ideology would likely have something to say about defence lawyer finance.

One change/clarification ought to be made to King's *Power* model, on the basis of criterion 1: assisting in providing a wider range of perspectives. King originally conceived the *Power* model as promoting the interests of the ruling class and maintaining its dominance over, for example, the

working class, ethnic minorities or (in Northern Ireland) Catholics.[465] It is worth clarifying that King also considered this to be a very general model, not limited to particular oppressed groups. He did not seek to "identify with any precision the particular groups involved".[466] For this reason, when using the *Power* model, we should seek to take a very broad view indeed of the potential oppressed groups. The most glaring omission from King's list of examples above is women, so for our purposes at least, the *Power* model ought also to encompass feminist concerns. Hence, a wide and useful application of the *Power* model would necessarily also involve, to use a phrase from feminist discourse, "asking the woman question" - [467] although, again, that is not the only question it ought to ask. As Bartlett points out, "analysis of gender must occur not apart from but within the contexts of multiple identifies". [468] In order to comply with criterion 1, use of the *Power* model involves asking the "woman question"; alongside asking the "working class question"; "ethnic minority question"; "LGBT+ question"; "disability question" etc. too. As pointed out above, such an approach is necessary in order to properly comply with the spirit of the model King devised.[469]

3. Macdonald ideal-types

Criterion 1 (would this tool assist in providing a wider range of perspectives?) is fulfilled here quite simply because there is nothing else quite like it. Although Macdonald did not come up with the concept of ideal-types himself, (Max Weber did) his use of ideal-types to analyse the criminal justice process in this way is quite a unique way of using them and the ideal-types he constructs (in an attempt to improve Packer's approach) also provide unique perspectives. Hence, this tool easily fulfils criterion 1.

Criterion 2 is also fairly easy to fulfil for Macdonald's tools. At the most basic level of analysis, his approach was formulated in 2008, so could hardly be said to be "out of time", and was used to analyse a particular policy of the *Anglo-Welsh* criminal justice system: the introduction of the Anti-social Behaviour Order.

[465] King (n 389) 26-27
[466] ibid.
[467] Katharine Bartlett, 'Feminist Legal Methods' (1990) 103(4) Harv. L. Rev. 829, 837
[468] ibid. 848
[469] King (n 389) 26-27

Finally, it is also submitted that it fulfils criterion 3 (relevant to research question), because of the generality of the ideal-types. The ideal-types are all so general that they could likely be applied to a great deal of criminal justice research, including this work. For example, the ideal-type of *Operational Efficiency* simply states that courts must run as quickly as possible and the *Investigative Efficiency* ideal-type states that we should have absolute faith in administrative fact finding. Neither of these general subjects is tailored to any specific issue or policy: they apply throughout the criminal justice process. Issues concerned with speed of the process or the reliability of administrative fact finding are relevant for all sorts of policies in criminal justice, including legal aid.

4.Walker and Telford Meta-model

In terms of criterion 1, it is submitted that the meta-model is an excellent candidate for being included. The stated aim was to draw the meta-model "as widely and comprehensively as possible" in order to avoid other approaches' problems of being "too selective and conceptually shallow".[470] Hence, it is argued that it would certainly assist in providing a wider range of perspectives.

Criterion 2 is also fulfilled. The paper was published fairly recently (2000), so it is arguably not out of time. It may be argued that it is out of place, having been designed for the particular task of analysing how the criminal justice process in Northern Ireland might be improved. However, on closer inspection, the Ultimate Objectives and Institutional Values are plainly meant to be of general application. As Walker and Telford themselves point out: "Obviously, our particular concern is with criminal justice in the North, but in order to understand how it operates and how it might be susceptible to reform we must construct a model of how criminal justice systems *in general* cohere... *Our model is not a blueprint for the development of criminal justice in the new political circumstances of the North, but an exploratory and strategic aid"* (original emphasis). [471] Hence, it is argued that considerations like Equity, Security, Equality, Economy, Participation and Political Legitimacy (the Meta-model's Ultimate Objectives) are not restricted to Northern Ireland in the 2000s. These values are of timeless importance and just as relevant when considering other, more specific, criminal justice process issues, such as legal aid.

[470] Walker and Telford (n 417) 5-6
[471] Ibid. 3

5. Roach Victim Models

Finally, Roach's models, it is submitted, also satisfy all three criteria very well. They fulfil Criterion 1 because, although similar in construction to Packer's originals, they highlight perspectives that might otherwise be lost. Roach's models are required because victims' interests are otherwise in danger of being marginalised. As noted just earlier, Roach pointed out that Packer's original models "cannot comprehend the new political case which pits due process claims not against the community's claims to enforce morality but against the rights claims of crime victims".[472] Hence, it would usually (unless completely irrelevant to the policy under discussion) seem appropriate to ensure that this is considered when analysing the value-sets of the process and its actors. Legal aid is no exception. For this reason, the victims' perspective fulfils the requirements for criteria 1, 2 and 3.

Having clarified the basics and our own choice of tools, we will now consider an example to explain how one might use the toolbox approach.

4.3 Using a Toolbox for Qualitative Research Interview Coding

This section will take the form of an applied example, analysing the following short, entirely fictitious, interview transcript to show how the suggested approach works.[473] For the sake of a clear example, we shall make use of a caricatured hypothetical fanatic:

Mr Dastardly, QC: *Technically, the cuts provide an incentive to advise your client to plead guilty. I mean that's certainly true economically and I can think of many who would – have, in fact -… but you know what? There comes a point, and I think we have reached that point now, where you just think "enough is enough" and I think I've reached that stage now, particularly since I am so rich that it doesn't really matter. You know? It loses me money yes, but to be honest, I think the incentive has gone the other way now. Yeh, I'll get less money if I advise a not-guilty plea, but that's the government's fault, so I now take a perverse delight in slowing the system down as*

[472] Roach (n 437) 674
[473] Note that the summary of tools contained in Appendix 2 may be useful to refer to here

much as I can and generally being a nuisance because that's the last thing They want. I'll delay for ages – there's all sorts of tactics you can use, you know – I'll drag the case on for ages and put on a great show. Of course this means the judges hate you, but it's worth it, because there's nothing quite like that feeling of sticking it to The Man. The whole system of criminal sanction is flawed anyway, so who cares if it means fewer criminals are punished? You must have seen the stats about prisons and reoffending, I'm doing society a favour by keeping them out. Sometimes, if it's a minor offence, the prosecution will just give up and drop it eventually! [Cackles mischievously]

Interviewer*: I see…*

If this were real, we would first consider what systemic analysis could be made of it…

4.3.1 Systemic Analysis

There is one piece of systemic information here: that the new rules provide an economic incentive to plead guilty, and this fictitious interviewee has seen some colleagues do the same. As pointed out above, it is then simply a case of applying each tool. Before doing that, it is interesting to note how this also illustrates interviewees' claims about "objective" facts *("the stats on prisons and reoffending"*) being a useful indication of their own subjective value-set, as discussed above at 4.2.2. Here, we can say that such a statement very clearly aligns them with the *Due Process* value of scepticism as to the morality and *utility* of the criminal sanction.

4.3.1.1 Ideal-types

This example is quite similar to Macdonald's own really.[474] Here, the government has shown a desire to reduce the remuneration paid to defence lawyers, whilst providing a financial incentive to plead guilty. An increased incentive for guilty pleas matches the emphasis on speed from the *Operational Efficiency* ideal-type. It will be recalled however, that this ideal-type depends on another in order to work. It stems from the assumptions of the *Investigative Efficiency* ideal-type, which places total faith in administrative fact-finders. However, we know that this is unrealistic: the police are not 100% correct all the time. The factual background is similar to the *Adversarial*

[474] Macdonald (n 280) 286

Reliability ideal-type instead. Hence, the changes will reduce the thoroughness of the adversarial fact-finding process, despite the fact that such a fact-finding process is needed (because the assumptions of *Operational Efficiency* are not true).

Use of Macdonald's ideal-types highlights the assumptions that need to be made in order for a policy to work and shows that they are not present here. This illustrates a practical effect of the changes and leads us nicely into further analysis.

4.3.1.2 Crime Control vs Due Process

What would Crime Control Make of This?

Encouragement of guilty pleas would be an excellent idea so far as this model is concerned. This correlates with the faith in administrative fact finders, by ensuring that the defence lawyers' interference with administrative fact-finders is reduced. This should mean the expert police and prosecutors can be left alone to get on with their job. Anything that facilitates encouragement of guilty pleas will also correlate with the presumption of guilt. Once the experts think the defendant is probably guilty, if the lawyer can be financially persuaded to make the client plead guilty, so much the better. Defence lawyers are also a hindrance on efficiency, an annoying and unnecessary brake, so if the effect of cuts is such that they push clients towards guilty pleas, this is a good thing. Hence, for the model, these changes can only mean that fewer guilty people get away with things and therefore more crime will be eradicated.

These changes could therefore be said to advance every *Crime Control* value and thus reflect a worrying practical shift in perspective. The impact is therefore that the system is characterised by values that consider concerns about collateral damage/state oppression of innocents to be an altogether secondary consideration – a startling analysis for an ostensibly liberal democracy.

What would Due Process Make of This?

Packer's approach tells us that *Due Process* (as a dichotomy) ought to hate these changes and they certainly would. Incentives to advise guilty pleas conflict with Values 2-4.[475] The fact that these changes impact solely upon those defendants who cannot afford their own, private, representation offends Value 5: Equality. Greater ease of getting convictions (lawyers being financially pressured to advise guilty pleas) would of course also offend Values 6 and 1.[476]

4.3.1.3 Medical, Bureaucratic, Status Passage and Power

Medical

This does not provide a great deal of help for this example. The proponent of the *Medical* model will obviously be upset if "diagnosis" becomes unreliable, but the model is so isolated we cannot know what they consider to be the most effective method of this. Do they follow *Crime Control's* trust in the police or the *Due Process* faith in courts? At best, we might say that skewing the perspective provided by defence lawyers towards guilty pleas might make diagnosis and treatment more difficult.

Bureaucratic

We must try to imagine a "bureaucratic fanatic". This person would probably favour the changes. For one thing, encouraging guilty pleas would make the system more "predictable and rational". Trials are of uncertain duration, the outcome is unknown, and witnesses must be examined. All of this makes the system less predictable and rational and it also of course slows things down and clogs up the system. Anything that encourages the quick, easy and predictable guilty plea is to be encouraged. If this can be done in a manner which also saves resources (as cuts ostensibly do), then so much the better.

Hence, King's approach has exposed something Packer's did not, in that these changes are of particular appeal to *Bureaucratic* concerns. If we then look back to Packer, we can see that this is

[475] Value 2: Distrust of Administrative Fact Finders; Value 3: Quality Control; Value 4: Legal Guilt and the Presumption of Innocence

[476] Value 1: Freedom of the Individual from State Oppression (the supreme value) and Value 6: Scepticism as to the Morality and Utility of the Criminal Sanction

at the expense of *Due Process* and therefore reflect that the system is putting bureaucracy as of higher concern than, say, freedom of the individual from state abuse.

Status Passage

This model would appear to have little to say about the changes. One thing they may approve of though is the encouragement of lawyers to turn on their clients and encourage guilty pleas for financial reasons. This can only add to the isolation of the defendant and reinforce a "them and us" attitude, thus building community solidarity. Of course, the model is silent on how this might give some false positive results, but for those who are actually guilty, putting financial strain on the lawyer-client relationship can only help this model's aims.

Power

These changes can also be said to appeal to proponents of the *Power* model. Given that they can only really impact those who cannot afford to pay for representation privately, these changes will (regardless of whether those arrested are guilty or not) have the pleasing effect of sanctioning more of the poor and powerless, whilst having no effect whatever upon the rich and ruling classes.

Thus, King's models provide the additional benefit of drawing to our attention the move towards prioritising bureaucratic, divisive and ruling class interests over the concerns of the *Due Process* model. In combination, it highlights areas that an analysis purely relying on Packer's models would have missed.

4.3.1.4 Rollercoaster Victims' Model vs Circle Victims' Model

Rollercoaster

The *Rollercoaster* proponent would react negatively. Increased incentive to advise guilty pleas for defence lawyers might lead to the very thing the rollercoaster model hates about *Crime Control*: its trust in administrators and guilty pleas. Guilty pleas are generally done as a matter between

the defendant and the judge, or, worse, the defence and prosecution lawyers.[477] There is not much scope for the victim to be involved or for the victim's punitive concerns to be taken into account here. Increased focus on backroom deals between the two sets of lawyers and/or the judge will marginalise victims for the sake of efficiency, just as the model's proponent fears.[478] And of course, the sentencing discount provided by a guilty plea will leave the punitive tendencies of the model wanting. The model proponent wants reduced crime (through increased use of criminal sanction), heavy sentences and victims to be treated well. The changes suggest a move towards guilty pleas. These two outcomes are irreconcilable. Punitive victims would seem to be sidelined.

Circle

What of non-punitive victims? The same problems would seem to surface. A focus on guilty pleas, backroom deals between both sets of lawyers, will mean that cases are dealt with swiftly and without much victim input. *Circle* victims may prefer instead to have their day in court.[479] However, hopes of going through a restorative process would be dashed, as the defendant is encouraged to get it all over with quickly by a guilty plea. Opportunities for a "better way" to solve the problem, like apology or "informal restitution" would seem to be rather limited. In fact, the defendant receives what restorative justice proponents may consider to be an "easy way out" of all of those sorts of things.[480]

Hence, we can see how the potential impact on victims raises an interesting new perspective beyond classic Packer here.

4.3.1.5 Meta-model

How can the meta-model be useful here? It is submitted we simply see which Institutional Values and Ultimate Objectives are being neglected and which furthered. Applying the meta-model we could see that, for example, institutional values: *audit* (less money is spent) and *discovery* (since more likely guilty pleas allow police a freer hand) may be being prioritised. Unfortunately, these

[477] See McConville and Marsh (n 213) for a comprehensive and critical analysis of this particular phenomenon
[478] Roach (n 437) 701
[479] A Restorative Justice adherent would certainly say so. See, Nils Christie, 'Conflicts as Property' [1977] Brit. J. Criminology 17(1), 1
[480] ibid. 9

changes appear to have the knock on effect of inhibiting *appropriate disposal* (guilty plea is not always the most appropriate disposal); *due process* (see Crime *Control* vs *Due Process* discussion); *individual redress* (lawyers have less inclination to run trials, even when this may be the most appropriate course), *public accountability*, *professionalism* (because of the financial incentive to plead guilty) and *reflexive coherence* (in that, a criticism often levelled at these reforms is that they will may pass costs on to other criminal justice agencies). Applying the relationships between institutional values and ultimate objectives identified by the meta-model, we can conclude that these reforms prioritise ultimate objectives *Security* and *Economy*, at the expense of the other four. That is not the end of the matter though. Since the meta-model tells us that the ultimate objectives have a causative relationship with each other, these changes could (ironically) even set back *Security* and *Economy* in the long run as well. To what extent is hard to say, but the fact that more objectives are being set back than advanced suggests it could be significant. The fact that some of the institutional values set back by the reforms are themselves supposed to support *Security* and *Economy* (those of appropriate disposal and professionalism) aggravates the problem. A final point that a meta-model analysis adds is that, given that it highlights security as being an objective that is largely provided by "other social influences" outside the justice system,[481] even this apparent prioritisation of security may not actually result in much increased security in reality.

4.3.2 Subjective Analysis

Subjectively speaking, there appear to be two pertinent items to examine: the interviewee now takes great pleasure in slowing the system down and they take issue with the idea of the criminal sanction. The reference to prisons and reoffending suggest this is an issue of the sanction's utility.

4.3.2.1 Ideal Types

The first thing to say is that this is one such situation where using ideal-types is not particularly useful. The views of this interviewee do not appear to really fit within any of Macdonald's ideal-types. The interviewee does not exhibit particularly strong views about the reliability of administrative fact finders (*Investigative Efficiency* and *Administrative Reliability*) or the reliability of the court system (*Adversarial Reliability*). The one thing that could be said with certainty is that

[481] Walker and Telford (n 417) 8

it is almost anti *Operational Efficiency* (speed) – though this does not really tell us very much. Thus, in some cases, the ideal-type approach is better suited to systemic analysis than judging the value-sets of individuals or groups of individuals. It is often[482] too extreme and specific to work on subjective analysis like this.

4.3.2.2 Crime Control vs Due Process

No such issue arises when applying these models, however. This interviewee's views clearly align most closely with the *Due Process* model. Their stated views about the flaws of the criminal sanction and their disdain for the use of prisons most closely fit with *Due Process* values 1 (freedom of the individual from state abuse) and 6 (scepticism as to the morality and utility of the criminal sanction).[483] Their willingness to ignore speed concerns would of course also put them at odds with the values of the C*rime Control* model even more so. From this perspective, legal aid changes have led to a shift in subjective value-set towards *Due Process* values.

4.3.2.3 Medical, Bureaucratic, Status Passage and Power

There would appear also to be a shift towards *Medical* model concerns. Of course, these may well have been present before, but the fact that concerns over the adequacy of prisons to rehabilitate are now actively being put into practice by this interviewee (in slowing down trials and generally making a nuisance of themselves to ensure less people end up having the sanction applied) suggests a strengthening of those values in particular. This is somewhat surprising and would have been largely missed had we only used the two tools used thus far.

The *Bureaucratic* model has clearly been shifted away from, by the interviewee's wish to clog up the system and waste time and also by the fact that they wish to make it less predicable and rational.

[482] Though certainly not always - as will be seen in the following chapters where the interviews are analysed
[483] As pointed out above, at 2.1, This is an example of an interviewee's claims about objective facts nevertheless being a useful indication of their subjective value-set – discussed in detail above at 1.2, page 8.

The *Status Passage* model is also arguably being departed from here. Far from reinforcing the acuteness of the "us and them" elements of the process. This interviewee is mitigating the defendant's isolation by fighting the other side ("Them", the court system) as much as possible and being a nuisance.

The *Power* model is an interesting one to think about here. Although, as noted above, of course the legal aid changes only apply to those who cannot afford their own representation, the unusual effect these changes have had on this interviewee do not seem to reinforce the *Power* model. Arguably they go against it because they have made the interviewee more willing to fight the defendant's case. On the other hand, it is not always in the defendant's best interests to plead not guilty. Hence, we can conclude that the *Power* model is being only somewhat undermined.

4.3.2.4 Rollercoaster Victims' Model vs Circle Victims' Model

The reduced desire to offer guilty pleas would appease the *Rollercoaster* victim, because the *Rollercoaster* proponent hates *Crime Control* trust in administrators and guilty pleas.[484] On the other hand, the lack of faith in the criminal sanction goes against the faith the *Rollercoaster* victim places in it. The motive for the interviewee always going to trial also suggests that victim concerns are not at the forefront of their minds… Consider, for example, the situation where the evidence against a defendant is completely overwhelming. This interviewee's views would nonetheless force the victim to go through the hassle of a trial. The emphasis on delaying would also delay punishment to the defendant. In the *Rollercoaster* victim adherent's mind, this is delaying justice for victims. The model wants reduced crime (through increased use of criminal sanction), heavy sentences and victims to be treated well. This interviewee's views further none of these causes on close examination.

However, this interviewee's views on the inadequacy of the criminal sanction would accord with the *Circle* model proponent's views. That said, their focus on always getting a trial and wasting time will likely bring them into conflict with this model in the final analysis. After all, as Roach points out, under the *Circle* model, victims who choose not to invoke the criminal process as we

[484] Roach (n 437) 701

understand it, ought to have their views respected.[485] This interviewee's insistence on always having an adversarial trial is at odds with that and leaves little room for restorative approaches to justice.

4.3.2.5 Meta-model

As before, applying this tool is a question of which institutional values are being prioritised and which are being set back - and from that, seeing which ultimate objectives are being set back/prioritised.[486] We also need to make sure (as with any of the models) that the links between the Institutional Values and Ultimate Objectives are actually true for the particular facts under discussion - as discussed when we first considered Walker and Telford's meta-model in Chapter 3.[487]

The interviewee's wish to slow down the system and always get his client to plead not guilty would certainly inhibit the *audit* value by slowing things down and wasting public resources and time. Similarly, *reflexive coherence* could be adversely impacted on the basis of the interviewee making a nuisance of themselves. *Appropriate disposal* could be said to be inhibited because, arguably, sometimes a guilty plea is the most appropriate disposal for a defendant. On the other hand, one might argue that the interviewee's views on the inappropriateness of prison as a sanction suggest they may believe themselves to upholding *appropriate disposal*: by avoiding inappropriate ones. Hence, the impact on *appropriate disposal* goes both ways. *professionalism* is impacted though, in the sense that the interviewee has changed from doing their job to the best of their ability, to making a nuisance of themselves.

Applying the relationships between values and objectives set out by the meta-model, we can then see that these changes in values mean that Ultimate Objectives *Economy, Equity* (to an extent, although arguably *Due Process* improves it) and *Security* are set back, as well as – due to *reflexive coherence* issues – all of the Ultimate Objectives to some extent.

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[485] ibid. 707
[486] Walker and Telford (n 417), See their helpful diagram at page 67
[487] We looked at the example of Institutional Value: *inappropriate disposal* and noted how it would not always necessarily set back Ultimate Objective: *Security*, despite their links suggesting that it would.

4.4 Adaptation to Longer Transcripts and this Research

The foregoing discussion illustrates the general principle. For shorter transcripts, surveys or documentary data this approach in itself may be sufficient, however, for longer interviews (such as those used in this research, which sometimes lasted over an hour), a slightly more complex approach can be taken for practical reasons. Directly coding using the criminal justice toolbox tools just outlined can very quickly became prohibitively complex for long transcripts. For example, Walker and Telford's Institutional Values alone add up to eleven and it is necessary to note not only each time that things said indicate subscription to a particular value-set, but also the opposite: when a value-set is undermined. This means that, for one tool alone, you can have 22 coding nodes. Very often (by their nature of providing different perspectives on the same phenomena) tools will overlap, so the same small quote can be significant for analysis using Packer's models, Walker and Telford's meta-model etc. – with the data for this research, sometimes *all* the tools were relevant! It is therefore possible to have over 40 coding nodes apply to a single, short, quote. This is plainly silly and risks any useful insights from the analysis becoming lost in complexity.

To solve this problem, running themes in the issues under discussion were identified, such as concerns about an increased reliance on privately funded work to stay afloat. The criminal justice process tools discussed in this chapter were then applied to these *nodes*. In other words, the toolbox approach can also work perfectly well, and in fact is sometimes more convenient, as a tool of analysis, *after* having organised data first, rather than being both organiser and analyser.

The data from this research provided the following manageable selection of nodes:

1. Bureaucracy, Delays and Speed
2. Financial Incentives Affecting Advice
3. Financial Incentives to Take Some Cases and Ignore Others
4. Financial Incentives Against Thorough Investigation
5. Future of Criminal Barristers' Profession
6. Future of Criminal Solicitors' Profession
7. Solicitors Taking Advocacy Work In-house
8. Referral Fees
9. Client poaching

10. Morale

NB: as we shall see in the following chapters, some of these are purely systemic, some are purely subjective and some contain elements of both. Additionally, some systemic nodes, such as Difficulties Being Granted Legal Aid (a sub-node of Bureaucracy, Delays and Speed), have a subjective counterpart, such as the Financial Incentive to Take Some Cases and Ignore Others: the difficulty of some clients being granted legal aid (a, systemic, field condition) influences the tendency of defence lawyers to choose client X over client Y (a, subjective, part of their habitus).

Taking this approach is somewhat borrowing from that of "grounded theorists". Grounded theorists would have the data shape your coding system and then, eventually, the general theory you construct. Grounded theorists "*create…* codes by defining what [they] see in the data."[488] That said, it is only partially so: a lot of the theory here is not "grounded" in the data. The toolbox approach and all but one of the criminal justice process analysis tools used were constructed and analysed beforehand – although, again, there is an element of grounding in the sense that one criterion for selecting the particular tools used is on the basis of them being most applicable/relevant to the data in question.

4.5 Conclusion

We have seen how the tools may be used to analyse qualitative data by looking at a fictitious interview transcript. Each tool, in terms of both systemic and subjective analysis, gives a slightly different perspective on what the interviewee said and thus we have a much more enriched analysis than we would have if we used one approach alone. We have also seen that, for large transcripts, it is sometimes necessary to sort data before using the toolbox approach for our analysis. The following chapters will apply this analytical framework to the empirical data in order to come to an answer to the research question.

[488] Charmaz (n 253) 47

Chapter 5: Systemic Analysis

5.1 Introduction

This chapter introduces the findings of semi-structured interviews carried out with 29 practitioners (plus one who just wanted to outline their experience via email correspondence) from June 2015 – April 2017 and discusses the systemic element of their analysis referred to in the previous chapter. The following chapter will then continue this discussion by looking at the subjective element of their analysis. The 29 interviewees consisted of 13 lawyers spread across 12 different solicitors' firms (including 1 experienced paralegal) and 16 barristers spread across 11 different chambers. This equated to over 30 hours of recording and over 200,000 words of transcription. They encompassed a wide range of experiences. Direct quotes from interview transcripts are in italics. Some changes were made for easier reading: for example, excessive amounts of "erm", repeated words, irrelevant/filler discussion and interviewer replies of "yes", "right" etc. are omitted except where these are important context – e.g. if someone was hesitating/saying "erm" because they were about to discuss something potentially controversial. Similarly, square brackets are used to assist the reader. Where the text within square brackets is in italics, this is a paraphrase of something an interviewee actually said (to avoid excessively long quotes). Where the text within square brackets is not italicised, it is to clarify something the interviewee said or how it was said. Particular ways of speaking/expressions have also been modified or cut where this posed a risk to anonymity.

Obviously, although fairly satisfactorily sized for a qualitative study, this nonetheless represents a small percentage of the total number of criminal practitioners in England and Wales. Hence, any conclusions should be treated cautiously as to the level of *generalisation* that is possible. That said, it would be foolish to dismiss these findings. It is necessary to reiterate what was said in Chapter 2:[489] that even just one interview can be useful, in that it can show us whether something is possible – by illustrating "the operation of a set of cultural understandings".[490] Thus, whilst we obviously cannot conclude that legal aid changes are having the effects discussed in this chapter *everywhere*, we can conclude that this effect is demonstrably *capable* of happening, and has

[489] Section 2.3.4
[490] Baker and Edwards (n 220) 23

happened, amongst a set of lawyers in various locations, firms, chambers and at many different levels of experience.

The chapter is structured in the following way. First, the interviewees are introduced, so that we can be clear on the experience of each one. Second, the coding system used in response to the themes that each interviewee discussed is set out. Thirdly, the methods of data analysis discussed in previous chapters will be applied to these themes in order to systemically analyse the change in value-sets, (i.e. to the extent that interviewees make "objective" claims about the world and system they work in). We will then conclude our inquiry with the other side of Bourdieu's epistemological coin, the subjective analysis, in the final chapter.

5.2 The Interviewees

In order to maintain confidentiality, the interviewees are referred to by randomly assigned letters: Barristers A, B, etc. and Solicitors A, B, etc. There was also one interviewee who (although not technically a qualified solicitor) nonetheless had very similar experiences; was involved in providing legal advice to clients and running cases in much the same way as some solicitors would have; and had done so for a number of years. For technical accuracy, I refer to them as Paralegal A, but in doing so I do not mean to suggest that they were any less qualified as a criminal law practitioner.

In terms of the diversity of the sample, invitation letters were sent to a variety of different law firms (some exclusively made up of ethnic minority practitioners) and obviously barristers were invited through their inns and the general Criminal Bar Association, so there was potential for a fairly diverse sample. In practice, all but one of the interviewees were white. 7 were female, and 22 were male. For some, law was a recent career change; others had worked in the job all their lives. Obviously, it would have been interesting to have heard the views of a few more women and certainly some more lawyers from various ethnic minorities, but with a self-selecting sample, there is only so much that can be done about this.

The following brief details are based on interviewees' own descriptions of their experience. Further details are provided in the analysis itself. Note that these are deliberately general in

response to specific requests by several to maintain confidentiality by not providing overly precise details.

Barrister A

- *16 years call,*[491]
- *Principally jury trials in the Crown Court.*
- *Prosecution and defence work*
- *At least 90% Legal aid work*

Barrister B

- *5 years call,*
- *80%-90% of time spent in Crown Court.*
- *Level 2 prosecutor*.[492]

Barrister C

- *5 years call*
- *Worked in all aspects of criminal law*

Barrister D

- *Practising for 30 years*
- *Head of their chambers*
- *Dealt with the most serious of crimes: murder, rape, serious fraud, etc.*
- *Purely defence work*

[491] "Call" refers to how long it has been since a barrister has been "called to the Bar". A barrister is "called to the Bar" after successful completion of their university training and can then start to work (initially, for one year, as a pupil/trainee). Hence, how many years call a barrister is is a rough guide to how experienced they are – assuming no career breaks, maternity leave etc.

[492] Scale is 1-4. Level 2 can accept the following CPS work: Crown Court jury trials including theft, deception, assault (ABH and GBH), burglary, possession of drugs and non-fatal road traffic offences – see: CPS, 'Advocate Panel Scheme 2011 Description of Levels'. Available at: <http://www.cps.gov.uk/advocate_panels/application.html> accessed 25th November 2015

Barrister E

- *14 years call.*
- *Almost exclusively crime work*
- *Almost all defence work*
- *However, in the process of diversifying from pure criminal defence into:*
    - *prosecution work*
    - *regulatory and inquest work*

Barrister F

- *No longer in practice, but had 4 years call when they left*
- *Did almost all work in criminal law*
- *Both prosecution and defence*

Barrister G

- *15 years call*
- *On a short secondment in a criminal law-related role, but intending to return to the Criminal Bar afterwards*
- *Worked in all areas of criminal practice*
- *Also had part-time work as a judge*

Barrister H

- *Very recently finished pupillage*
- *Previously had career in international law (but not as a lawyer)*
- *Had also briefly worked in a criminal law solicitors firm prior to being a barrister (but not as a lawyer)*
- *Practised entirely in criminal defence*

Barrister I

- *Very recently finished pupillage*
- *Previously worked in government (but not as a lawyer)*

- *Almost entirely legal aid crime, but the odd private defence case*
- *Just starting to diversify out of criminal defence to prosecution and regulatory work: roughly 20% – 80% split in favour of criminal defence*

Barrister J

- *11 years call*
- *Initially did purely crime (prosecution and defence) but since diversified into doing the vast majority of work on criminal extradition and immigration.*
- *75% legal aid*

Barrister K

- *Junior barrister*
- *Exclusively practised criminal law*
- *Does all Crown Court work*

Barrister L

- *15 years call*
- *Initially did almost entirely crime, but now down to around 15% criminal work, 30-40% if criminal appeal work (different pay structure) included*
- *Almost all their criminal work was defence rather than prosecution*

Barrister M

- *28 years call*
- *Always practised criminal law*
- *Worked in both defence and prosecution*
- *Worked in all areas of criminal law, though now only very serious offences, particularly sexual offences*

Barrister N

- *Worked as a barrister for under 2 years + pupillage year.*
- *Left recently due to finance concerns*
- *Whilst practising, mostly did legal aid work and mainly crime*

Barrister O

- *37 years call*
- *Former head of chambers*
- *Did mainly criminal legal aid work for over 20 years, finishing in 2014. Now does less and less of it due to finance*

Barrister P – Email Correspondent

- *Practised for 1 year in criminal law. Left recently due to finance concerns.*

Solicitor A

- *44 years experience*
- *Did solely criminal legal aid for many years*
- *Began to diversify eventually into civil law*
- *Recently stopped their criminal legal aid work due to finance concerns*

Solicitor B

- *Was partner in criminal law firm for 11 years*
- *Recently gave up partnership (for personal reasons) and now does criminal legal aid work for various firms freelance*
- *Works in all areas of criminal defence (from police station to Crown Court)*

Solicitor C

- *36 years experience*
- *50% criminal work - 50% civil (still legal aid) work (increasingly more civil than criminal)*
- *Does some private crime work, including some private prosecution work*

- *Focused on criminal advocacy in the magistrates court and litigation in the Crown Court. Very little police station work*

Solicitor D

- *Over 25 years experience in criminal legal aid*
- *Does all areas of criminal law (police station to Crown Court)*

Solicitor E

- *Partner in mixed practice firm*
- *Worked in criminal law for around 10 years*
- *Around 10% private clients*
- *Does all areas of criminal law (police station to Crown Court)*

Solicitor F

- *Head of criminal department at their firm*
- *Over 10 years experience*
- *Predominantly publically funded criminal defence work*
- *10% private defence work*
- *A small amount of civil work*
- *Chiefly did magistrates court work and Crown Court advocacy*

Solicitor G and Paralegal A

- *Worked at the same firm and interviewed together*
- *G*
    - *Nearly 40 years experience of criminal law.*
    - *Initially worked as a police prosecutor, but eventually moved into criminal defence firm*
- *A*
    - *Over 25 years experience working in criminal defence*
    - *Worked as a police station advisor and on cases at all levels*

Solicitor H

- *Managing director of their firm*
- *28 years experience of criminal law*
- *Mainly worked in Crown Court as an advocate*
- *70% of firm's work is crime*

Solicitor I

- *Over 50 years criminal defence experience*
- *Formerly did Crown Court advocacy*
- *Now does all magistrates court work*

Solicitor J

- *Managing director of their firm*
- *Firm does purely criminal defence*
- *95% of work is legal aid (rest is private crime)*
- *22 years experience*

Solicitor K

- *Worked in criminal law for over 25 years, initially as a legal executive, but later qualified as a solicitor.*
- *Former partner, now working freelance*
- *Works in all areas of criminal defence (police station to Crown Court)*
- *Does not do Crown Court advocacy (although a qualified solicitor advocate)*

Solicitor L

- *Managing director of their firm (for around 5 years)*
- *Firm only does criminal defence work*
- *95% legal aid, 5% private*

Now that we have got to know the interviewees a little better, it is time to outline the coding system that developed following the major themes they discussed in their interviews.

5.3 The Coding System

The nodes discussed in this, systemic analysis, chapter are:

1. Bureaucracy, Delays and Speed
2. Financial Incentives Affecting Advice
3. Financial Incentives to Take Some Cases and Ignore Others
4. Financial Incentives Against Working Thoroughly
5. Future of the criminal law professions

5.4 Analysis

This section approaches the analysis in the following way. Each node is discussed individually and then the tools identified in Chapters 3 and 4 are applied to analyse any systemic changes. We will then come to a conclusion on this, before doing the same in the following chapter with subjective analysis. This ensures we have the useful analysis provided by the models, but also prevents the discussion becoming prohibitively complex. Obviously, the full analysis and discussion of the tools in the previous chapters should be borne in mind, however, there is also an appendix (Appendix 2 – Summary of Analytical Tools Used) with a short summary of each tool - which the reader may find useful to refer to in following the arguments made in this chapter.

5.4.1 Bureaucracy, Delays and Speed

This was a theme that came up frequently. The systemic picture was of a criminal justice process that was occasionally crippled by bureaucracy and delays, but one that would nonetheless sometimes compensate for this by rushing things. This is a very general coding node, and includes many observations. However, they tend to influence one another and all have an impact on court delays and speed in some way - hence, they are considered in the same section. Delays were chiefly attributed to six factors: 1) and 2) solicitors and barristers not having time to prepare cases; 3) difficulty/reluctance instructing (scientific) expert witnesses; 4) defendants having difficulty getting legal aid; 5) some solicitors delaying choice of advocate; and; 6) an under-resourced court and prosecution service.

Not all of these are directly caused by cuts to legal aid: issues 4 and 6 concern different policy and resources issues, but they are relevant in the sense that cuts to legal aid do not operate in a vacuum. 4 and 7 are therefore important systemic field conditions to be aware of before considering the subjective analysis later and could potentially aggravate other issues with legal aid rates.

5.4.1.1 Solicitors Not Having Time to Prepare Cases

Several noted this as an issue. Intriguingly, barrister interviewees did not appear to really want to paint solicitors in a bad light. Since solicitors are qualified to do advocacy work too (in the magistrates court and, with some extra training, all higher courts as well) they can sometimes be in direct competition with barristers for advocacy work. Hence, it would not have been surprising to encounter some inter-professional mud slinging. However, this did not occur. For example, Barrister B, whilst outlining the problem, said:

I've got solicitors that work all night. They'll stay in the office 'till 11 and go completely above and beyond the call of duty, but then I've got solicitors that don't do that and just leave it… I quite often will have clients where there's no proof of evidence[493] whatsoever and they won't have been in to see their solicitor, there's no instructions and it's for me to sit down on the morning of trial and say: "OK what do you say happened" and start from the beginning… they just don't have the manpower to give each case what it deserves.

Barrister B also spoke about a trend within solicitors firms to use unqualified staff to make up the shortfall:

They haven't got the staff. So you end up with paralegals - which are fine, but they're not qualified lawyers. They can be very young, they can be people who are doing their degree part-time and they can be given quite a lot of responsibility. Which obviously isn't great, because they don't know the ins and outs of it. So you feel their cut indirectly…. a solicitor's job in a criminal case is quite a difficult job and that is being delegated to paralegals, who don't have the court experience to know what issues need to be flagged, what things are irrelevant.

[493] The preliminary document containing the clients'/solicitors instructions to counsel.

Barrister J said similar: *quality goes down, you don't get support from solicitors, you get very unqualified paralegals helping you who are working on just above minimum wage… but it's also a business and people have got to make money out of it. These firms employ 20-30 people, if you can't pay their wages then what are you going to do?*

Barrister K put it even more strongly: *It's rare that you get the whole thing altogether until the morning of trial, which is stressful. The solicitors don't do any preparation really on the files most of the time. They're on all sorts of hard margins. You haven't got the defence statement or a proof of evidence for a client because that would have involved a prison visit and that takes up ages.*

Hence, even the solicitors who don't stay up late into the night are, it is accepted, victims of a lack of staff and economic reality, rather than laziness etc.

Of course, this wouldn't necessarily be a problem if the courts could get underprepared cases into a satisfactory state on the day, however, many claimed this wasn't always possible:

Barrister B: *"if I ever see a case that's in such poor state that it's not ready for trial, or it needs an expert or it needs something doing that hasn't been done, I'll just ask for an adjournment and usually I'll get it… judges obviously don't just want to have trials that are palpably unfair*."

The extent of delays caused by this could vary from an hour, to six weeks:

If you get there and they haven't edited the interview, you just say to the judge "listen, I need an hour, this interview's not been done, I'm gonna go and do it". You run into difficulty when you form the view that something needs to be done that's gonna take six weeks, because then you're there, the jury are there; you haven't got 6 weeks.

Barrister B gave the examples of challenging expert evidence and arranging interpreters as things that could not necessarily be sorted out on the day. They then continued:

if the judge refuses to do that [adjourn] *and the person gets convicted, it may be a ground of appeal… you can say "well, I asked for an adjournment for a DNA expert or an interpreter and it was refused and the trial was unfair".*

On the other hand, Barrister K was more sceptical as to the chances of getting adjournments, they usually had to play "catch up" and pull it together on the day:

Once I got there I could cross-examine the first prosecution witness and catch up with the case as I went, which is what you do in that situation. We do manage to pull it together, actually - I mean, I haven't had a situation where I haven't pulled it together. And certainly, you cannot ask for an adjournment or anything of that nature. If it's listed for trial, that's what's going to happen that day, or it'll crack [the defendant pleads guilty/prosecution drops the case].

Barrister L also picked up on this idea of having to, in their words, "wing it" as a result of adjournments being difficult to get:

the less conscientious [firms] *will give you something the client's drafted at home on his own, which he hasn't gone through with them… and if you're lucky the client might be clever enough that they've given you the information that you really need, and if you're unlucky you'll be, sort of winging it at the court trying to get 15 minutes here or there to ask questions to try and make sure you're able to ask the right questions of the witness and keep the trial on track. Things get done, but just not done properly* [laughs]*, or sometimes not done... people are trying to cut all the corners they can.*

Interviewer*: is the trial always going ahead?*

Barrister L*: Well, there's always an impetus to try and keep a case on the tracks, but the reality is that on occasion it will have stopped things going ahead, or maybe that they take much longer… The efficiency of the courts is not helped by making criminal solicitors struggle to make a living.*

On the solicitor side, there was much agreement, for example:

Solicitor A: *you either do the job properly and lose money or you don't do the job properly - and the alternative perhaps for some is to work evenings and weekends as a matter of ordinary routine, but you end up so tired that you can't really do it.*

Solicitor B: *at the end of the day this is a business, so what's happening now is that you're getting what I would describe as bare minimum preparation… and it's very difficult to motivate yourself if you can get away with bare minimum preparation.*

Solicitor E was another interviewee who mentioned this, but was more cynical than Barrister B as to the ability of an appeal to always put things right: *we really do still do it properly, but a lot of firms now, they'll pick up the case and you're talking minimal minimal work on it. They're not really looking at any of the legal issues, they're just sending all the papers to the barrister: "you sort it out". The barristers, it's going from one to the other to the other and no-one's <u>really</u> getting to grips sometimes with the very important issues that are going on, so then you can get to the day of trial and actually you realise "oh, there's <u>this</u> really important issue, there's <u>this</u> really important witness or expert that we should be having". So the trial either gets derailed which really pees off the Ministry of Justice, or it doesn't get derailed and it goes ahead without this person having a vital part of their case ready!*

Interviewer: *And so in that situation is there any possibility of an appeal if it transpires later "oh, they actually should have had that work done" and it wasn't?*

Solicitor E: *If you're convicted at the magistrates court you can automatically appeal at the Crown Court, so you could easily do that there. But if you're convicted at the Crown Court it's very difficult because just saying "my trial representatives were crap" - not really gonna be enough for a ground of appeal, you're gonna have to show that they were really really <u>really</u> crap. This guy I was just on the phone to, he feels very <u>very</u> let down by his trial representatives and I can see why, but I keep saying to him "that isn't gonna be sufficient to get you a ground of appeal". So no, you can't necessarily put right what happens at trial.*

Solicitor B particularly also picked up on Barrister B's paralegal point:

There's a big difference between somebody like myself who goes to court and does the trials day in day out and knows what points do and do not work in court – and of a caseworker who would never have that experience and therefore doesn't understand that what looks like a great point in the office sometimes is a terrible point when it comes to court.

The adjournment issue was particularly acute for magistrates court cases. I asked Solicitor B if preparation problems in these cases could be fixed by the time they got to court:

You can't, it's too late. The number of times I've looked at a case and said "well why haven't you asked for this, and this CCTV, and have you asked this person to give a statement, and have you investigated what the police officers have done with that witness who's missing?" "Have you asked the supermarket", for example, "what their position is in terms of their staff and security guards?" and these things just don't get done. They just do not get done.

Interviewer*: and there's no question of getting, say, an adjournment to go away and do it then?*

Solicitor B: *no, because adjournments in the magistrates court are a thing of the past - by and large.*

Since barristers suffer from the same issue, we will consider that next, before analysing both of these issues.

5.4.1.2 Barristers Not Having Time to Prepare Cases

Solicitors were not the only ones said to have a lack of time to prepare. Barristers too were reported (from both solicitor and barrister interviewees) to be suffering from similar issues in terms of their ability to prepare cases on tight margins, for example:

Barrister H: *They got the papers at 6.00pm; they have to be in court tomorrow morning at 9.00am. Some of these matters can be complicated.*

Solicitor E: *you might have a barrister who's picked it up that morning and they just simply have not done the preparation, they haven't got the time to read it because they just got it and they've got their own families and their lives and actually there's some pretty complex issues.*

Solicitor B: *there was a time when barristers took great pride in the preparation they did pre-trial. I cannot tell you the last time I saw an advice from counsel. There was a time in my career whereby you'd brief a barrister, the barrister would send you an advice on evidence and you would then use that advice on evidence as a blueprint to prepare your client's case. That's gone.*

Barrister J contrasted this with the experience a private client might get:

I represented somebody recently, but the fact that I was privately funded meant I got the papers at the first appearance. I could meet the client for a conference. We could prepare a proper defence. We had a video of what had happened at the scene. The prosecution barrister, who was very experienced, got the papers the night before and hadn't been able to look through them, hadn't been able to plug any of the gaps in his case, and it was that that made the difference. It wasn't my brilliant advocacy… well, partly my experience, but mostly it was the fact that I'd been able to prepare the case properly and that was all I was doing on that day. I wasn't running around trying to make ends meet by doing 16 other things - because that's how barristers keep doing legal aid work. If you're in a good enough chambers, there is enough work. You can go down to court and do six or seven hearings in a day at £46.50 or £50 or £100 and actually then the days become profitable enough to keep yourself afloat.

If it's a private case, you pay me to turn up and do the case. I'll turn up and I'll sit there and I'm yours for the day. For the two days, three days, five days, however long your case takes. I'm not going to then go and take two Mention Hearings in court three or another PTPH in another court or try and fill in the gaps to make more money, because actually I'm being paid properly and I can concentrate on one case. And I think it makes a lot of difference.

There was, again, some mention of it occasionally being possible to get adjournments as a result of lack of preparation time:

Barrister M: *what actually increasingly happens, instead of staying up until the milkman arrives to get it ready for Monday morning, you'll say, 'Well, I've just had this material,' and the judge gives you until Tuesday afternoon. So, you're on day one or two of the trial doing that which you could and should have done, if everyone else had had their ducks in a row, weeks ago.*

There were two reasons given for this lack of time:

1. The barrister received it late themselves because:
    a. the case is financially undesirable (see 5.4.4),
    b. the CPS and/or police have not provided all the evidence to the solicitor and/or the firm was delaying the choice of advocate (Barrister M and see below discussion: 5.4.1.6 and 5.4.1.7)

2. The barrister has to do so much else in order to make a profit (Barrister J)

Both of these are influenced by legal aid finance, albeit that lack of prosecution finance also allegedly plays a part. Indeed, as Morrison and Leith noted from their interviews, balancing time "dictates much in the life of the barrister". Finding (or making, by reducing preparation) sufficient time to be in certain places at certain times is the difference between having a sufficient volume of work (and therefore being busy and successful) and not.[494] In crime, the lower fees are, the more cases need to be squeezed into that same block of time to stay at this level.[495]

5.4.1.3 Analysis of Solicitors and Barristers Not Having Time to Prepare Cases

It is interesting to note here that what on its face might be considered a denial of a defendant's *Due Process* rights sometimes reveals the *Due Process* rights to be alive and kicking - to the point where *Crime Control* and *Bureaucratic* concerns lose out. Both Packer's *Crime Control* and King's

[494] Morrison and Leith (n 65) 19
[495] Ibid. 43-44

Bureaucratic models would take issue with these delays. In particular, Value 2 of *Crime Control*, efficiency of the process, would be undermined along with Value 3, the faith in administrative fact finders (who provide the DNA evidence the defendant wants to challenge etc.). Similarly, we might say that this closely resembles the *Adversarial Reliability* ideal type, in that the tribunal is considered the only way to effectively test the case against the defendant and if adjournments are required for that, so be it. Both Roach's *Rollercoaster* and *Circle* victims too would obviously lose out in such a situation – they are ready to give evidence and then, thanks to inadequate prep, the case gets adjourned and victims' time is wasted. Applying Walker and Telford's Meta-model provides for an interesting result. Adjournments of this kind impact the institutional values of *Audit* (time and money is wasted), *Professionalism* (solicitors are unable to provide the preparation that courts require) and *Reflexive Coherence* (defence litigators are one part of the system, the courts are another), whilst ensuring that *Due Process* is not undermined. This would appear to set back ultimate objective: *Economy*, as well as all of the others (*Security, Equity, Equality, Participation and Legitimacy*) to an extent due to the impacts on *Reflexive Coherence* and *Professionalism*.

This was somewhat inconsistent though. As Barristers K and L pointed out, often they could not get their case adjourned and certainly, per Solicitor B, not in the magistrates court. Equally, appeals against conviction only *sometimes* follow and, as Solicitor E pointed out, where the refusal is less blatantly unfair, inadequate prep can slip through the net, but nonetheless impacts a defendant's *Due Process* rights. In that situation, the exact opposite effect (in terms of systemic values) occurs to that just discussed. And of course, since this is to an extent that a defendant with private funding would not need to worry about, there are the additional setbacks in a general sense to the various models' values of Equality (the Meta Model treats this as an Ultimate Objective, and it is also one of the vales of the *Due Process* model – though conversely, as Barrister J's comments particularly highlight, this would please the proponent of King's *Power Model* on the basis that it is the poor, who cannot pay privately, that are negatively affected here.) Barrister J's comments provide a very stark illustration of this difference between private and publically funded representation in action.[496]

[496] It is tricky to speculate whether more people are representing privately. It is true that there has been a long-term downward trend in overall criminal legal aid workload; however, it is also necessary to take falling crime rates into account – see Legal Aid Agency, 'Legal Aid Statistics in England and Wales October to December 2016' (2017) 9-18. Defendants outside the legal aid system may also self-represent rather than pay privately, which, as we shall see, may also be on the rise.

5.4.1.4 Difficulty/Reluctance to Instruct Independent Experts

This is another, very similar limb of the bureaucracy and delays node. Barrister E pointed out a growing reluctance from solicitors' firms to instruct independent experts, alongside reluctance from the LAA to provide funding for them:

It's more and more difficult to get those reports, partly because the people that ultimately decide whether you get the funds to do those reports are tighter than they ever used to be… so you are less likely to be able to challenge prosecution evidence by way of your own expert evidence than you used to be… and it takes up a lot of time for the solicitor, they have to source experts, they have to find them, identify them, instruct them and they just don't get paid enough money to do it properly and as a result it just doesn't happen as much as it used to.

In other words (as I put it to Barrister E in interview, and they expressly agreed with):

Interviewer*: It's a fight for defence barristers in two senses, because, number 1, it's hard to persuade the Legal Aid Agency to fund experts in the first place and, number 2, your solicitors are less keen anyway because they don't get paid that much for all the effort of sourcing, interviewing etc.* This was not idle hypothesising. Clearly this issue had been on Barrister E's mind that day:

The case I've literally just finished today, which is a sentence on a robbery case where the client is 16 ... to be honest I would have liked to have got a psychological report on my defendant but it would have been, but it's one of those where it would have been very difficult.

Barrister O noted an additional problem with this issue:

At the moment, the defence are being forced to put up with whatever the prosecution expertise is. It's very difficult unless they've got it massively wrong to get permission to instruct another expert or to go back to the expert who was instructed by the prosecution. I think, try as you may, experts are like anybody else. They're not automata. The stance on which they first approach a question and the people who regularly are funding them, can sometimes colour their approach to an investigation and the answers they give. I'm not saying they're dishonest, but it's just human nature. There is a sense that they're part of a [prosecution] *team.*

Solicitors B and E explained why instructing an expert was unattractive from a solicitors' perspective:

Solicitor B pointed out how firms pay the expert up front and this results in a cashflow problem: *They have to pay out the disbursement and then carry it on their firm's ledger for at least another 4 or 5 weeks. Doesn't sound much, but you extrapolate that over several cases and you can see why it might become a headache.*

Solicitor E explained how instructing an expert also involved a great deal of extra work: *We went through about five psychologists before I had someone who would do it for the money that the LAA are offering. So I'm spending loads more time – which is unprofitable out of my fixed fee – finding an expert.*

Solicitor E raised a similar point to Barrister O: *I had a case which was all about whether my client had nicked a car or not, and we had a "streamlined"* [prosecution] *forensic report saying "your client's DNA has been found on the airbag of the car." So you think "mmm, well on the face of it that's quite compelling evidence." Got my own expert to look at it and she said "this report's an absolute load of crap." Basically, they're doing things on a shoe-string from a prosecution point of view and unless you go and get your own expert to test it - which again is more expense and time for us - you could rely on it and actually it doesn't say what they've said it says. So it means that the guilty plea that might have followed if we had a proper report takes much longer to get to.*

Here we can clearly see a situation where, had the defendant been paying their defence team privately, there would have been no difficulty getting an independent expert in. The difficulty stems from the reluctance of some solicitors to spend the amount of time required on experts (ostensibly because the legal aid litigator funds paid by the government have been reduced to such an extent) and because of the LAA being reluctant to pay the expert. Both of these would be non-issues if the defendant were using private funds. Again, whilst the *Crime Control* value of faith in administrative fact finders is enhanced, the *Due Process* value of equality is infringed (alongside the Ultimate Objective from the Meta-Model – and, again, the *Power Model* approves because

this only affects the poor), but this also goes against King's *Medical* model. The role of the expert in the *Medical* model is key, since they can provide a source of "diagnosis" and suggestions on "prognosis" and "cure". Less willingness to use experts can only upset the proponent of the *Medical* model. We might also say that this contains similar assumptions to those of the *Operational Efficiency* ideal-type. In the interests of speed, we can negate the scrutiny of the court. This is based on the assumption of the *Investigative Efficiency* ideal type being true: we can have absolute faith in administrative fact-finding and thus can dispense with experts. Of course, we know that *Investigative Efficiency* (absolute faith in the police) is not entirely true and, to that extent, application of Macdonald's ideal-types suggests this is an approach based on a false premise. On the other hand, as Solicitor E pointed out, this can sometimes mean that what would have been a quick guilty plea, sometimes takes longer, which would have the opposite effect. Again, there is a sense of inconsistency.

5.4.1.5 Difficulties Being Granted Legal Aid in the First Place

The next issue to consider under the bureaucratic umbrella is applying for legal aid. Barrister A pointed out how this was an issue:

Self-employed people invariably have that many more hoops to jump through before they can get public funding granted to them.

Continuing the example of a self-employed defendant, Barrister A pointed out the practical effect of this would be delays:

In the event, he instructed a solicitor privately - but if he didn't have the funds for that and if he had asked for an adjournment to give him another couple of months to secure legal aid, I think the judge would probably have granted him that because judges are reluctant to see people tried without representation on serious charges… and the knock-on unavoidable consequence of that is that the victims wait longer to have their day in court and the quality of their evidence is diminished – undoubtedly. There are countless examples of cases where the defendant or suspect has either struggled to get legal aid or has not got legal aid and that's led to a delay in court process.

Barrister K also pointed out how difficult it could be: *Your heart sinks when someone says they're a self-employed plumber because you just know what's going to happen.*

Similar comments were present across the board. Solicitor E provided some particular examples of the difficulties:

Classic situation. You've got a plumber who's assaulted his wife. He gets remanded because he can't go back to the home. She's not going to give you a single piece of information - and you wouldn't ask her to because it's not appropriate – so how on earth is this man supposed to apply for legal aid? You're trying to [sigh] "who did your books last?" [impression of client] *"uuuuhhh dunno", trying to find a bookkeeper, trying to get hold of some accounts – it is a complete nightmare.*

Frequently they have to do it themselves even in a trial. Which holds up the whole court process. There never used to be anyone unrepresented at the Crown Court, but that is becoming more of a phenomenon now. I was just at a course [recently] *and the course guy was saying that he had a Crown Court case where the bloke had such complex self-employed finances that every firm just said "no we won't represent you". So he was just stood in court for a GBH saying "no one will represent me and I can't afford anybody…"*

Interviewer*: and in that situation, did the trial just go ahead?*

Solicitor E: I think it got adjourned again, while the judge tried to scrabble around to find somebody who would do it. So witnesses had to be put off.

These findings are in line with recent, but controversial, research suggesting that the number of defendants being granted legal aid is falling and the number self-representing is increasing.[497]

[497] Polls of both magistrates and prosecutors suggest large increases in self-represented defendants across the board, however there are no official figures on unrepresented defendants in the magistrates courts and official Crown Court figures suggest there has been no change in the last 5 years: Gibbs (n 258).

MoJ Statistics do show a fall in representation orders being granted since from 2013 to 2017, but it is difficult to separate this from the effect of falling crime rates: Legal Aid Agency, 'Legal Aid Statistics in England and Wales October to December 2016' (2017)
The MoJ controversially decided not to make their own, more recent and detailed, report into this phenomenon in the Crown Court publically available: Monidipa Fouzder, 'MoJ refuses to publish research on unrepresented defendants' (*Law Society Gazette*, 31 March 2017) < https://www.lawgazette.co.uk/law/moj-refuses-to-publish-research-on-unrepresented-

They also reflect Kemp's 2010 qualitative interview comments with solicitors (particularly in regards to the self-employed)[498] and quantitative data from defendant polling. Kemp found that a substantial number of defendants surveyed (18%) were unrepresented in the magistrates court on financial grounds.[499] Of course, this is not necessarily about the legal aid changes under discussion here (the drying up of legal aid availability by virtue of the LAA's process for analysing claims is a separate issue from the level of funding paid to defence lawyers), however, following the previous discussion; they arguably aggravate the previous issues and sometimes lead to further delays in themselves. To that extent, they are relevant field conditions to note here. If lawyers are overworked to the point where their preparation is sometimes below what is required to run a trial and if they are less inclined to instruct experts, then, as Solicitor E noted, they are also less likely to have the time or inclination to deal with sorting out this sort of client's legal aid.[500] Hence, Barrister A's defendant's decision to pay privately. Of course, if this self-employed client was not doing so well and did not have the funds, then, as Barrister A pointed out, there would have been delays. Again, we move full circle from an example of *Due Process* rights sometimes being trampled on by going full steam ahead with the trial (legal aid being granted or not), to them sometimes being vindicated at all costs - even at the expense of victims (and also *Crime Control*, because the quality of the evidence found by administrative fact finders – victim testimony – is being diminished.)

5.4.1.6 Delaying Choice of Advocate Until as Late as Possible

The issue of *some* solicitors delaying the choice of advocate until late is a similar problem and, to an extent, is aggravated by the earlier issue of a lack of time to prepare cases due to funding cuts. In order to understand this, we must first understand the "swings and roundabouts" analogy. It will be recalled from the introduction that criminal legal aid works by a system of fixed fees for certain categories of work.[501] The analogy is a reference to how the fixed fee system economically works: the idea is that you take on a variety of cases, some of which end up having an effective hourly rate that is poor and some that have an effective hourly rate that is generous.[502] The idea is that the two balance out. For example, there is one fixed fee for doing the advocacy work for a

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defendants/5060489.article> accessed 7 April 2017. Given what Gibbs' and my own research suggests about this, it is certainly interesting to speculate about why the MoJ did not publish their report.

[498] Kemp (n 116) 70-71

[499] Ibid. 63

[500] See discussion of "the junk case phenomenon" at 5.4.4 and in Chapter 6, 6.2.2

[501] See Chapter 1

[502] By "effective hourly rate" I simply mean you take the fixed fee for that case and divide it by the number of hours actually spent working on it.

guilty plea for the offence of causing grievous bodily harm with intent. Because some cases of this have more complex facts than others, some cases will require much more work than others - despite the fact that they have the same fixed fee. Equally, some cases will be factually very simple and not take very long to deal with. For example, compare the following (fictional) situations of two guilty pleas:

Case A: The defendant pleads guilty to an offence under s18 of the Offences Against the Person Act: intentionally causing grievous bodily harm. There is very little mitigation to be done, but the defence barrister does her best. Nonetheless, the sentencing hearing is done in under an hour.

Case B: The defendant pleads guilty to the same s18 offence. However, the defence barrister discovers a goldmine of mitigation factors to consider, but this takes six (higher than six would lead to a graduated fee) hours of conferencing and investigating to ascertain.

Both of these cases would (as indictable only offences) end up in the Crown Court, but clearly the second situation is going to take more time to deal with. Despite this, a (non-QC) barrister dealing with this would, under current fee levels, earn £694 for their trouble for both offences.[503] In effect, they earn six times as much (per hour) for Case A than they do for Case B. You can earn six times as much by doing six Case A's in six hours than spending those same six hours on one Case B. The same phenomenon occurs for litigation work done by defence solicitors.

The "swings and roundabouts" analogy says this is OK because these two will balance out to provide the lawyer with a reasonable rate. If some solicitors hold onto cases they think will provide easy guilty pleas and give out the more complex (and thus, with a relatively poorer effective hourly rate) work to the Bar, then this system becomes skewed.

The claim is that a solicitor will not brief a barrister in a case like Case A until very late because they are hoping that the client will plead guilty, or (if it goes to trial) that the case is a simple one. A guilty plea is something that can be dealt with fairly quickly and easily and hence a firm may be quite keen to keep it in-house in order to claim an extra fixed fee for what is not a great deal more work (since they are already familiar with the case). This is not limited to guilty plea cases either,

[503] Criminal Legal Aid (Remuneration) Regulations 2013/435 (as amended), Sch 1, Part III, Para 8, Table A. (GBH with intent is classified as an offence justifying a class B fixed fee – see Sch 1, Part VII, Para 1.)

since some trials for quite serious offences (with consequently high fixed fees) can end up being relatively simple to conduct, whereas some more minor offences can be very difficult and complex. Barrister B gave the example of a rape trial where the only issue is one of identification: did the victim pick the right person in the ID parade or not? vs a harassment case (a relatively trivial offence), with huge amounts of phone evidence to sift through, legal issues, witnesses abroad, children in care etc.

Barrister A described the overall problem thus:

If you're a solicitor and it's a long drugs case or something and you have a feeling that it probably will end up in a guilty plea, I can understand why they do that. If the solicitor is doing their job properly and are preparing it for trial then the client's interests needn't be prejudiced by late instruction of a barrister.

Barrister B also noted this phenomenon:

Some solicitors from less scrupulous firms will keep it in-house until the door of court, thinking if he pleads guilty we can send our own advocate and then we get the brief fee as a firm… and then it turns out that they're not going to plead guilty, they're completely mad, their families need loads of TLC, the case needs an advice, there's loads of work, it's going to be a nightmare, there's twenty police officers coming to give evidence… and their in-house advocate takes one look at it and thinks "well, we'll just brief that out". And you get these kinds of mess of a case the week before… the cuts have exacerbated it because obviously, the solicitors are looking to lower their margins wherever they can.

Barristers E and K said much the same, E: *you get a lot of cases these days where solicitors have taken on a case, they think they might do it in-house and it's quite serious and at the last minute they realise that they're not really capable of doing it… and normally you would have had that case from its outset (so you may have had it for 4 or 5 months) now you're getting it a week before trial when the solicitor suddenly decides they're not really up to it*

Barrister K: *I rarely get a case early enough for me to make any significant difference to it.*

Obviously, only some firms do this. Again, this is not a case of mud slinging between rival professionals. As Barrister D put it: *Some criminal sets of solicitors do it, some don't…. it depends on their individual sort of morality really.*

When I asked Solicitor B about this, they also agreed that this was a problem:

I know of at least one firm who basically take as much as they can… their modus operandi is that they run the cases to as late as they can and then they just at the last minute pass it over. It really is, I mean, I absolutely endorse what the barristers are saying there. It's disgraceful.

To reiterate, the claim is that a solicitor will not brief a barrister in a case with a high effective hourly rate until very late because they are hoping that the client will plead guilty, or (if it goes to trial) that the case is a simple one. It is important to note here that this needn't (necessarily) be a problem *in terms of the criminal justice process* - [504] as Barrister A was quick to point out, if a solicitor is preparing correctly this need not be a problem. Unfortunately, as we have seen above, cuts have already put solicitors under pressure to the point that, at the best of times, there is sometimes not enough time to prepare all cases properly. The financial incentive to delay like this therefore serves as an aggravating factor to the above models discussion on insufficient prep.

As Barrister A put it: A*s litigators' fees are cut, that will only encourage that to happen more often, inevitably.*

Barrister K provided an example of the problems this caused in terms of the criminal justice process: *I got a call at 4.30pm to say you've got a trial in [city] tomorrow and it's a Section 18* [Grievous Bodily Harm with Intent] *and the brief is being emailed through. There was no proof of evidence from the defendant. They had given a no comment interview. There was no defence*

[504] It is a *personal/financial* problem for barristers because they are losing out on lucrative fixed fees and receiving trial instructions at the last minute, which makes their working lives difficult. The fairness of such an approach as this between the two professions is not relevant to the discussion here, except to note that inter-professional bitterness risks upsetting *Reflexive Coherence*.

statement ever served. I therefore had to go to court, grab my chap in the cell, find out what his defence was and make my own notes, which is not ideal. You don't really want to be doing that on the morning of a trial.

Before leaving this particular issue, it should be noted that this also triangulates somewhat well (or at least, does not contradict) with fairly recent quantitative data. Quantitative data from the MoJ, highlighted in a report by Sir Bill Jeffrey, suggested that the level of publicly funded Crown Court advocacy work conducted by solicitor advocates has increased dramatically: in general, from 4% to 24% from the years 2005/6 - 2012/13 and from 6% to **40%**, for guilty pleas, over the same period.[505] The claim that solicitors firms are doing more Crown Court guilty pleas than they used to is thus backed up by further evidence. On the qualitative side of things, Sir Jeffrey also visited Crown Court Centres and spoke to judges and advocates – both of which reported similar concerns about delayed instructions to those of my interviewees.[506]

5.4.1.7 Under-resourced Courts and Prosecution Service

Much like issues with being granted legal aid in the first place, an under-resourced criminal courts and prosecution service is not strictly within the remit of the research question. The amount of funding provided to these is a separate issue to the funding provided to defence lawyers. Nonetheless, defence lawyers do not do their work in a vacuum and it would be misleading to pretend otherwise when analysing the data. Funding provided to defence lawyers might agitate issues caused by courts and prosecution service funding and, equally, an under-resourced court and prosecution service may agitate issues raised by defence lawyer funding.

Barrister A described a backlog of cases in the courts:

What there is a lot of is… a lot of low-level stuff; two to three day trials which often turn on one person's word against another. And all the courts have backlogs of these going back many

[505] Sir Bill Jeffrey, *Independent Criminal Advocacy in England and Wales* (MoJ 2014) 5 and 19
Though note that levels of remuneration paid were expressly excluded from his terms of reference by the MoJ

[506] Ibid. 56, though Sir Jeffrey considered late instruction to be down to four factors, rather than just the tendency of defence solicitors to hold onto cases in the hope of a guilty plea. Other relevant factors were barrister diary clashes, Crown Court listing practices and *the CPS* instructing advocates late too.

months, but that's often because the courts themselves are operating on reduced capacity: fewer judges, fewer members of staff, so less space to process through their backlog.

Similarly, Barrister B drew particular attention to the Magistrates courts: *I did a year in the magistrates court and it was hilarious*. *It's just chaos. There's just so many cases coming through that you're really up against it, but I quite enjoyed it.*

Barrister B also considered this to be an issue in the Crown Court:

If you get given a date for a trial it won't necessarily come in, so if the court's full that week, you go off for a different week. I've got a sexual assault, where the complainant's quite vulnerable… and it's had three of four trial dates… and it's just not been met, it's been going on now for over a year.

Solicitor B and Barrister H also noted a similar issue in terms of courts not being maintained and how this could also lead to delays:

Barrister H: *In some of the cases they're disgusting and I think it's a bit of an embarrassment. Like if you go to [London Court X] or [London Court Y] or [London Court Z], God, some of those places I don't think have ever been cleaned. The lifts don't work. The bathrooms are broken. If the facilities were in better condition it would probably just make the whole process easier for people. They really are pretty woeful.*

Solicitor B: *You go to courts these days, they've got chairs that are broken, they've got things that don't work, issues with flooding. No one's investing in the courts themselves. No one's investing in the court staff, who are demoralised and don't answer the phone etc.*

A similar story was presented about the prosecution service, some barrister interviewees in particular could give a useful perspective on this since many of them did prosecution work as well, but even purely defence practitioners could see it:

Barrister M: *The CPS are fire-fighting; they have no real joined up approach to looking at cases. As people leave and are not replaced due to cuts you've got lawyers with a caseload sometimes three figures and so they end up fire-fighting. They haven't got time to answer letters because they're just jumping from case to case dealing with problems. And it's not their fault because they're being effectively set up to fail: there aren't enough people, never mind enough good people, to actually make the system work. Little things make a huge difference. If there's no one in the CPS room because they haven't got enough people and the photocopier is broken, then the case you're trying to present comes to a halt. I prosecuted on my own a five-handed drugs case some years ago, and it was five weeks of sheer, unadulterated hell, with the judge giving me a hard time in circumstances where I had no support*

Barrister K*: the cuts that have been made to the CPS have, basically, pretty well halted it. There are parts of the country where it barely works at all [city] is particularly bad and so indeed is [city in different part of the country]*, *where you can be certain that important bits of the case are missing and then there will be a sudden panic and a flurry of stuff uploaded just before the case. It's as though nobody is worried too much anymore about dates of service or anything like that. We're all just going "okay, well"… the whole thing feels like it's run on the seat of your pants.*

Solicitor I: *The big waste of time is the prosecution and police just don't get stuff ready. Statements served, disclosure made and witnesses brought, they don't bother with that.*

Barrister D: *Trying to get papers from the CPS is really difficult, within a particular time period, people have to wait.*

Barrister G: *[as a prosecutor] you are stretched very thin as I say. A lot of work that should have been done before court hasn't been done by the time you get to court, and so a number of knock-on effects for that: one ultimately is that obviously where things haven't been prepared properly there might be a delay in any trial.*

Now, notwithstanding the fact that Barrister B clearly enjoys the challenge of a chaotic court system, in terms of impacts on the process it is not hard to see why this might be a problem. Obviously, as noted at the start of this sub-section, applying the models to these observations in themselves would be to go beyond the scope of the research question. However, we can say that, at the very least, this might well aggravate the issues we have already seen in this section and the delays caused are another field condition to take into account when analysing the behaviour of defence lawyers.

5.4.2 Final Thoughts on Bureaucracy, Delays and Speed

In terms of analysis, the overall picture from this section, which the toolbox approach allowed us to see, is an occluded one: no particular value-set is promoted overall. Rather, they are all set back and enhanced at various points in an arbitrary way. This matters in the sense that, as a judgment of the field in itself, we might say this is an unacceptable state for the criminal justice process to be in. Whether we prefer *Crime Control*, *Due Process* or something else, we might at least hope that the values we think are important are considered sometimes. However, as we have seen, the issues described in this section are mostly bad for all the models. Similarly, we can say that privately paying defendants getting a vastly superior service compared with publically funded ones (see 5.4.1.2) and delays in the system are unacceptable in themselves. Going beyond simply commenting on the state of the field, it also suggests that, whatever habitus might be of high symbolic capital for a defence lawyer to have in this field, it is not one that accords with any of the conventional understandings of what the process ought to be about (represented by the various tools in our toolbox). Finally of course, there are also the immediate practical problems: delays waste time and taxpayers' money.

5.4.3 Financial Incentives Affecting Advice

This particular node is of great interest for our analysis of the interviewees' subjective value set as well, however it does contain several observations useful for a systemic analysis. In terms of systemic values, the trouble with this node is that, again, it revealed an approach that was unprincipled and random. Interviewees were perfectly happy to frankly discuss what they saw as financial incentives to advise some course or another, but the incentives did not point in one direction. Rather, sometimes it was in their interest to encourage guilty pleas and sometimes in their interest to encourage not-guilty pleas.

5.4.3.1 Elected Crown Court Trials

The first major incentive picked up by the interviewees was the fee for certain Crown Court appearances. Many mentioned this issue (solicitors and barristers), e.g. Barrister B: *If they're sent there [to the Crown Court] by the [magistrates] court, you get the full cracked fee, but if you choose the Crown Court and you change your mind, the fee to your lawyers is miniscule. So if people elect and plead, that, for a lawyer financially, is bad, but can be for the client the right course of action.*

Barrister B is referring to Part 4 of Sch 1 of the remuneration regulations.[507] Paras 9 and 10 set out a scheme whereby if you have a cracked trial in the Crown Court after the defendant has initially pleaded not-guilty and elected to be tried on indictment, despite the magistrates being happy to try the offence summarily, then both advocates and litigators receive a fixed fee and nothing more. The exact amount for the advocate is: £194.[508] This particular fixed fee was first introduced in 2011[509], so around the very start of the period of changes this work considers. In that sense it is part of the "legal aid changes" itself, but of course, it is important to bear in mind that the temptation to succumb to financial incentives like this might also be aggravated by further cuts in litigator fees introduced in 2013,[510] 2014[511], 2015[512] and beyond.[513]

In terms of systemic value-sets, this is good news for the *Crime Control* model adherent. Financially punishing defence lawyers if their client pleads guilty at a later stage will hopefully provide an incentive to get them to make sure their clients plead guilty at the earlier stage. This would increase efficiency of the process (Value 2) and is the natural consequence of faith in the presumption of guilt and administrative fact finders (Value 3). In other words, the police and prosecutors say they did it, therefore they did do it and therefore we ought to punish those

[507] Criminal Legal Aid (Remuneration) Regulations 2013/435, Sch 1 Part 4, paras 9-10
[508] ibid. para 10
[509] Criminal Defence Service (Funding) Order 2007/1174, Sch 1, Part 3A, paras 7A and 7B
as amended by Criminal Defence Service (Funding) (Amendment) Order 2011/2065, art 12
[510] Criminal Legal Aid (Remuneration) Regulations 2013/435
[511] ibid. as amended by Criminal Legal Aid (Remuneration) (Amendment) Regulations 2014/415
[512] ibid. as amended by Criminal Legal Aid (Remuneration etc.) (Amendment) Regulations 2015/1369
[513] Litigator and Advocate Graduated Fee Schemes MoJ Consultations (n 15)

lawyers who do not advise these obviously guilty people forcefully enough to plead guilty early on. If some innocent people are encouraged to plead guilty when they aren't, then this is just unfortunate (but necessary) collateral. After all, the *Crime Control* adherent believes freedom of the individual from crime to be the justice system's paramount consideration (Value 1).

This is also another example of a policy based on Macdonald's *Operational Efficiency* ideal-type (courts must run as quickly as possible) without the other ideal-type that it is built upon (*Investigative Efficiency* – absolute faith in administrative fact finding) being factually true – no-one has *absolute* faith in administrative fact finders. Mistakes can be made and innocent defendants can lose out.

In terms of King's models, this would be of particular appeal to the adherent of the *Bureaucratic* model, since it encourages quick resolution of cases at the magistrates court stage. On the basis of a lack of equality (if the client pays their lawyers privately, then there is no financial punishment for their lawyers at whatever stage they end up pleading), this would also please the proponent of the *Power* model, as it helps keep the poor defendant in their rightful place.

Walker and Telford's Meta-Model raises similar issues. The focus on early guilty pleas puts emphasis on the institutional value of *Audit* and, by extension, the Ultimate Objective of *Economy*. Conversely, it sets back Institutional Values: *Due Process, Appropriate Disposal* and *Professionalism*. This suggests setbacks to Ultimate Objectives: *Security* and *Equity*. However, in this case it is important to question the links. It is hard to see how this policy sets back *Security*. The link to a setback to Security comes from Institutional Value: *Appropriate Disposal*. Sometimes this can set back *Security*, for example, if someone dangerous is not sent to prison, this is an inappropriate disposal and also a security issue. However, it is hard to see how this policy does, hence we ought to focus on the setback to *Equity*. Nonetheless, the Meta-Model still shows us how this change shows a shift in systemic values towards concerns of *Economy*, at the expense of *Equity*.

Finally, what about victims? Roach's *Rollercoaster* proponent would not be pleased by this policy, since the model rejects guilty pleas as a satisfactory solution and has a lack of trust in administrative fact finders. The *Rollercoaster* victim wants their day in court and the harsher

punishments that the Crown Court can provide. Anything that encourages magistrates court guilty pleas goes against this. Equally, this policy would upset the *Circle* model, since an early guilty plea in the magistrates court provides little opportunity for restorative justice and does not give victims a say – guilty pleas are a matter between both sets of lawyers and the judges, not victims.

Hence, it looks like there is a decisive shift in systemic values here. The *Crime Control, Bureaucratic* and *Power* models (generally speaking, concerns of economy) are being prioritised at the expense of *Due Process, Equity* and the rights of victims.

Or are they? Logical as that may sound, this incentive is not quite that simple. It is certainly true that pressurising a client into pleading guilty early on in the magistrates court is one possible economic option for a defence lawyer, but is it the *only* financially sensible option in this situation? In Barrister A's view, the incentive could go the other way: *In practice what I think has happened with that is that a lot of people are fighting cases that they wouldn't normally fight. Nowadays if it's an elected case, that financial incentive has gone. If anything the incentive is the opposite way: the advocate would rather run the case to trial. He'll get more money out of it for 2 or 3 days of trial than he would pleading it guilty [in the Crown Court] where you get practically nothing.*

Hence, in terms of incentive, we might call this an "all or nothing" incentive because it is equally attractive (or perhaps, in Barrister A's view, more attractive), in such a situation, to encourage the defendant to stick with their not-guilty plea, despite the fact that their odds of success are hopeless. Obviously, encouraging that sort of behaviour flies in the face of *Efficiency, Audit, Bureaucracy* etc. and has more or less the exact opposite effect of the incentive to plead guilty in the magistrates court. The only exception would be in terms of victims, because although this would no doubt make the *Rollercoaster* victim pretty happy (they get their day in court and the defendant will get the maximum sentence possible – no guiltily plea or magistrates court discount) it would again be showing a great deal of contempt for the *Circle* victim. The *Circle* victim model requires the victim's choice to invoke (or not) the criminal process to be respected, whereas the incentive here is for the trial to go ahead - whether the victim likes it or not.

We are therefore faced with the prospect of an incentive that operates in multiple ways, and those multiple ways represent completely different systemic[514] values at play. They pull in different directions.

5.4.3.2 General Incentives to Plead Guilty and Bring Cases to Trial

It is worth reiterating that the above discussion applies to only *one* area: where a defendant elects a Crown Court trial for an either way offence. This is not the only area where financial incentives operate. Many other interviewees discussed the issue of incentives to do things based on the circumstances. For example, Barrister E considered financial incentives a "daily problem": *I think that is a daily problem in our system because there is a financial… you're often in a completely invidious position. I'll give you an example. You get a big case that looks like it could potentially be worth quite a lot of money, but you also see that it's quite a weak case on paper. Now your professional duty says to you, "I should make an application to dismiss this case". Now if you make an application to dismiss and you're successful, you get paid literally next to nothing for that, I mean a couple of hundred quid, whereas if the case ran to trial and you made a successful submission at half-time*[515] *you'd earn a large sum of money, so there is almost a financial incentive to not make the right application to dismiss the case and that applies across the board to all sorts of applications, where the applications you make result in you losing money.*

So, here we have an example where, systemically, the incentive is to go to trial. In terms of models, the very same issues arise as for the not guilty plea with the elected Crown Court trial discussed just previously. It could be argued that this particular incentive is not the *direct* product of changes to legal aid, however it is relevant in the sense that lower fees introduced by the changes make it more tempting to succumb to the financial incentive. As Barrister E put it: *the less money there is, exacerbates that particular problem and you're conscious when you've got a case which represents a certain sum of money, and there aren't that many cases like that around anymore, because the cuts and because more work is going in-house*[516] *and so you're looking at where you're less willing to give up what that case might be should it go to trial.*

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[514] To what extent this is reflected in lawyers' actual subjective values will be discussed in the next chapter
[515] This is referring to a submission of "no case to answer", which can occur after the prosecution have presented all their evidence: "half-time". The defence must convince the judge that, per Lord Lane CJ in *Galbraith* [1981] 2 ALL ER 1060 (CA), "the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it."
[516] Discussed in detail in the next chapter

Solicitor H gave another example: *If it's a trial with over 10,000 pages, that can be a significant chunk of money. It can make the difference between, well, having a profit and not, basically. So, a drugs case supplying heroin multi-handed with lots of telephone evidence, easily over 10,000 pages, have a trial, that's worth to you as a litigator between £60-70,000 possibly. If you're pleading guilty, it's worth less than £4000. So, I mean you could say that the incentive would be to have trials that were against your client's interests, but I have to say I've never succumbed to that temptation.*

In other situations, it was in a lawyer's financial interest to get clients to plead guilty.

e.g.

Paralegal A: *it almost works to your disadvantage to have a client who wants to plead not guilty and take matters to trial on occasion doesn't it?*

Solicitor G: *Oh yes*

Barrister J: *If you've got a decent case for Crown Court, not only do you get paid quicker, but there are deliberately built in financial incentives for you to encourage your client to plead guilty. They're not so huge as to be overwhelming, in my opinion, but they are there.*

Solicitor A: *It's in your commercial interest on occasion to get a client to plead guilty. I mean lots of small hearings, associated with the orderly preparation of the case, attract a fee of £75 and that includes travel to the court [chuckle] and so you can have a short case that actually takes up all day (because you have your place in the queue) that pays £75! The cost rate of a lawyer in a well-managed and resourced firm is around… £50-£75 an hour! So [chuckle] it is not in your interest for those hearings to take place and that leads to things being done other than in the client's best interests.*

The initial impression upon considering the *Transforming Legal Aid* consultation paper is that there was an effort to encourage guilty pleas via the funding structure for defence lawyers. On reflection we can now see that that is too simplistic. Instead, whilst we do have a selection of

pleading incentives, they are not based upon principle and pull in multiple, often conflicting, directions. Could we try and get rid of these? Barrister A thought not: *there's no way of mitigating it as far as I can see, because they've tried various ways… they've tried tinkering with the payment structure at various stages to introduce or reverse incentives, but there is always, I think, in every case there's the law of unintended consequences.*

This is a sensible view. For every change to try and eliminate incentives that is made, there is always the logical possibility of other conduct being incentivised instead, hence why they currently pull in conflicting directions. It might be better to consider that if there *are* going to be incentives to advise, we might as well ensure that they are considered and based upon principle rather than arbitrary, as they are now. Instead of trying to eliminate all incentives (which is a battle we may never win), it might be better if we could at least decide on what conduct we *want* the criminal justice process to incentivise (based on the values we think are important and the fact there is only so much money available) and to then do this openly and deliberately, rather than arbitrarily.

5.4.4 Financial Incentives to Take Some Cases and Ignore Others – the "Junk and Golden Cases Phenomenon"

In basic terms, this issue is that, as a result of the way the legal aid system runs, in combination with fee cuts, some cases are worth considerably more to defence lawyers than others, to the point where some cases are worthless or even financially damaging to have, whereas others are the opposite. We can call this the "junk and golden cases phenomenon". Again, this is something with systemic and subjective aspects. Systemically, the issue is that under the legal aid regime, some cases are worth considerably more money to defence lawyers than others. We will consider the subjective element to this phenomenon (how defence lawyers may actually respond to this setup) later.

This section is not concerned with cases that pay better than others for logical reasons e.g. it is logical that shoplifting cases do not pay the same as murder cases. Nor is it concerned with the swings and roundabouts issue already discussed. Any system based on fixed fees can expect slightly anomalous results where lawyers are sometimes somewhat overpaid and sometimes somewhat underpaid relative to the actual work spent on the case, which eventually balance.

What we are concerned with here is something different: situations where it would be financially self-defeating for the lawyer involved to take a case because they would be making virtually nothing or even working at a loss (junk cases) vs cases that are so remunerative that any lawyer voluntarily turning them down would be working against their financial interests to a very substantial degree (golden cases).

Factoring in travel, overheads etc., the elected Crown Court trial guilty plea we looked at earlier was considered to be one of these cases:

Barrister J: *If somebody has elected Crown Court trial and you go along and they decide or you advise them to plead guilty and then you come back for sentencing, I mean, you're almost doing it for free.*

Barrister O considered certain lower level crimes also fitted into this category: *I haven't done, for example, burglary for a long time or lower levels of assault below wounding with intent, because those cases, 1) [the fee for these cases was very low]. Secondly, because they were so low, there would be a disproportionate number of attendances required at court. Whereas, paradoxically, the more serious cases will be given priority, they're given fixed dates. So sometimes the lesser cases, I'd turn up at court and because they were short of court time or some other inconvenience, you'd have to come back another time. When one added up, you'd work out very often that the number of times I'd been to court, the number of days I'd spent on a case, the number of times the case had been adjourned, the final payment when I got it just was absurdly small.*

Solicitor L gave the example of a Crown Court Burglary guilty plea: *In the Crown Court, for a guilty plea for a burglary we get paid £184.70+VAT. Now, that person could be in prison, so we have to drive to the prison and see him, take instructions. There are often three hearings and attendances that need to be done and we need to instruct counsel and we need to do the paperwork and we need to advise on the evidence. And we are doing all of that for £184.70.*

Solicitor B (amongst others) considered a general rule to be that all magistrates and police station work was unprofitable: *If you had no Crown Court cases in a six month period you would go out of business. I can tell you that now.* According to Solicitor B, the only reason police station or

magistrates court work was done was as a loss leader (in the sense that police station clients arrested for serious offences may retain your services until it reaches the Crown Court) and as a source of cash flow.

Similarly, Solicitor G said that their firm only made a profit this year thanks to **two** high paying Crown Court cases: *If I look seriously at what the criminal department of this firm actually earns, were it not for two cases, we would probably have made a loss on doing legal aid crime. Those sort of cases make the difference.*

For example, one of the cases referred to was a multi-million pound tax fraud. Compare this to a small criminal damage case:

Solicitor G: *I think my fixed fee was £249. Pathetic.*

Interviewer*: How much time did you spend on that?*

Solicitor G*: I can answer that because I've actually got the file there!* [shuffling papers]. *4, 5, 6, ah! 7 and a half hours* [seizes desk calculator] *249 divided by 7.5, that's £33.20 an hour.* This would not cover Solicitor G's overheads.

There were exceptions to Solicitor B's rule though. Solicitor C dealt with the similar issue of certain clients being much more desirable to have than others: *I've got a particular client who's now on case number 215 [with me]. He's subject to several different ASBOs and* [example of how every now and then he breaches the ASBO] *and he probably gets 4 cases a year now. Every now and again he'll try and get off one, but 9 times out of 10 he's in the magistrates court, it's a guilty plea, Thursday night: offence; guilty plea: Friday morning. 15-30 mins work: £190. So it came out well!*

On the other hand some clients were most undesirable. For example, the self-employed plumber who would struggle to apply for legal aid from 5.4.1.5.

Similarly, Solicitor D pointed out that clients where there was a risk of it not being deemed sufficiently serious to be granted legal aid were also undesirable, giving the example of two hypothetical shoplifting clients: *Now you've gotta think strategically again, you've got to think to yourself "well am I gonna get legal aid?" They might think it's not a case serious enough to justify the grant of legal aid because all he's gonna get is a fine or a conditional discharge, so you might think "well if I go and spend two hours at the magistrates court, that's dead time, I'm not getting any money from that. If they're not granted legal aid, the time I spent on his case is wasted."*

This is not so much about being incentivised to deal with certain *crimes* but certain *clients*. As Solicitor D then pointed out: *[On the other hand] let's assume he's got a terrible record and he's kept in custody, or even better he's on a suspended sentence, then you think to yourself "well I've got a pretty much guaranteed legal aid order here". So you're ideal shoplifting client is somebody who's in receipt of income support* [because unlike the self-employed plumber, their finances are easy to prove]*, on a suspended sentence, in custody* [because this means the merits test will be easy to fulfil].

Same crime, different clients, one is vastly more attractive to a solicitor to represent than the other.

What this small selection of the various examples the interviewees gave illustrates is that there is no generalisable principle to this phenomenon. A case can be a junk case or a golden case for the most arbitrary of reasons (such as the client's circumstances), completely unrelated to how much work the case requires or the seriousness of the offence.

Systemically speaking, the fact that the system randomly financially incentivises some cases over others is another of those issues which is going to have the effect that the various models are enhanced and set back at random points as well. Lawyers are not incentivised to take or reject particular groups of clients (for example, it is not a case of poor clients = bad vs rich clients = good, which would enhance the *Power* model). The reasons why certain cases are junk or golden are not based on any principle at all: good or bad. Other times, none of the models would be particularly furthered, for example, none of the tools (even the *Power* model) would take a particularly prejudiced stance against self-employed defendants in particular, yet their cases are

often considered junk on account of how difficult it will be to get legal aid relative to the potential rewards at the end of it. Obviously, cases like this must always have existed since the fixed fee system, no matter how generous legal aid fees are, but as we have seen, incentives like this bite a lot more when margins are tight.

We will consider the subjective analysis of this, how lawyers might actually respond to this issue, later.

5.4.5 Financial Incentives Against Working Thoroughly

This was a collection of systemic incentives (made more attractive as fees went down) that are all related in the sense that they go against what we might call "thorough" work. It turned out there was a surprisingly large amount of work that, under the current fee system, it was financially disadvantageous for defence lawyers to do. This included working on things like case statements, reading prosecution evidence, tracking down witnesses and training staff. This section outlines how this works and what that tells us about the system's value-sets. The corresponding subjective chapter will examine how lawyers may respond to this system.

Barrister G gave the following example: *How much effort you put into [the defence case statement] will very much depend on the case, but also on how much effort, erm* [hesitation]*, you are prepared to put in as a practitioner. I have seen good defence case statements, well drafted, work to finish a case early. But spending a couple of days really researching and really drafting that defence case statement and going through the unused*[517] *to find references to things you might want disclosed is time consuming and you don't get paid for it and so I think that's one area where diligence isn't rewarded.*

By "you don't get paid for it" Barrister G means that this work is notionally included in the overall fixed fee, but because payment of this fee is the same no matter how thoroughly the statement is

[517] Meaning prosecution evidence "unused" by the prosecution, but which, per s3 Criminal Procedure and Investigations Act 1996, "might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused".

prepared or the evidence looked through, you are effectively not getting paid for doing anything more than the minimum. Despite this clearly being very important work (indeed the authors of the criminal litigation textbook used on the Legal Practice Course, considered that its importance "cannot be overstated"[518]) in practice the financial incentive is to spend as little time as possible on it. Of course, this phenomenon is not unique to criminal lawyers - I too get paid the same amount whether I spend 6 hours preparing to teach a class or do no preparation at all and "wing it". The difference is that in most jobs where that happens, there is little incentive to do so (except laziness), whereas for criminal lawyers, as we have seen, putting less effort in at one point, often means that other remunerative work can easily be done in its place. For example, short hearings with other criminal clients. The stakes are also uniquely high here, in that, as we saw earlier, poor representation is difficult to argue as a point of appeal.

Solicitor A gave the examples of considering DNA evidence and finding independent witnesses: *You've got to spend a bit of time thinking about it and you've got to assess the exhibits in the case to see whether they're susceptible to testing. None of that can be done* [properly with the legal aid rates].

On the independent witnesses point: *For instance, you get an incident in a pub. Somebody gets glassed. Your client says "well that isn't what happened. I was attacked by this chap and I pushed him away and he fell on a glass", so it becomes a question of witnesses to events. Well, you don't get paid, as a defence lawyer, for going out and finding witnesses. There's no allowance for going off finding independent witnesses, who, you know, must exist, but will consume time to find them.*

Solicitor E also picked up on Barrister G's point about unused material: *It's in-built in the system that for Crown Court work you do not get paid for looking at unused evidence. The unused evidence is the evidence that's capable of undermining the prosecution or assisting the defence, so they have literally written into it that you are not being paid to look at the evidence that might exonerate your client.*

[518] Martin Hannibal and Lisa Mountford, *Criminal Litigation Handbook 2014-2015* (Oxford University Press 2014) 223

As did Solicitor D: *People are gonna think "perhaps I should do it more… quickly" to maximise my return on the case, but you've got to balance that against your professional obligations to make sure you do the job properly. And then this is where you start having a bit of a problem, which is in what's called the unused material. Now this, even on a relatively straightforward case, might run to 40-50 pages. You're not gonna get a penny in respect of the time you spent looking at it because it doesn't go into the calculation. So, your question is, are you going to look at it?*

There was also an incentive against appeals. As Solicitor F explained: *The whole system therefore to some extent, dis-incentivises doing the job properly. I mean the fees for counsel on an appeal against conviction from the magistrates court are ludicrously low: £130 for what is essentially a trial and maybe someone's good name at stake.*

Finally, there was also the incentive against training staff - Solicitor E: *I mean [sigh] it means there's less money flowing around to have them trained properly.*

Provided the regulatory requirements are met, there is no commercial advantage to training staff to do a better job. This is therefore put in the firing line when firms' fees go down. We will examine to what extent this happens, in the subjective section.

What can we say about the system based on the fact that it, at many points, dis-incentivises doing a thorough job? In some ways, it embodies *Crime Control* and *Rollercoaster* victim values, in that spending less time on all these things: appeals, training staff, drafting good defence case statements, looking at unused evidence etc. could be said to both speed up the rate at which defendants travel through the process and make them more likely to be convicted at the end of it. On the other hand, that does involve making an assumption about the process. It might equally be argued that, sometimes, spending a little more time initially can speed things up on the whole. Thorough investigation by the defence lawyer can sometimes reveal how weak a factually guilty individual's case really is and may lead to an early guilty plea. Barrister B, for example, said that they would (and did) advise defendants to plead guilty when the evidence was overwhelming – it is in their interests after all, if conviction is certain, to get the sentencing discount this provides and we can recall Solicitor E's comments about how more thorough investigation by experts can

encourage guilty pleas: *It means that the guilty plea that might have followed if we had a proper report takes much longer to get to.*

The *Medical* model is also set back, as a good understanding of the unused material would be useful information in terms of deciding on guilty defendants' "treatment" upon conviction. In terms of lack of training, there is also the issue (discussed earlier) that whilst poorly trained lawyers obviously may provide a poorer service to their clients, they can also waste court time or treat victims inappropriately. This element would therefore seem to set back every tool discussed. Nobody really benefits from defence lawyer ineffectiveness. Overall, this incentive does not operate to further any particular value-set – at least not consistently.

5.4.6 Final Thoughts on Incentives

Here again, in terms of analysis, the overall picture the toolbox provides on incentives is an occluded one: no particular value-set is promoted overall. Rather, they are all set back and enhanced at various points in an arbitrary way. As a judgment of the field in itself, we might again say this is an unacceptable state for the criminal justice process to be in. Consistency is important and working inefficiently is to none of the models' benefit. Going beyond the state of the field, it also builds upon the notion first highlighted by section 5.4.1: whatever habitus might be of high symbolic capital for a defence lawyer to have in this field, it is not one that accords with any of the conventional understandings of what the process ought to be about (represented by the various tools in our toolbox).

5.4.7 Future of the Criminal Law Professions

There is a lot to be said about this issue, but there is a danger of going off topic. In many ways, the result of the legal aid changes is that the future of the criminal law professions is bleak. However, this research is concerned with the impact of changes on the criminal justice process, rather than the impact of changes on hardworking professionals personally. Hence, the fact that the discussion in this section is limited to issues affecting the justice process should not be taken as understating the problems practitioners face personally. Some of the insights into the personal

impact on my interviewees made for unsettling listening. Barrister K provides a short, but insightful, comment of the personal impact, but I heard much the same across the board:

It's hell and no one can really see any prospect of it improving, to be honest

…

Interviewer*: So I mean, as far as you're concerned there is, at present, no real future for the junior Criminal Bar?!*

Barrister K*: I can't see one, which is why I'm getting out.*

That said, our primary concern here is the impact on the criminal justice process and, in this chapter, the impact in terms of systemic values, so that is what we shall focus on. These nodes certainly do provide some interesting examples of that.

5.4.7.1 Future of the Criminal Bar

For barristers, the main response was doing other kinds of work. Interviewees mentioned: privately funded work; prosecution work; "quasi-criminal work" and of course, as we just saw, leaving the independent Bar entirely. There was also mention of a series of behaviours that could be termed "hobby criminal law" – people not necessarily formally leaving, but diversifying so much that they only did the odd criminal case – for a mixture of goodwill/pro bono and intellectual stimulation.

5.4.7.1.1 Private Work

Many interviewees discussed this option. E.g.

Barrister A: *I think, in the next ten years, any chambers that exclusively sells itself on doing publicly funded criminal defence work is going to be in a lot of difficulty.*

Barrister B: *I do quite a lot more private work, because so many more people are being rejected for legal aid.*

Barrister E: *There'll be more and more people who don't receive legal aid and will therefore have to pay privately for their representation in a criminal case. Now in a way that's bad - and it is bad because it's gonna deny access to justice - but strangely it may be the saviour of the independent Criminal Bar! Because there may be a lot more of the smaller private crime work, which is slightly better paid than legal aid rates, and if that does happen then the independent Bar might well benefit from that, strangely.*

Barrister J put their position more strongly:

The general run of the mill crime, at least defending, is not worth doing. So if I do criminal cases at the Crown Court, it's privately paid only now.

The difference in service was frankly explained:

You get somebody who's had the opportunity to prepare your case, to read your case, to advise you properly, like we used to - I mean, when I started, you had to turn up actually knowing your case rather than reading it on the train on the way there. It gives you a massive advantage.

Barrister L also reported a growth in people doing private crime only:

When I started, everybody did legal aid, now I can name people who I know at the Bar who've been there around the same time who refuse to do legal aid work anymore because fees are no longer reasonable. So there's a move towards two tiers of standards of justice, where you may be able to afford the top barristers or you may not.

Perhaps most tellingly of all, in an offhand comment, Barrister L revealed that not every barrister could count on doing this, only those who were "successful"…

Interviewer: *And you can make a living off that… off private work alone?*

Barrister L*: Some people can, you have to be successful, usually you have to have been at the job for a while*

Crudely put, criminal lawyers who are "successful" do private defence and only those who aren't are, to varying degrees, let loose on the poor.

Systemically speaking then, there is an incentive, if you can, to do private work instead of legal aid. This incentive can operate very strongly: Barrister E, after all, called it "the saviour of the independent Criminal Bar". There is an incentive, crudely put, to avoid representing poor clients - perhaps, if Barrister E is to be believed, not merely an "incentive" but a soon-to-be-prerequisite of an economically viable criminal law practice. At the other end of the scale, as Barrister L pointed out, if you are successful enough, you can avoid doing legal aid entirely and do purely private crime. What does this say about the criminal justice process? In terms of models, it would, to an extent please the proponent of the *Crime Control* model because (although, regrettably, rich defendants can get a good defence) defence lawyers will be financially discouraged from representing a significant proportion of defendants: the poor. Correspondingly, it would also set back *Due Process*, since Value 5, Equality, is set back. The main winner though, would be King's *Power* model. This systemic incentive promotes the interests of rich defendants at the expense of poor ones, reinforcing the current social class setup. It also, due to the complexities of the legal aid system, accomplishes this fairly covertly – just as the model demands: formal, but not substantive rationality. To the untrained eye, it appears fair. The only ones who really appreciate this financial incentive are the lawyers themselves who benefit from it, and thus it is in their own financial interest to keep quiet about it. Of course, this is not to suggest that those lawyers *do* keep quiet about it (lawyers freely told an academic researcher about it after all), but in terms of the systemic values that the current setup embodies, the *Power* model clearly gains ground here. It is hard to speculate what the other models would make of this, since the more detailed practical effects of it are not known. Would, for example, having a privately funded defence lawyer mean the victims in the case were dealt with any better or worse? What is clear though, is the particular dominance of the *Power* model (a largely passive participant in the model evaluation so far) to this systemic setup. The difference in service is stark.

Barrister H also pointed out the issue that, due to the difficulty of being granted legal aid, there is inequality even within the sphere of defendants who can pay privately. Even those who pay privately will sometimes get different treatment, further advancing the agenda of the *Power* model:

They might go there and say "look, I can only afford to pay £2,000-£3,000" and then the barristers' chambers will say "well, for that we're going to give you someone with six months' experience or one year's experience", the really lowest level we have. And whilst everyone has obviously passed the Bar, it's like anything else they're just not going to have the same level of expertise and,

unfortunately, probably not offer as good a defence, so people's ability to get a good defence is compromised because they can only afford maybe the more junior or less experienced lawyer.

5.4.7.1.2 Prosecution Work

Barrister A also mentioned a dramatic shift towards prosecution work: *my practice has shifted to I would say three quarters prosecution work from when it used to be three quarters defence.*

As did Barrister B: *I'm prosecuting much more than I did three years ago… if I have a free day I will prosecute, because there's much more prosecution work at the moment and that hasn't been cut as much.*

Barrister C also felt this:

[I do] both and I would say that is a growing trend within the profession now.

Barrister E said much the same:

We were getting a lot more prosecution work than we ever used to and that coincided with cuts in the defence, so I thought, it would make sense to try and get on the list and to be honest it's a good fill-in. To be honest the reality is that I have a lot of prosecution work now, I mean, a lot of cases. I probably do 80% defending, 20% prosecuting.

Barrister M would have been prepared to do 100% prosecution work if their preferred defence firms closed due to cuts: *I was looking at not doing any defence work at all at one point or at least not in any meaningful sense.*

Interviewer*: What, so you'd just go to 100% prosecution then?*

Barrister M*: Well, yeah because if the people that have been sending you defence work for years aren't there anymore, I guess that's what you have to do.*

Barrister J even managed to link this issue with the previous section, doing work that is both prosecution and private:

It's growing rapidly. There's a firm called [name], who are doing a lot of private prosecution work for a lot of banks, because the CPS are so under-resourced. If you want to prosecute an employee who's stolen loads of money from you, it's not about getting the money back; it's about making an example of them. So if you're in the right area, there's a fair amount of that around actually. Some of the private stuff is being paid at private, city rates.

So, there is a significant impact here: at the extreme end, we now have Barrister A spending ¾ of their total time on criminal law doing prosecution work and Barrister M almost going to 100%. In a sense, this is similar to the previous sub-section, in that it is an incentive to do a different kind of work. The difference is that rather than it being an incentive to do less defence work for poor defendants, it is an incentive to do less defence work entirely. This has a rather different effect in terms of systemic values. In an abstract sense, it is still a *Power* model-esque incentive in that some may argue that the use of criminal law by the state (or indeed, a bank etc.) against defendants is a tool of oppression to keep the current ruling class in place (this can be seen, for example, in the scepticism as to the morality of the criminal sanction within the *Due Process* model). However, more practically, this follows the values of the *Crime Control* model. Advocates are financially discouraged from defence work (which is a drain on the *Crime Control* value of efficiency) and instead encouraged towards becoming an independent contractor for the administrative fact finders (the police and prosecution service - faith in which, is Value 3 of the model) – or, in the case of Barrister J's example, directly dealing with the crime themselves so the traditional administrative fact finders do not have to. This might also please the proponent of the *Status Passage* model, on the basis that potential defence lawyers are encouraged to avoid representing defendants and this could contribute to isolation of those defendants: the "us and them" mentality the model's adherent would desire.

In terms of Walker and Telford's Meta-Model, obviously this sets back *Due Process,* and thus, the Ultimate Objective of *Equity*. This also highlights a problem with legitimacy of the system too though. An encouragement to prosecute more and defend less might be argued to set back Institutional Values of *Professionalism* (barristers are supposed to treat all clients equally: the so called "cab-rank" rule) and *Representativeness* (in principle, barristers are being discouraged from

representing defendants). This has the effect of setting back many Ultimate Objectives: *Participation*, *Legitimacy* and, though we already know this from the *Due Process* model, *Equality*.

The effect of all of that is aggravated by the system of providing legal aid. It will be recalled from the introductory chapter that in order to qualify for legal aid, one must pass a merits and a means test for representation. And even if one is awarded a representation order there can be – in the Crown Court – a contribution order paired with it. One response to that, as we saw, is to pay privately. Another response, pointed out by Barrister D (and many others, solicitors and barristers) was to self-represent: *If a defendant's representing themselves, they don't know the law, they don't have the practice. If it's in the Crown Court they don't know how to address a jury. I mean they're up against maybe an experienced prosecutor in a system where they're… amateurs!*

So not only does the incentive run towards encouraging barristers to do less defence work, but it is occurring in an environment where there is the parallel and aggravating feature of defendants being more likely to have to take matters into their own hands.[519]

5.4.7.1.3 Quasi-criminal Work and Leaving the independent Bar

Finally, the nuclear option is also incentivised by these changes: either staying in legal practice, but doing non-criminal law work or leaving legal practice and doing something else entirely.

Firstly, Barrister A noted the tendency to do other legal work, either entirely or as a large supplement to criminal work: *There are non-criminal fields which are quasi-criminal that a lot of people are trying to get into: regulatory work, professional regulatory and so forth.*

For some barristers, the pay was so bad that they all but left criminal legal aid, only viewing it as something to do out of goodwill or for intellectual amusement - Barrister J: *the impact it's had on*

[519] For a recent study into this phenomenon, see: Gibbs (n 258)

my criminal practice is that now I won't do criminal legal aid work, except if it's either worthy or very interesting.

Barrister L: *I only do crime for interest because I make my living on the public law* [laughs]. *But I can tell you now that if my public law work dried up I would not be prepared to go and do crime full time legal aid.*

There are cases where I'm taking more out of my pocket on travel than I'd ever earnt for the case. Well, if that's your living it's going to be a problem. If it's not your living you can just swallow it and say, "well, I'm doing this because I enjoy it, it's my own fault." But that's… criminal legal aid work shouldn't be people's pastime, hobby or secondary things for people.

Barrister N (who occasionally volunteered to provide career advice to interested law students) reported a similar phenomenon when discussing with students about what to do:

In some cases they have independent means and the job is more of a time-filler than a necessity and so it doesn't matter – it's more important they do something they're interested in… there is a bizarre reliance on people that have a very very particular interest

At the other end of the scale, former head of chambers Barrister O had also reached the stage where they were only doing some cases out of a sense of duty to the ethnic minority community, rather than it being financially viable to do so: *I felt clients welcomed having a barrister from out of town, because of being an ethnic minority, I've found it comforts clients, they felt they could talk more freely, and also who was not part of, as they saw it, the local establishment. I have done it and I've known by doing it I'm going to be out of pocket. It's part of my commitment to social justice.*

Shute et al's review of ethnic minorities in the criminal courts found a similar preference from surveyed defendants. There was a belief that confidence in the courts would be strengthened if

more personnel from ethnic minorities were seen to be playing a part.[520] It is regrettable that financial issues hinder this.

Barrister C set the scene for the ultimate nuclear option*: Everyone continuously contemplates leaving. I don't know anyone who's adamant they're going to stay.*

Barrister B also reported this: *There's been loads of junior barristers who have left in the last kind of 12 months… I mean of the people I went to Bar school with, at the Criminal Bar, I only know one other guy who's still in practice [out of 15].*

And just swathes of young barristers going to do secondments, so for example if the Serious Fraud Office is doing a massive fraud, loads of junior barristers just going to do that because they get £250 a day and they just go and do that really. And we don't see most of them again! [chuckle]. *They stay on or they use that as a springboard to apply for civil service things.*

Barrister C also pointed out the (in their case, irresistible!) lure of the secondment lifeboat:

A lot of people want to keep it as a job because it's a hugely rewarding job to do and it has all the aspects of glamour and excitement and intellectual stimulation, all these great things, but there comes a time when the money talks.

Most junior members at the moment have either left the profession or are on secondment somewhere. The SFO often provides secondments, the FCA [Financial Conduct Authority] *do as well …so I'm for example, I'm off! There's three! Me and two other members of my chambers are all going to do secondments with the SFO starting in the next few weeks.*

Barristers N and F left the independent Criminal Bar to work in another area of law for financial reasons too – and this was before the 2013 criminal legal aid changes strictly under discussion:

[520] Stephen Shute, Roger Hood and Florence Seemungal, *A Fair Hearing? Ethnic Minorities in the Criminal Courts* (Wilan Publishing 2005) 131

Barrister N: *My clerks came to me at one point after I'd just been very lucky – I took my first case to the Court of Appeal on my own and won, and they said, "You're doing great, but you have to accept that you're going to be taking on the equivalent of an overdraft that is a mortgage for a house and that's what it's going to be like for the next ten plus years or so". I had to move back home to afford to live when I was doing my pupillage and I didn't fancy the idea of a mortgage without a house.*

Barrister F had some intriguing things to share: *Most of my work was in legal aid work and the fact that the cuts were being made was a significant factor in my deciding to take another career. By the time I left, I was doing a pretty steady diet of Crown Court work, but the point at which that was properly remunerated and I could be certain of repayment, was just, it was like the Bob Dylan song, "It's just around the corner from you, but with truth so far off what good would it do"? It almost seemed like it might come about at some point and in the end, given the way the profession looked like it was going I just thought, "fuck it". I remember going to the Isle of Wight to go to court. Once you get to Ryde, you're still on the wrong sodding side, Cowes, so you've got to get a bus across the Isle of Wight to Newport and I didn't have enough money for the bus! That's what alcoholics call a moment of clarity! When you realise you're several years into a professional career and something's not quite right here. Now I've gone into a [different] career and without being too modest, I'm doing very well, so I don't think I was a duffer. I think that certainly in the time that I was at the Criminal Bar there was something very wrong with the setup.*

Of course, this would tend to be a good thing as far as the *Crime Control* model proponent is concerned (particularly as some of those leaving or semi-leaving sometimes end up in permanent administrative fact finder-esque positions, such as the SFO or FCA.) Defence lawyers are, after all, seen as something of an enemy by the model. This would tend to set back *Due Process*, in particular the values of quality control and equality. However, when people start to leave the profession entirely, King's *Medical* model also suffers a setback. If perfectly good and qualified lawyers are leaving criminal defence, the "diagnosis" stage of the process is arguably compromised.

Barrister O's observations about the effect on their work for the ethnic minority community also suggests a systematic favour towards the *Power* and *Status Passage* models. If it is systemically financially self-defeating for a lawyer to do this, minority ethnic groups are less likely to be able to have a lawyer whom, as Barrister O suggests, they feel comfortable talking to, both increasing the sense of isolation for some in the process (*Status Passage* model) and helping to keep marginalised groups marginalised (*Power* model).

There is a similar issue that was also raised in the interviews: those people who graduate from Bar school who may have considered a career at the Criminal Bar, but decide against it (or just financially will never be able to get started) for the same reasons those who leave have. Barrister D, speaking from recruitment experience as head of chambers, outlined the issue: *It's just not attracting candidates from university. I mean at your university, I wonder how many people would actually want to go into crime, either as a solicitor or a barrister. I bet the answer would be very few.*

Barrister G also had some experience of chambers recruitment: *New entrants don't really want to do crime. I think that's the main problem! Most of the applicants we have now in our set are only interested in civil. I think people come out of bar school feeling very enthusiastic about the criminal justice system, but they lose that pretty quickly afterwards. Those who don't go off to do civil often go in-house, we've had quite a lot of people who leave who for example go to one of the regulatory prosecutors, so the Nursing and Midwifery Council is quite a popular one.*

Barrister M put this even more strongly*: I don't understand why anyone would want to start at the Criminal Bar. I've been invited on more than one occasion to go back to [my] University and do a lecture about the choice of the Criminal Bar and when it's become apparent that my advice is going to be "don't and if you're not sure, think about it and then don't", the invitation has been withdrawn.*

Barrister K said similar: *They're already up to their eyeballs in debt and now that they have to pay for their own education, it's a lot of money, and at the Criminal Bar you're not going to make a living. So unless you've got family money or a very helpful bank manager, you won't last. That's why hardly anybody's coming through in crime. If you look actually, I was called in [early 2000s]*

and there's almost nobody of my call still doing crime. Most people have got out into employment or family or something. And it's just got worse and worse and worse. A couple of years ago there was only one criminal pupil on the western circuit![521]

Certainly, the two recently finished pupil barristers I spoke to: Barristers I and H had no intention of staying in pure criminal legal aid either. Barrister H planned to use the experience as a springboard for a career as an international lawyer: *I'm sticking with it because I ultimately want to get back to international law (laughs) and the only way I can do it is having gone through this.*

Barrister I, whilst not abandoning criminal legal aid altogether, had already diversified (to just under 20% none-legal aid crime) and intended to diversify further into other areas:

I joined the Bar to do crime and I do love it, but as much as find it interesting, I know that I'll find other things interesting too, so I'm not concerned that I'm going into boring areas just to pay the bills. But part of the reason I'm doing this and not just doing pure crime is that I do worry that the money isn't going to be enough and the work is too insecure.

Barrister H also noted why someone else in a similar position to them decided to leave: *She said "that's it; I'm done." I said "why?" and she goes "I'm sick of waking up at 7.00am and working until midnight, getting up and doing it again. I just don't want my life to be like this." And she didn't mention the money, to be fair. She just said it's just too much. But then, it wouldn't be that much if there were more practitioners at the Bar, if they got paid better.*[522] *Monday through Friday, my routine is I get up at 7.00am. I'm in court till 6.00pm. I get my papers from my chambers. I get home about 7.00/8.00pm; have something to eat; start looking at my papers between 8.00 and 9.00pm and I usually spend two or three hours a night and I go to bed at midnight or 1.00am. Get up at 7.00am and do it again. I do that every single night. And Saturdays, I usually go to Saturday court, back by 3.00/4.00pm, do my papers. And I sleep Sunday. (Laughs) And then Sunday night, I have to prep for Monday morning. And there's only so long you can do this for.*

[521] A very large area, including, for example, all of South West England, London and Portsmouth
[522] See above, 5.4.1, particularly 5.4.1.1 – 5.4.1.2 for how legal aid finance comes into this

To give a final example, Barrister P told me (via email) that they too had left soon after qualification due to legal aid cuts: *I practised as a criminal defence barrister in 2011-2012. I loved it and found the work extremely rewarding. Unfortunately I concluded that it was not a viable career due to the legal aid cuts, which have only become more stringent. I left the bar for purely financial reasons. Too many talented and committed Criminal Barristers are struggling to make ends meet and are forced to go in-house or work in other areas of law.*

Obviously, this raises similar systemic value issues to those who leave later on in their career, but there is something unique to the issue of juniors not joining in the first place, or leaving soon after qualification. As Morison and Leith found, starting out as a barrister without other (e.g. parental) income to assist in the early days is uniquely difficult at the best of times, due to the way the profession is structured.[523] There is no salary and reputation needs to be built up (which takes time, during which one may not earn particularly well). Barrister C made a similar point and illustrated how this structural issue is aggravated by fee cuts:

Most people that survive the first five years are those that have independent wealth because if you were from a poor background and you managed to get yourself all the way there just by your ability at school and education, you're then hit with a massive wall once you're into practice because in those first five years you won't be earning enough money to pay for a house, a flat, pay your rent, pay your travel. You can end up being on below £20,000 for several years. And obviously in London that's very difficult to live on and then on top of that there's travel that you don't really get reimbursed for. The actual costs of running a practice isn't factored, you have to pay for books, you have pay for wigs and gowns, you have to pay your rent to your chambers.

Barrister B made the same point: *It's not great for them* [prospective pupils]. *I think the diversity at the bar will suffer very soon. Diversity at the bar has kind of peaked. If you look at people in my generation at the Bar, I went to a state school. I was first generation to go to university from my family. A lot of my friends, my call, are from ethnic minorities. Loads of people from under-privileged backgrounds, scholarship students, so it's a real mix, but it's definitely reverting back*

[523] Morrison and Leith (n 65) 25

again because, if you're looking at spending £16,000 on a course[524] and then your starting salary is £16,000…

My mum and dad kindly sent me £100 a week for about 8 months to help me get going, but some people don't have that…. and they really struggle.

Barrister O pointed out the particular issue this move away from criminal legal aid by prospective barristers had had for those from ethnic minorities or the working class:

The role models have gone, especially for the ethnic minority youngster, or working class, to enter the profession of social legal services, because when I was head of chambers, I arranged specifically for young people at about the age they were trying to decide on their O levels and A levels to come and spend a week in chambers. And the numbers of ethnic minority youngsters who subsequently decided they wanted to become lawyers and have become lawyers was remarkable.

And it's not just a race thing either. There were working class youngsters from parts of London who came along - white. I remember several who went home and told their parents there were barristers in chambers and some of them were black. They came and told me their parents couldn't believe it! So that changed the outlook of a lot of people.

The unique element to this issue in terms of systemic values is the emergence of King's *Status Passage* model. Here is a systemic value it could really get behind. The incentive (or in some cases financial reality) caused by the low remuneration for students from poor economic backgrounds/families, and those from ethnic minorities, to pursue other careers (legal or otherwise) than a criminal advocacy one, might have an impact on the criminal advocates of tomorrow. The incentive is for poorer students to work elsewhere, leaving the criminal defence barristers of tomorrow as, crudely put, mainly middle or upper class and white. This would have the effect of (apart from where the defendant is themselves, middle or upper class and white) increasing the sense of isolation of the defendant and the "us and them" effect that the model believes is necessary to ensure community solidarity of the majority.

[524] The yearlong compulsory vocational training course for prospective barristers after they have completed their law degree. If they did not study law as an undergraduate, the expense increases even further because they must also complete a graduate diploma in law: another fairly costly yearlong university course.

It also greatly aggravates the issues with the earlier discussed set back of Walker and Telford's Institutional Value of *Representativeness* (and thus, Ultimate Objectives *Equality, Participation* and *Legitimacy*) and advances the *Power* model, for similar reasons. Considering that, in the UK, criminal judges are recruited from the ranks of existing criminal lawyers, this issue of institutional representativeness is even more significant: not only the criminal lawyers, but the *judges* in the criminal courts of tomorrow are incentivised to be only those from privileged backgrounds.[525]

5.4.7.2 Future of the Criminal Defence Solicitors' Profession

The issues discussed here were very similar to those of the barristers' profession. Interviewees mentioned private work and leaving the profession, both at the senior and junior end. The systemic issues here are identical to the ones raised in the previous section for barristers, so there is no extra systemic analysis to make here. It is just important to note that the issues just discussed and about to be discussed are present across both professions.

5.4.7.2.1 Private Work

This was something almost everyone did, to a greater or lesser extent e.g.

Solicitor B: *about an 80-20 split in favour of legal aid. It's [recently] changed. There's more private client work these days. A, because legal aid is more difficult to obtain and B, because frankly, my firm is a very well regarded firm and we will be briefed on cases that, for example, the client had legal aid, he didn't like the fact that he was seeing 4 or 5 different lawyers so he came to me in particular.*

[525] These findings would certainly tally with the growing volume of research illustrating diversity issues in the legal professions. See for example, the recent published colloquium: 'The Challenge of Equity in the Legal Profession: An International and Comparative Perspective' 83 (2015) Fordham L. Rev. 2241-2577 and also in particular for the senior Bar: Michael Blackwell, 'Taking Silk: An Empirical Study of the Award of Queen's Council Status 1981-2015' (2015) 78(6) MLR 971
Recent data from the professions' regulatory bodies suggests a major dominance of white lawyers across the legal profession:
Bar Standards Board, 'Practising Barrister Statistics' <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/> accessed 6th April 2017;
'Trends in the Solicitors' Profession Annual Statistics Report 2015' (Law Society 2016)

Solicitor C: *we do private work and we do a lot - we had a meeting last night* [with the firm's business manager] *and said we would do more private work if we can.*

Solicitor D: *in the old days it was always considered that legal aid was a top up on your private. Now it's your private that's enabling you to do your legal aid.*

Hence, much like Barrister E's prediction for the bar, as far as some solicitors are concerned, private work is a pre-requisite of a financially sound criminal law solicitor's business.

Most interviewees also said there was significant competition for private work, because there was not that much of it around.

e.g. Solicitor E: *we try and get as much private work as we can because it's so much better paid, but the people who are in the criminal justice system are from a certain socio-economic background that generally cannot pay private fees.*

Solicitor D: *Easier said than done. If the phone doesn't ring and it's not a private client coming in the door…*

Again, that phenomenon of the "successful" lawyer doing more private work raised by Barrister L appeared to be somewhat reflected here. As solicitor B put it, "well regarded" firms are the ones who can get most of the limited, lucrative private work.

That said, there was also that similar sense of goodwill and enjoyment raised by some barrister interviewees for doing mainly legal aid. For example,

Solicitor K: *I don't go out chasing the private paying work. I do see myself as a legal aid lawyer and I'm quite - I'm very committed to it and I enjoy doing it and I think it's the right thing to do.*

Solicitor E: *our responsibility to our local community is that we do legal aid work even though it's not very profitable*

Systemically speaking then, there is a similar incentive, as with barristers, to do private work instead of legal aid and this incentive appears to operate very strongly – albeit that the residual pro bono motivations for doing legal aid remain.

5.4.7.2.2 Doing Other Work or Leaving the Profession

Many solicitors I spoke to had diversified from crime to a greater or lesser extent. E.g.

Solicitor C: *I've also done some childcare work, and I'm doing more of that now, I'm doing about 50-50 crime-childcare. The benefit in childcare being it probably pays better than any other legally aided work.*

Solicitor E: *this firm is very good in that it's very committed to legal aid and as long as we're keeping our heads above the water, we help with the cashflow and we help with a number of things and that's because we have loads of different areas of law in this firm.*

Sometimes diversifying was the first step on a road that eventually meant they left criminal work altogether:

Solicitor A: *for many years I did nothing but legally aided criminal defence, but gradually moved into doing other things, particularly civil litigation, and to cut a long story short, their came a point last year where I couldn't stack up doing the proper job on legal aid with having a business that was going to be commercially viable. So I personally went into other work.*

Others, like those who threatened to follow such "escape routes" in Moorhead's study,[526] left more suddenly to do other areas of law e.g. three former employees of Solicitor J:

We just had a young girl, she's 26 now, she's just qualified, she's leaving us to go and join another local firm doing family work. They're able to pay her a lot more and her future is going to be significantly better.

There's a lady, she used to be a full-time duty solicitor with us and she's leaving. She's doing regulatory work with various different bodies. She's a very experienced, well-qualified, very good criminal defence lawyer and she's leaving criminal defence because she doesn't see a future in it.

We had another lady about two years ago and she left to go and re-train to do insolvency law. Again, incredibly well qualified and very experienced criminal defence lawyer just decided there was no future.

This would seem to confirm the early prediction of Smith's respondents that the best "would leave crime in their droves".[527]

Solicitor L (after discussing the difficulties recruiting trainees and that several barristers were leaving) explained why they still did it, a mixture of goodwill and feeling trapped: *I do it because I'm too old to change direction. That's how I feel. Plus, after 25 years you become an expert at these things, so you've got a lot to give, a lot to offer*

Similarly, respondents in Kemp's research noted that, even then, junior lawyers had began to drift away: "It's so hard to recruit now because low-level people are transferring out [of criminal defence services] and they going in to the government, the CPS or the Courts Service."[528] From the current research, we can now see that this has mutated further: into leaving criminal law entirely.

And then at the firm level, whole firms may "leave" in the sense that they just have to close down due to lack of profit e.g.

[526] Moorhead (n 97) 175, 180
[527] Smith (n 125) 28
[528] Kemp (n 116) 107

Solicitor H: *We're a business, basically. We all know what it's about. I mean, the facts that we spoke about are true: less profit, businesses fold; less profit, probably less of a service. But at the end of the day it's because we're a business just like a sweet shop. That's the way it is. Don't do it if you don't like it, basically. And that's the lawyers' choice, but that doesn't help the people who need our help. And there are people out there needing help and that's a <u>real</u> crime, if you ask me, that it's the people being punished, the ones that need your help, not the lawyers.*

There was a genuine sense of "this might be it for us" in some cases:

Interviewer: *so what happens do you think if they decide in a few months time to "unsuspend" the other half of the [17.5% legal aid] cut?*

Solicitor C: *I don't know… I don't know. Erm… it will be a real worry to the solvency of the criminal department. Over the years we've closed down departments as they've become insolvent. The sights and guns of the other departments would be on us, because if commercial property are making a profit and crime aren't then the partners and solicitors in the commercial department are subsidising crime. We've gotta think, is it a public service or a business? We <u>are</u> a public service, but we're <u>also</u> a business.*

Solicitor E: *we're actually expanding. I'm taking on somebody new at the end of this month. She's a part-timer, but she brings with her a whole duty slot*[529] *so it's hopefully going to make us have a bigger slice of the pie, but it's gonna be tough. It's gonna be kind of shit or bust* [sic] *really. We're hoping that a few other [firms] might bow out, but it's gonna be tough... It's tough when we look at our figures and our property department's made 5 times the amount we have in one month.*

Solicitor E later considered that their department closing was a very real possibility:

I mean [sigh] if it… [sigh]. I honestly don't know because with the new cut in April [2017]. We've had a bit of decline in work as well, so it could mean the end of the department. Because we didn't make a lot of money last year and knowing that we're gonna have 8.75% off that, eventually this

[529] This is a potential benefit for firms because, as noted in Ch 1, it gives firms a larger, sometimes literally, captive audience of potential clients to tap into when "on duty" at the police station or magistrates court.

firm's not gonna keep doing it are they? Why would they keep employing all of us if the profit's gonna be that small?

Barrister O also relayed similar issues on this as with barristers: *The more independent firms of solicitors, and particularly ethnic minority solicitors, that served small communities found that they couldn't be in business unless they joined up with other firms to be able to ride out the financial constraints. Their [ethnic minority] client base would be relatively small, so there were lots of firms that had just one partner or two partners per practice. Many of those small firms would take on cases and defend/represent their client base and sometimes they'd sustain the reduction in profit or losses because you believed in their case. It wasn't just a business. When it's a sole practitioner, they're face-to-face with the community where something's gone wrong, a lot of wrongful arrests to do with drugs, say, that partner would have to face the families and say "yes, of course, I'll defend you"; whereas, if he was part of a firm of five or six partners, it's easier to say "well, I'd love to, but the partners won't let me."*

This echoes the experience of one of Kemp's respondent solicitors: "we are in an ethnic minority area and people come to us because we are local and know what is going on... it is getting more difficult… I was overdrawn by £50,000 last year."[530] Kemp's respondent clients also showed a clear preference for someone from "the same ethnic background as me"; "I want someone who understands my ethnic background and uses words I can understand."[531] Likewise, Shute et al.'s findings (already mentioned in terms of barristers) are equally applicable to solicitors. Confidence in the courts would be strengthened if more personnel from ethnic minorities were seen to be playing a part.[532] Barrister O's comments suggest cuts to legal aid frustrate this laudable aim.

And again, there was the same problem as with barristers in that fewer people were training in criminal defence firms in the first place. Some also said quality had suffered:

Solicitor B: *the quality of what we're getting now is appalling. We're really at a nadir in terms of the quality of people the profession is now attracting. The firms haven't got the resources now to attract the best and the brightest.*

[530] Kemp (n 116) 110
[531] Ibid. 97
[532] Shute et al. (n 532) 131

The issue was a mixture of not many students being interested and that firms would be unwilling/unable to take them on in any event. Solicitor D pointed out that, irrespective of finance issues, new solicitors were inconvenient for a firm at the best of times: *We have to supervise the trainee solicitor as he or she acquires that experience, which is, bothersome… irritating… time consuming and annoying. Nothing like as bothersome irritating, time consuming and annoying as it is as soon as they've qualified: they go somewhere else! So you have invested in them, but you don't get any return. So trainee solicitors are very unattractive.*

Add finance difficulties into the mix and it became very difficult indeed:

Solicitor F: *People aren't coming in. The salaries aren't awful but I think firms are just not really recruiting unless they absolutely have to.*

Solicitor A: *I obviously see quite a lot of young lawyers and there's a great appetite, but they're not the ones who have to stack it up. A firm has to involve a number of people and premises and all the rest of it and it has to stack up, so there's no point them being keen if there isn't a business model that can deliver the goods.*

Solicitor K: *In this area I don't know of any trainee solicitors in crime. I was a partner in my own firm for seven years and we didn't have one. There seems to be not many people wanting to come into crime or the crime firms haven't got the capacity to commit to that level of training.*

Solicitor L: *I wouldn't financially. I would love to pass my expertise on to somebody, but there is absolutely no prospect of being able to recruit a trainee.*

Hence, the systemic issues raised here are just the same as those of the Criminal Bar in the previous section. The same wide range of models' value-sets are set back. In short, the incentive to do private or non-criminal defence work provides for some enhancement of values of the *Crime Control*, *Status Passage* and, especially, *Power* models, but a setting back of the *Medical* and *Due Process* models - alongside Ultimate Objectives: *Participation*, *Legitimacy* and *Equality*.

5.4.8 Final Thoughts on Profession Futures

Echoing the previous sections, in terms of analysis, the overall picture the toolbox provides on incentives is mostly occluded: no particular value-set is promoted overall. Most are set back and enhanced at various points in an arbitrary way. On the other hand, there are some systemic gains here for the *Power* and *Status Passage* models, but as a judgment of the field in itself, this is equally unacceptable: oppressing poor defendants in particular and locking poor people generally out of a profession is not something anyone would seriously try to defend. Going beyond the particular state of the field, it also builds upon the broader notion made by the former sections of this chapter: whatever habitus might be of high symbolic capital for a defence lawyer to have in this field, it is not one that accords with any of the conventionally acceptable understandings of what the process ought to be about (represented by the various tools in our toolbox). It is also self-evidently (because defence lawyers are leaving) not one that accords with the current habitus of many defence lawyers – rather vindicating the view of one of Somerland's "political" defence lawyer respondents when they said they "don't know who will do this work in future".[533] There is a change in the kind of lawyer who will do this work. What it has have changed *to* will be considered in the next chapter.

5.5 Conclusion

The legal aid changes have a surprising effect on the value-sets that the system embodies. Upon first look, one might be tempted to conclude that *Crime Control* values were being given dominance; a closer analysis suggests this is not the case. It is true to say that, *in some circumstances*, the changes have the effect of prioritising *Crime Control* concerns,[534] but in others precisely the opposite occurs and *Due Process* values are given priority.[535] Other models, such as King's *Bureaucratic*, Status Passage and *Power Models* also occasionally gain priority,[536] but in other situations are set back, almost at random.[537] Walker and Telford's meta-model shows this phenomenon particularly well. The forgoing discussion has seen Ultimate Objectives *Economy*, *Equity* and *Equality*, both set back and enhanced at various stages – alongside setbacks to *Participation* and *Legitimacy*. The only Ultimate Objective that, surprisingly, has not changed

[533] Somerland (n 94) 360
[534] E.g. the move towards prosecution and other work seen in 5.4.7 and the occasions where incentives operate to encourage guilty pleas in 5.4.3
[535] E.g. where the financial incentives in operate to encourage trials (5.4.3) and inefficient work (5.4.5)
[536] Particularly in the previous section
[537] e.g. the arbitrary incentives to take certain cases over others, 5.4.4

much is *Security*, but then again, as Walker and Telford point out, the criminal justice system does not necessarily have a significant impact on Security anyway.[538] On other occasions, such as those considered at 5.4.1, we have delays in the system that would set back every single value-set considered. There is a perpetual systemic fight; prioritising one principle at one point and then completely undermining that principle elsewhere. Systemically speaking, there is a need to consider what values are important and ought to be prioritised, because the picture that currently emerges is one where priority is decided at random.

In terms of our broader analysis of looking at habitus and field to understand the likely practice of defence lawyers in response to legal aid cuts, the field conditions are sporadic and at this point it is difficult to state which particular habitus might be of high symbolic capital for a defence lawyer to have. Certainly it would not be one that incorporates any of the value-sets discussed thus far (*Crime Control, Due Process, Rollercoaster, Operational Efficiency* etc.), because all of them are significantly set back at various points. The habitus that allows defence lawyers to thrive in *these* field conditions must be something different. The next chapter will consider what that might be.

[538] Walker and Telford (n 417) 8

Chapter 6: Subjective Analysis

6.1 Introduction

The previous chapter gave us an indication of the field conditions resulting from (or relevant to) changes to legal aid, which individuals within the field found particularly important. That finding was that the field conditions were sporadic and that is was therefore quite difficult to guess which particular habitus might be of high symbolic capital for a defence lawyer to have.[539] All we know is that it would probably not be one that incorporates the value-sets discussed (*Crime Control, Due Process, Rollercoaster, Operational Efficiency* etc.), because all of them are significantly set back at various points. The habitus that allows defence lawyers to succeed in *these* field conditions must be something different. This chapter explores what that might be: the subjective analysis. It is structured in the same way as chapter 5, but considers how defence lawyers react to changes, in terms of which value-sets are incentivised.

The nodes discussed in this chapter are:

- Financial Incentives Affecting Advice
- Financial Incentives to Take Some Cases and Ignore Others
- Financial Incentives Against Thorough Investigation
- Future of the criminal law professions
- Solicitors Taking Advocacy Work In-house
- Referral Fees
- Client poaching

[539] See Chapter 2, 2.2.3, but very generally, we would say that a defence lawyer's habitus is a little bit like their "disposition". It is a combination of what they are inclined to do and how they tend to comprehend the social world around them. It is an individual's sub-conscious understanding of how the world works. The defence lawyer field is the self-contained social world that defence lawyers operate in. These two concepts interact: what that field is like (its conditions) will affect the people within it and certain views and inclinations are more useful in some conditions than others. Bourdieu likens someone with a habitus well suited to their field to an accomplished athlete with a "feel for the game". Such a person has high symbolic capital because having that habitus provides an advantage in that field (capital being Bourdieu's method of measuring power positions in a field and *symbolic* capital being a kind of capital that is not money). We are of course using the simplified models and tools in our toolbox to pin down habitus and field into something that would otherwise be quite abstract.

- Morale

We shall consider each in turn before coming to our conclusion on this.

6.2 Analysis

6.2.1 Financial Incentives Affecting Advice

This section looks at the same things we considered for this issue systemically, but through a more "subjective" lens. In other words, we have already considered what value-sets the system characterises (what the hypothetical observer would make of it); now we are looking at whether defence lawyers' personal value-sets could be encouraged to change in reaction to legal aid changes.

6.2.1.1 Elected Crown Court Trials

The first thing to take a look at with a more "subjective" lens is the issue of the fee for elected Crown Court trials.[540] Barrister C provided a detailed explanation of how this might impact the advice a practitioner gave: in order to get the client to plead not guilty: *You just wouldn't advise, or another tactic is to ensure that you send people that are just covering interim hearings, rather than the trial counsel. Obviously if you go to cover someone else's hearing, you'd be very reluctant to give advice because it's not your case, so you'd say "well look, you can speak to the barrister whose running the case for you or speak to your solicitors, I'm just here for today and today's purpose is x". So you can plan it so it avoids having to deal with that issue.*

Whilst Barrister C initially said: *I have to say in my experience everybody at the Bar, however much the cost is would never dream of not advising a client correctly*, they relented on this a little later: *I'm not saying the pressure doesn't, I'm not saying individual barristers wouldn't contemplate holding back their advice.*

It seems sensible to suppose that this sort of thing probably goes on.

[540] Criminal Legal Aid (Remuneration) Regulations 2013/435, Sch 1 Part 4, paras 9-10

Barrister C went on: *The other thing is there's a great deal that goes into how forceful you are with your advice, so for example you can really sit someone down and go through the evidence with a fine-toothed comb and say "well I've been doing this for years…I know you say you haven't done it but the evidence against you is very strong, all these other factors are going to come into play and the chance of you winning a jury trial is going to be minute so you really need to think about what you're gonna do", whereas other times you can just turn to the client and say "well, did you do it?" they'll say "no of course not" and you go "right, well you've just given me not guilty instructions so we'll crack on."… every practitioner does it differently, but because of all that financial pressure it does have an obvious effect.*

Solicitor E on the other hand, suggested this had made some solicitors tailor their advice towards keeping cases in the magistrates court:

I know a firm who, since that rule came in, have never elected a Crown Court case again. Never. They'll just keep everything in the magistrates court because it's not financially viable for them to do elected cases in case they crack [plead guilty]. Now that <u>cannot</u> be in the best interests of the clients. It just can't be. I would never do that and the day I've got to do that, that's when I'm gonna leave because once you've started putting your own wallet before the clients, then you're not doing the job anymore, but that… I can see why he's doing that. It's a guy I've known for years who's a partner in a firm and I can see why he's doing that

In some cases, Solicitor E also felt the same pressure: *I knew I'd have to advise her to elect, even though it was going to mean that if the case falls apart, I'm gonna get a very minimal amount of money. Erm [hesitation] and it's making, you know, at the end of the month when the boss comes and goes "right, why have you only made this amount this month?" you have to face up to the fact that it's because you've had to do cases like that.*

Solicitor F pointed out the same: *If you elect a trial and you plead guilty at any stage before the trial, then the fee for the solicitor is very very minimal and the fee for counsel is limited as well, so that puts pressure on you to plead guilty as opposed to acting in what might be in your client's best interest.*

Hence, we have the rather interesting issue in that some solicitors' response is to take a course of action that would encourage guilty pleas at the magistrates court stage and not elect the trial, whereas some barristers see profit in running the case. This could be because a solicitor may have more cases available anyway and can simply move onto the next one after the guilty plea, whereas, with more work in-house[541] the barrister may not always be able to count on a decent "next one". Each of these outcomes will be analysed in terms of value-sets in their respective section dealing with the general phenomenon of incentivised guilty pleas and incentivised trials respectively.

6.2.1.2 Pleading Not Guilty and Running Trials

As we saw in Ch 5, Barrister E considered the temptation to let Crown Court cases run to half-time rather than applying to dismiss straight away:

There is almost a financial incentive to not make the right application to dismiss the case and that applies across the board to all sorts of applications

They later went on:

I don't suppose anyone does anything other than makes the application – I'm sure, but, there's people I suspect who don't make the application… they'll be just a sort of unconscious working for something like that where you, where you're not, where you probably don't do as good a job as you might otherwise do when there is a financial incentive to, you know, working against you.

Solicitor C pointed out how some (not them, I hasten to add) solicitors run cases to trial for the same reason: *It is possible if you've got a erm, [sigh] if you've got a big case in the Crown Court, erm, well, you know, you're gonna make a big fee out of it on a not guilty. If it's a guilty plea, you're not. So it's not a very difficult exercise to persuade a client, to say, "well, it looks a bit difficult, but I think we've got a good run here! I think we should run it!" Even though it might be very much in people's [clients'] interests to say "early guilty plea first opportunity in the Crown Court, maximum mitigation, and maximum discount on the sentence." but it means a reduction in fee to the solicitor.*

[541] See section 6.2.5

Barrister K saw Solicitor C's theoretical possibility realised in reality from one of their own instructing firms: *There are solicitors' firms, and I know there are, who advise everybody to go no comment in the police station and not guilty until the very latest stage and that's because they make more money out of it.*

I've been instructed by them several times and seen exactly the same pattern and, in fact, that's how lots of firms get business because people who are largely not very bright - and let's face it, the criminal fraternity isn't the intellectual cream of the country by any means - they just think "oh, they really fought for me". Even though, in fact, they've ended up with a worse result than they would have got.[542] *Even if it's absolutely unwinnable.*

And of course, as we saw earlier, this is made more intense by general cuts to fees:

Barrister E: *The less money there is exacerbates that particular problem and you're conscious when you've got a case which represents a certain sum of money, and there aren't that many cases like that around anymore, because the cuts and because more work is going in-house and so you're looking at where you're less willing to give up what that case might be should it go to trial and that leads into advising clients about whether to run a matter to trial or not! It shouldn't, but of course, you get paid much more money if the case goes to trial than if they plead guilty so there is… and of course, I mean, no-one does that but it, it, the way that it's set up doesn't assist, put it that way*

It is also worth noting that any financial incentive here operates in addition to other self-interested incentives in favour of trials. As one interviewee of Morrison and Leith put it: "Barristers live by their reputation and work by their reputation and you don't get a reputation running bum cases… counsel want to win cases and be seen to win cases and also if a case runs… you [may] get more money."[543] Likewise, Tague also noted some junior barristers may prefer trials

[542] Much in line with Tata et al. (n 104)'s finding that clients' views were more influenced by how good their solicitors were at: "listening to them; believing them; being able to explain the process; being accessible; 'standing up for' them, etc." than results (pg. 132)
[543] Morrison and Leith (n 65) 137

as they provide a forum to demonstrate their skills to their clerks and solicitors.[544] Finance is still a key factor however: Tague also accepted finance was another reason trials can be preferable[545] and similarly Bredar's view was that barristers' "attention naturally is more focused on their cases which are at the trial (and thus more remunerative) stage".[546]

Recall as well (from the systemic analysis) Solicitor H's comments about how sometimes it could be the difference between making a profit or not:

It can make the difference between, well, having a profit and not, basically. So, a drugs case supplying heroin multi-handed with lots of telephone evidence, easily over 10,000 pages, have a trial, that's worth to you as a litigator between £60-70,000 possibly. If you're pleading guilty, it's worth less than £4000. So, I mean you could say that the incentive would be to have trials that were against your client's interests, but I have to say I've never succumbed to that temptation.

Nonetheless, Solicitor H concluded their discussion of this particular example by noting it was a *difficult conundrum*. At the very least, this means the incentive has some force, even if, in Solicitor H case, not enough to impact their advice.

Barrister L would have agreed: *it's less acute when you have a system where people are making a living. It's more acute when you're forcing them to struggle.*

As would Barrister K: *You can't avoid it. You know in your soul* [laughs]. *You know exactly what everything's worth. And there are times, well, put it this way: there's someone who says they want to plead guilty; I would never persuade them to plead not guilty, even if it was in my financial interest. But if they're not very sure, I will outline the two scenarios, this will happen if you plead guilty, that will happen if you plead not guilty, which is normal advice, but I probably wouldn't seek to persuade them to plead one way or the other if it wasn't in my financial interest. Although*

[544] Tague (n 114) 6. We shall consider this issue again, in greater detail, at 6.2.3, as it is one reason why a junior may take a junk case.
[545] Ibid. 3
[546] Bredar (n 58) 157

I would never persuade anyone out of acting against my interests, I probably wouldn't persuade them into it.

In other words, where the client already wants to plead not guilty (whether it is in their interests to or not) the temptation is to not try too hard to persuade them out of pleading not guilty (just like Barrister E said). Where the client is unsure, Barrister K is also pointing out that, whilst the incentive does not operate forcefully enough to make them actively persuade the client to plead not guilty, it is definitely forceful enough to prevent the barrister actively persuading the client to plead guilty - even when it may be in the client's best interest to plead guilty (because the evidence is overwhelming, for example). Barrister K's comment in particular lends support to the view that most lawyers are well aware of the financial benefits (or not) of particular courses of action, in line with Tata and Stephen's similar finding that "almost none" of those they interviewed were unaware of the most financially beneficial way to deal with a case. [547]

Barrister L similarly noted the ease with which, on the odd occasion, one could ensure a trial occurs simply by being passive*: I don't want to give the wrong impression that I think there's some widespread malpractice going on, I don't think there is. I think there's the odd occasion when if you're giving people [clients] options about what they do or don't do, passivity could be an option where somebody's actually worried about their income. You know, they're employed by a firm, they're told by their boss, "don't come back telling me you've cracked this one, we need the trial!"*

And, of course, this must operate even if one is not employed by a firm (but simply instructed). As Morrison and Leith noted, practically, it is more important to stay on good terms with a solicitor than it is a client. Their solicitor's wishes are disproportionately influential on barristers, because they supply future work.[548]

So we see several interviewees accept that this does have a subjective impact on the work defence lawyers' do. Even if, in their view, it is not necessarily an active "I'm going to disadvantage clients so I can get more money" attitude, it is present as something passively going on in the background or an almost subconscious consideration. You wouldn't persuade your client

[547] Tata and Stephen (n 112) 739
[548] Morrison and Leith (n 65) 52-53

to do something bad for them and good for you, but at the same time, you wouldn't try too hard to persuade them to do something good for them, but bad for you. The exact details of this influence are unimportant: we are not trying to make moral judgments about lawyers. The point is whether the incentive can influence their behaviour and values. These comments suggest that it can.

What is particularly interesting is how closely these views concur with the Scottish studies' suggestions and findings on "ethical indeterminacy". On this point, Goriely et al. stated that their report "does not contend that professional, dedicated people will abandon cherished principles simply for monetary gain. Rather, it suggests that modifications in behaviour will be greatest in areas of ethical indeterminacy: that is where the choice is between two courses of action, both of which have advantages and disadvantages, and where ethical practitioners genuinely differ about which is the better. In making difficult and evenly-balanced judgements, greater weight is placed on the advantages that flow from a course of action that is in one's own interests. Less weight is placed on those that flow from actions that run contrary to one's interests."[549] This appears to be a perfect description of the ethical dilemmas described here. For example, Barrister K's comments relate to a situation where the choice between pleas is very finely balanced. In such a situation, they admit, the greater weight is placed on their own interests. The trouble of course is that the more fees are cut, the more financial pressure there is and the more heavily it will weigh towards self-interest in these finely balanced situations. Furthermore, as Stephen and Tata argue, "while the concept of ethical indeterminacy accepts that a client's clear choice is taken as an instruction, it also suggests that in many other instances the simple distinction between "instructions" and "advice" is less clear-cut than these terms suggest".[550] Clients often play a passive role in the process, and do not always provide clear instructions. If a client wishes to "get off", what does this actually mean? A reduced charge? Sentence discount for a guilty plea? Effective mitigation? Complete acquittal? "What is deemed to be favourable to the client ('get off') can only be understood in terms of clients' (managed) expectations."[551] There is also the issue that pursuing one (potentially hopeless) "get off", such as complete acquittal, means being unable to pursue other, more realistic, ways out (e.g. a much lesser charge, but not complete acquittal.) The point here is to note that ethical indeterminacy situations can actually occur quite frequently. Every

[549] Goriely et al. (n 101) 68-69
[550] Stephen and Tata (n 106) 56
[551] Tata (n 113) 518-519, footnote 95

time they do, the financially pressured lawyer has a simple way to resolve the dilemma: rational self-interest.

We can very clearly see here an encouragement to change one's subjective value-set. Here, the funding system actively discourages the style of guilty-plea-inducing advice that some have accused barristers of being complicit in[552] and which would have pleased the proponent of the *Crime Control* model. Instead, we can see a shift in value-set towards *Due Process* concerns. Guilty pleas and efficiency of the process mean advocates lose money, so they are incentivised to go to trial. This enhances *Due Process* Values 2, 3, 4 (lack of faith in administrative fact finders; quality control and the presumption of innocence) and, of course, Value 1: freedom of the individual from state oppression. Always fighting charges means that the individual (guilty or not) will always have a chance (however slim) of being acquitted – a chance they are denied if they plead guilty. This level of incentive goes further though, because the *Due Process* model itself does not think protecting people from crime is unimportant, it just thinks it is not as important as protecting the individual from state oppression. Equally, sometimes fighting an utterly hopeless trial (and thus ensuring it ends up in the Crown Court – where sentencing is harsher – and without the guilty plea discount) leads to more state oppression of the individual. This does not seem in keeping with the value of scepticism as to the morality and utility of the criminal sanction, so this really goes beyond *Due Process*. The mental goings on at work *here* are more like Macdonald's *Adversarial Reliability* ideal-type: which holds that ALL defendants must go through a trial – guilty or not. This ideal-type is based on the logical policy one would draw if we completely accepted the assumption that the administrative fact-finders are utterly incompetent: that those charged by prosecutors and presented to court are a completely random group of individuals. Obviously, this is not the case in reality. Hence, this fee incentive encourages defence lawyers to change their advice to something that would only be appropriate if unrealistic pre-requisites were true.

In terms of Walker and Telford's meta-approach, this represents a move away from *Appropriate Disposal* (because sometimes a guilty plea *is* the most appropriate disposal) and *Professionalism*. This is to the benefit of Institutional Value: *Audit* – though in the sense of personal audit, not the system's. This translates to setbacks to Ultimate Objectives *Security* (some guilty defendants may escape liability who otherwise could have been encouraged to plead) and *Economy* (due to wasted time on hopeless trials), to the benefit of lawyers' personal economy. In other words, this

[552] McConville and Marsh (n 213) Ch 4 "Lowering the Bar"

incentive encourages lawyers not to care about *Security* or *Economy* of the process. Given that the changes to legal aid are ostensibly supposed to save money, this is intriguing.

We saw earlier that, systemically, this ran in multiple directions. Subjectively, it looks more like it runs in one direction only: lawyer finance. For barristers, this may be due to the much reported "drying-up" of work for Criminal Barristers, as solicitors take more cases in-house (considered at section 6.2.5). If there were plenty of these cases around, then it might make sense to encourage as many as possible to plead guilty at the magistrates court stage and then move on to the next one and repeat. If there isn't necessarily going to be a "next one" then it is more financially sound to get as much money as possible out of cases like this when you do have them. However, we have also seen that solicitors too can sometimes take this approach.

6.2.1.3 Pleading Guilty

Nonetheless, as we saw in the previous chapter, Solicitor A noted that it was sometimes in a solicitor's interest for their client to plead guilty in order to avoid poorly paid pre-trial hearings. In a surprisingly forthright[553] answer to my question of whether this went on, they said it did: *All the time! And people calculate that pleading guilty will benefit the lawyer best commercially and it gets justified on the basis that the evidence says that, despite his denials, he's probably guilty and even if he's not he's probably going to be convicted, so he'll do better with a third off for an early plea of guilty. So, I've seen it on a daily basis, that clients are pressured into pleading guilty.*

Morrison and Leith heard this sort of argument from barristers as well, with one interviewee taking the view that "while you can't force him to plead guilty, there is often good reason for him to plead guilty for his own benefit."[554]

Solicitor K made a similar point:

In an ideal world in a day you want four or five cases in the magistrates' court, all straightforward guilty pleas that are dealt with at the first hearing where you get your fixed fee for that. What you

[553] Perhaps because they had recently given up criminal law and therefore giving me the "full monty" (in their later words) wouldn't matter so much for them personally
[554] Morrison and Leith (n 65) 116

don't want is for those cases to be adjourned off for three weeks for reports or inquiries to be made because that's another hearing coming out of the same fixed fee so you can see how that thought process operates. I mean I've done cases where it's almost cost me to do the cases by the time you've finished doing the work. You've still got to do the job properly for the client, but I'm sure there are some firms that, you know, don't. They'll say, 'well, this is what we're being paid to do, we're not going to see you in the office. The case has to be concluded today'.

Solicitor H explained the financial reality: *if I'm in my local magistrates' court on a Monday morning and I've got three cases to do, then I'll break even, but if I still have to be there for one case, then I won't - and one case can take as much time as three. You need to do volume and if there isn't volume then you're not going to make money. And if you don't make money, you go out of business and therefore you won't be able to provide the service. That's how it works, really. You're working on very reduced fees and every time they chop at it, it makes you closer to not being able to provide the service*

So, Solicitors A and K both said they thought this was going on. Solicitor H's comments are interesting, not in the sense that H thought this was occurring, but because they illustrate a potential train of thought that could lead to this conduct. If the financial reality is either you get through three cases and break-even or you get through one and you don't,[555] if the choice is that simple, it is not hard to imagine how strong the pressure is. One could even self-justify it in a utilitarian manner in the sense that if you go out of business you won't be able to help anyone, but if you stay in business you can at least help some. Mulcahy's finding of lawyers being "acutely aware" of the potential costs and disadvantages of trials[556] and (as already noted) the Scottish studies' similar finding that lawyers were "routinely influenced" by financial incentives[557] [558] is still very much true. Indeed, cuts would seem to have made it far more acute.

[555] As many acknowledged, guilty pleas are much quicker than trials, so the incentive here is to have them, since this increases your chances of getting through several cases
[556] Mulcahy (n 78) 412
[557] Tata et al. (104) 135
[558] Tata and Stephen (n 112) 730

It wasn't only solicitors who felt this way:

Barrister J, referring to the Crown Court said: *Technically, if you made a client plead guilty every day, if you have that many clients, you would make much more money than having the same trial run for a week.*

It turns on how financially desperate barristers are as to whether that makes any difference to what they do, but I can see a scenario where it would be easy for somebody to want to persuade their client to plead guilty financially.

Barrister O: *There are always instances where you could capitulate, advise a client to plead guilty and it would be better for your bottom line, but your professional integrity says you don't do that. I'm not saying this is something that's recent in terms of the dilemma itself - it's always been there. But these further cuts in legal aid have made it more likely.*

So, sometimes, as a result of cuts to fees there is also a very strong temptation to get clients to plead guilty. How much this operates in reality is unclear. Certainly previous research and these interviewee comments suggest that it is something a lawyer is capable of doing. As Morrison and Leith pointed out, managing one's time (and ensuring one is doing the right case at the right time) is a key skill of the barrister.[559] One interviewee pointed out that a quick guilty plea is one way of doing this,[560] with many of their other respondents (as here) describing unscrupulous colleagues forcing clients into pleading guilty for financial reasons.[561] Likewise Baldwin's early work provided a multitude of examples of defence lawyers "talking sense" into their clients[562] and few of the lawyers in that study anticipated serious difficulty in doing so.[563] The comments here are also quite consistent with Baldwin and McConville's defendant interviewee references to lawyers pulling "a fast one" "to get it over with".[564] Mulcahy's observation illustrates the same

[559] Morrison and Leith (n 65) 19
[560] Ibid. 132
[561] Ibid. 120
[562] Baldwin (n 56) 86
[563] Baldwin (n 56) 89
[564] Baldwin and McConville (n 54) 51

phenomenon.[565] One reason why lawyers would want to do that today is, as we have seen, financial pressure.

Our interviewees spoke in terms of "seeing a scenario" (Barrister J) or cuts in legal aid making it "more likely" (Barrister O), whereas others more candidly stated it was going on (Solicitors A and K). Either way, such a state of affairs favours a value-set that enhances the *Crime Control* model over *Due Process* and, indeed, King's *Bureaucratic* model. The *Power* model is also furthered, in that those whose lawyers were being paid privately would likely not be under such pressure. Interestingly, King's *Medical* model is set back here because the incentive here is not just guilty pleas in the abstract, but guilty pleas as the means to an end: as a means to get through a high volume of cases. Hence, not only are we talking about guilty pleas, but *fast* guilty pleas. As Solicitor K pointed out "*What you don't want is for those cases to be adjourned off for three weeks for reports or inquiries to be made".* There is no room here for a *Medical* model-esque diagnosis of the defendant to enable effective rehabilitation options to be considered. Roach's victim models would not be entirely happy, because the defendant's guilty plea will lead to less punishment (upsetting the *Rollercoaster* victim) and the victim's involvement in the process is minimised because the case is over as quickly as possible (upsetting the *Circle* victim). Many of Walker and Telford's Institutional Values are also set back: *Due Process, Appropriate Disposal and Professionalism* – which translates to a set back to Ultimate Objectives, *Equity* and, interestingly, *Security* - because the guilty plea will lead to a third off the sentence that defendants who had a trial would not have got. Obviously there is a risk with a trial of an acquittal, but there will be some cases where the evidence against the defendant is overwhelming and so conviction at trial would have been all but certain. Technically, in this situation, a *Security* fanatic working within the current British criminal justice process would have wanted a trial for those offenders. Institutional Value, *Audit*, is advanced, obviously enhancing Ultimate Objective *Economy* and potentially *Discovery/Clear-up*, in the sense that a guilty plea is a "clear up" and therefore, in some cases (particularly where conviction of a factually guilty offender would have been uncertain had the matter gone to trial) Ultimate Objective *Security* is advanced.

[565] Mulcahy (n 78) 424, with one solicitor suggesting/requesting the police organise an identity parade, so that their client could be identified, see sense and plead guilty!

6.2.2 Financial Incentives to Take Some Cases and Ignore Others – the "Junk and Golden Cases Phenomenon"

We have already considered this issue systemically, now we need to ask what effect this phenomenon has (if any) on defence lawyers' values.

The main response was to simply not do junk cases unless one absolutely had to or to do just enough to (in the case of barristers) keep the instructing solicitors happy and (in the case of solicitors) to keep repeat clients happy. As Barrister J put it when discussing the elected Crown Court trial junk case: *I stopped doing them. We might do them as a favour to somebody, but you have to be really careful when you take them now. There's a balancing side between what I'll do for my fees and what you have to do in order to, as loss leaders, help your solicitors out.*

What happens to those junk cases that nobody wants and are not done out of goodwill? Barrister H provided one explanation: *If the solicitor is trying to instruct somebody and nobody wants to take it because it's not worth their while financially, it can end up going down the line and then after two, three days it's been knocked down from someone who's more senior all the way down to someone who's low enough on the ladder that they need the experience and they'll take the case no matter what. Then the problem is that they have less experience, so they actually need as much time as possible to prepare and now they've only got maybe one evening to do it.*

Why would you need the experience as a junior advocate? Barrister H: *You want to have had X amount of cases. First you get to 100 cases, 1,000 cases, 2,000, you'll have built that experience up. You'll have, at some point, had to deal with some difficult issues of law, done well on a case, etc., but you'll only have done that because you've had the experience. So there's a point at which you'll take anything.*

This is in line with (as we saw earlier at 6.2.1.2), Tague's view that more junior barristers have not inconsiderable self-interest in running trials: as a forum to demonstrate their skills to their clerks and solicitors.[566] As much as this desire may operate to incentivise a junior barrister to advise not

[566] Tague (n 114) 6.

guilty pleas in their own cases, it could equally operate as an incentive to accept certain cases from others that would otherwise be regarded (by those more senior) as junk cases. These junk cases can serve as a way for very junior barristers to practice their skills. Usually, complex cases would not go to inexperienced barristers (on the basis that they need to be handled by someone experienced). However, if it is a junk case, then anyone experienced enough is likely to have more profitable things to do. Morrison and Leith also heard about this particular aspect from their interviewees. Cases were "passing from hand to hand as their true nature is discovered until, at last, a difficult, unprofitable or poorly prepared case finds its way to a new barrister too lowly to pass it on further."[567] Barrister H shows us that this practice is alive and well at the junior Criminal Bar and, more problematically, that finance cuts necessarily enlarge the "junk" category quite considerably.

The problems with this are significant, as Barrister H reflected: *I have had a few cases where I'm sure that they were innocent and they probably needed, in a couple of cases, more senior counsel than me. And because of legal aid… I don't know if those kind of counsel are going to get the case*

Another approach might be to do them, but not necessary very well. As Solicitor B put it when describing their general rule about magistrate court cases: *Magistrates court cases by and large these days- and this may be a legal aid cut or the demoralisation in the profession - are just not prepared at all. They're just seen as… you know, "£200 here, £300 there", basically, you know that's the legal aid cuts writ large in the sense that there isn't any incentive with magistrates court cases.*

Solicitor D provided another interesting insight into how junk cases and golden cases might affect the approach of a defence lawyer, using the hypothetical example of whether to go back to the police station to observe witness identity parades in a golden murder case vs in a junk shoplifting case and also the effect on different clients:

In a shoplifting you're gonna be very reluctant to do this, because your fee is through the floor now: you are now losing money on this case. Now they're saying, "do you want to come back for the viewing?" Now in a shoplifting you wouldn't do it, but on a murder… you might…

[567] Morrison and Leith (n 65) 27

You have to think, effectively, strategically about this. You have to think to yourself, "what's most cost effective?" To make sure that I'm doing what I'm required to do in providing the appropriate level of service to the client, but not bankrupting the firm while I'm doing it. So you, what you're gonna do, you're gonna make a judgment call - like so much of this it's a judgment call. You may not do it on a simple shoplifting, but you would do it on a murder. Because if he's charged with the murder and it goes to court, you might be looking at a fee of £10,000 or £15,000 on that murder. You don't wanna see <u>that</u> walking out the door, simply because you skimped on £100 in the police station.

You've also gotta think about the client. If it's a regular client, who gets arrested 3 or 4 times a year, that client's very important to your firm. So you've got to manage him, which means when he asks for somebody to come you've gotta go.

One of Kemp's interviewees made a similar point: "On the more serious cases we can spend eight or nine hours in the police station and you then get a massive black hole where we just don't get paid. So basically, I ask myself why I should spend all this time for nothing… on a different day and a different climate we would probably turn some cases away because we are still getting paid the same."[568] Likewise, respondents to Smith's 2013 survey on the cuts speculated they would "refuse to undertake difficult cases or clients as the fee will not reflect the work needed."[569]

It is worth pointing out the relationship with fee cuts at this point. Hence, Solicitor D went on to say: *You think to yourself "well it wasn't so bad last year, but this year I've got to do the same work and I've had my fee cut 17.5%.". So you know these are ways that it affects your thinking. And it does mean that there are certain things, which in the old days you would do without thinking, nowadays you do think about quite hard.*

These comments suggest we may have reached that different day and climate that Kemp's interviewee referred to.

[568] Kemp (n 116) 116-117
[569] Smith (n 125) 28

Solicitor E pointed out this sometimes led to clients having multiple barristers in one case, as barristers left to chase golden cases: *Say you've got a vulnerable defendant, they're going along to the Crown Court for the first time and their solicitor who they've dealt with from the beginning isn't there. They've gotta meet a new face, a barrister, and then what ordinarily happens is that barrister's also got no money, so they might meet them at the pre trial and then there'll be the trial. And on the morning of the trial we get told "oh, such and such isn't coming anymore, the barrister they've got to know, because he's been sent off here and he's got to take it because of the money", so they end up with a different barrister whom they've never met before, they don't have any rapport with. It's important that a defendant who is facing a serious allegation feels comfortable, feels that his legal team have got his best interests at heart and know his case - because meeting someone on the morning of the their trial is not gonna engender that feeling and if you go into court feeling "well, this is all gonna go horribly wrong because they don't know what they're doing", then what sort of performance are you gonna give when you're testifying? Probably not a very good one.*

In some junk cases, some firms would not help at all: Solicitor L: *<u>We</u> do it because I do not believe as a criminal defence firm that you can pick and choose your cases. I do not believe that you can do that to people. You can't say "oh, I'm not going to make enough money out of you, so that doesn't suit me'. We never turn down any case ever. We have never turned down… However gruesome, however minor, however hard, we've never turned down a case [but] I'm sure there are lawyers out there who say "I'm not going to do it. I'll just say to that person 'sorry, we can't help; get the duty solicitor to represent you'. Just say 'we're really busy. We can't get there. We can't do that.'"*

Similar comments were made to Kemp in regards to how troublesome cases could be avoided: "less scrupulous firms inventing a conflict so they don't have to deal with the case".[570]

The last word on this goes to Solicitor E, discussing the financial implications of a particular junk case they were in the middle of doing: *At the end of the month when the boss comes and goes "right, why have you only made this amount this month?" you have to sort of face up to the fact that it's because you've had to do cases like that.*

[570] Kemp (n 116) 117

Lastly, it should be noted that this issue would appear to be very widespread. Indeed, the Law Society recently published a practice note suggesting that refusing uneconomical work may sometimes be required in order to fulfil solicitors' regulatory obligations.[571]

At first blush, more experienced lawyers rejecting junk cases looks like a *Crime Control* approach - in that it doesn't matter if the lawyer is inexperienced, as this will help the expert administrative fact finders get on with their job and convict more defendants. On the other hand, amateur mistakes can also waste time, which would be contrary to the model.[572] It is a better example of Macdonald's *Investigative Efficiency* ideal type, but even this does not accentuate that point of view to its theoretical maximum – because good lawyers on a case can sometimes make it go faster. As Barrister A pointed out when discussing in-house advocates (whose comments we shall revisit at section 6.2.5): *There are advocates who will get into needless arguments with the judge and the lay client may be quite impressed by that because he'll feel his advocate is actually putting up a fight for him. What he won't realise is that the argument is pointless and avoidable and his advocate is in the wrong.*

Nor are the victim models enhanced. Amateur lawyers dealing with cases above their capability may inadvertently treat victims badly. As Barrister C pointed out when discussing the need for training on how to deal with victims properly*: It's not just training in how to put your arm around someone and be nice to them, it's training in how to conduct advocacy in a court - how to ask certain questions in a certain way.* It seems the only value-set really incentivised here is lawyer self-interest: the seniors get to avoid the badly paid cases and the novices have a way to flesh out their CV with impressively senior work. And whilst, of course, many experienced lawyers still do junk cases out of a sense of duty/goodwill, on the other hand, as Solicitor D pointed out, when fees are cut, there are things that used to be done without question that are now thought about quite hard - to make sure that you provide the service, whilst not bankrupting yourself in the process.

[571] Law Society, 'Rejecting Un-remunerative Publically Funded Criminal Work' (June 2017) <https://www.lawsociety.org.uk/support-services/advice/practice-notes/rejecting-un-remunerative-publicly-funded-criminal-work/#more> accessed 1st June 2017

[572] Which one of these two potential outcomes is more common (or indeed whether it is 50-50) overall is unclear

6.2.3 Financial Incentives Against Thorough Investigation

Having considered the systemic implications of this phenomenon in chapter 5, it is now time to consider how this may impact defence lawyers' value-sets.

Firstly, the issue of there being an incentive to do a minimal defence case statement and minimal consideration of unused prosecution evidence. Barrister G gave an example from their practice of how this might operate:

[The defendant] underwent 4-5 interviews with the solicitor present in which he went "no comment" - reason being is that he has mental health problems and he was very susceptible to questioning - but after the 5th interview the solicitor left and about half an hour later the police officers are talking to him in a healthcare room along the corridor in which he apparently made a full confession! There was a couple of hundred hours-worth of CCTV footage which we then had to go to the police station to watch - myself and the solicitor. So we did that and actually it was very revealing and it showed what pressure the police had put on him at various times without the solicitor being present and so we formed that as our basis for having the confession excluded and also the defence of diminished responsibility. So those three days that we spent at a station in [city], we got absolutely nothing for even though it was obviously vital to our client's case. Certainly it would have been in my financial interest to go to court somewhere else rather than going to the Police Station to watch the CCTV. I could have taken on other cases during those three days and made money.

Not everyone is going to be willing or financially able to work 3 days for free. Even at the best of times, as Morrison and Leith found, barristers avoided spending too much time on certain unprofitable activities (such as legal research, preferring to rely on "hearsay" from colleagues.) "In the hostile barristerial world, where time is short and pressures are constant" there is no time for such things.[573] Cuts to finance make these pressures all the greater.

Solicitors have to balance the same issues, as Solicitor B pointed out: *There's no incentive to prepare a case really well. There just isn't – I mean apart from the professional incentive - at the*

[573] Morrison and Leith (n 65) 91

end of the day this is a business, so, I take the view and I'm sure others will echo this is that what's happening now is that you're getting what I would describe as bare minimum preparation. And it's very difficult to motivate yourself if you can get away with bare minimum preparation. Because again you're trying to maximise your fee earning capacity and that really is by picking and choosing what work you do.

Indeed, the efforts of Barrister G and their instructing solicitor in the police station are already going well beyond what was observed by Choongh ("very poor, with some not being given any legal advice at all.")[574] and, earlier, Dixon ("often passive and unsupportive")[575] and the Royal Commission ("disturbing")[576] in the police station - in *better* financial times.

Solicitor D said similar about unused material: *Your question is, are you going to look at it? Well, you're required to look at it because of your professional obligations, but you can imagine that some people who are concerned more about the financial aspects than doing the job properly are gonna cut corners.*

It may not even necessarily just be those who are greedy that would not look at the unused material. As Solicitor D said when discussing whether to go and observe police identity parades being carried out at the police station: *You have to think, effectively, strategically about this. You have to think to yourself, what's most cost effective? To make sure that I'm doing what I'm required to do in providing the appropriate level of service to the client, but not bankrupting the firm while I'm doing it.*

An interviewee to Kemp's work highlighted the problem even then: "I worry about solicitors shortening the process at the police station. I've come across a number of incidents recently. There was one case where a solicitor spent about 7 minutes with a client [before the police interview] and it turned out to be a murder case with four-and-a-half hours of interviews. I don't know how she could spend that time with her client and then go in to a detailed interview. There

[574] Choongh (n 81) 179
[575] Dixon (n 60) 242 Not to mention the Royal Commission's findings at the time
[576] Report of the Royal Commission (n 63), Para 59

was another case involving three rapes where the solicitor left the police station after the first interview. Even the police were surprised at that… I don't think practitioners are providing the level of service they used to, because that's the only way they can survive and be economic".[577] That was 2010 and we are now several financial cuts further along since then. Balancing service to the client with not bankrupting your firm (as Solicitor D put it) is now that much harder than it was at the time of Kemp's study.

Similarly, Solicitor E pointed out how finance issues impact this: *What is the incentive to be looking at that evidence? There isn't a financial incentive, so again, the client's interests are that you would look at that really thoroughly, but your financial interests are: "that's a waste of time. I'm not gonna get paid for it". The tighter you cut the funding, the more pressure there is on everyone to cut the corners and put your own interest first and they can say 'till the cows come home "well, you should put your clients' interests first", but when it's your own bread and butter and you know your firm's gonna go under or something...*

The similar issue of lack of incentive to thoroughly investigate things like DNA, extra witnesses and identification procedures was dealt with in a similar way. Solicitor B's discussion (also partially considered systemically in relation to adjournments) gave the example of doing extra work by the time things were in court and why this would generally never happen:

Interviewer: *and there's no question of getting say, an adjournment to go away and do it then?*

Solicitor B: *No, because adjournments in the magistrates court are a thing of the past - well by and large, I mean that's quite a sweeping statement but there's certainly not... I mean again linking that back: ask for an adjournment? Why would I do that? I'd lose money!*

As a freelance advocate that's a frequent bugbear of my firms. I went to court last week for a client who had mental health issues, [but no expert report had been done]. When I asked the court, I got the adjournment to get the medical report because obviously that's not one where I could even conceive of doing the trial in the absence of any mental health evidence. And the solicitors firm who instructed me then said they were going to cut my fee for that trial because the trial was then set for 2 weeks later [but included within the original fee]!

[577] Kemp (n 116) 115-116

Similarly, Solicitor A outlined the options in terms of DNA and looking for independent witnesses:
You either do the job properly and lose money or you don't do the job properly.

Money isn't the only thing that matters to criminal lawyers, but you've got to stack it up! At the end of the day you've got to pay the wages, the rent and all the rest of it, and if you don't make enough money then you will not remain in business.

This is a similar response to that found in the Scottish study on the introduction of fixed fees: less time is spent on unprofitable activity, such as interviewing witnesses.[578] Solicitor A's comments suggest the same thing happens when rates are simply lowered. An interviewee from Somerland's research provides an indication of the standard of lawyering this attitude leads to: "you see some solicitors round the courts – calling out their clients' names, obviously never met them before… for me, it's about spending time with them and making sure they understand what's going on, what I've told them, and how they want to run it. Doing that extra bit of research, finding out about the social context, the culture the client is operating in. That means continuity of care and time… It all comes down to time really. The more time you spend with the client the more you find out. Then you find the important question, the detail that maybe the client doesn't realise is important."[579] The former is obviously an example of the "don't do the job properly" option Solicitor A posits. The later is doing the job properly, but, as Somerland's interviewee made clear "It all comes down to time". However, as we have seen here, it is cuts in finance which makes that very thing less available. Every reaction here is to either do work for free (which becomes more difficult as cuts bite) or to cut corners. As many interviewees put it here, the funding situation is such that sometimes, even with the best will in the world, in order to avoid bankrupting yourself, some corners will need to be cut. Smith's respondent's 2013 prediction that, as a result of the cuts, "standards will fall because it will not be economically possible to maintain them"[580] would therefore appear to be coming true. Just as the switch to fixed fees initially resulted in less time being spent on cases,[581] so too does reducing the level of fees paid. The alternative, as with Solicitor A, is to give up criminal law before you are forced to do that. As pointed out when discussing this issue systemically, this results in many value-sets being set back. Subjectively,

[578] Stephen and Tata (n 107) 40, in line with similar behaviour observed in England in the past: Young et al. (n 107) 75-76
[579] Somerland (n 94) 347
[580] Smith (n 125) 27
[581] Stephen and Tata (n 106) VIII, 34-42; Somerland in Young and Wall (n 89) 307-311

lawyer finance is the only thing being encouraged. Cutting corners can lead to delays (as Solicitor B's instructing firm's lack of preparation did) as much as it can lead to speedy justice, hence both *Due Process* and *Crime Control* would be set back. Both victim models would also be set back (*Rollercoaster* because of potential delays and *Circle* because a thorough investigation is arguably necessary in order to ascertain what exactly happened and allow the community to move on together.) The *Medical* model would be set back, as this requires a detailed understanding of what happened. *Bureaucratic* concerns would sometimes be furthered, but, as with *Crime Control*, cutting corners can lead to delays too. The *Power* model may gain some ground here, but lawyers are certainly not adopting *Power* model-esque values themselves. It is coincidental. It is difficult to say that any of Walker and Telford's Institutional Values have been furthered – in fact all of them are set back to some degree by corner cutting.

In terms of the incentive against thorough investigation of appeals in particular, Solicitor E explained how this was dealt with: *I get a file this big* [lifts hands over half a meter above the table] *and I've got to read it, review it, listen to the client, speak to them, for £270– which is so small for that amount of work. That could be four month's work and there's no way that I'm gonna be able to do that for £270, so it means you have to do a very quick nip into the case to try and find the relevant issues*

Sadly, this is reminiscent of Plotnikoff and Woolfson's findings on the matter of appeals for the Royal Commission, in the wake of several high profile miscarriages of justice, as far back as 1993! That research found that 25% of prisoners received no assistance from a lawyer within the 28 days after their conviction (where time is of the essence due to appeal time limits),[582] alongside a raft of concerning qualitative comments. One defendant recounted writing to their solicitor instructing them to go ahead with an appeal and never hearing back.[583] Plotnikoff and Wilson blamed ignorance of both the law and the good practice guidelines.[584] However, after 24 years of time for education in the relevant law and good practice, Solicitor E's comments suggest the problem is one of finance rather than education.

Here at least, we can see a clear dominance of one model at the expense of others: the *Crime Control* model's trust in administrative fact finders is enhanced. The defence lawyer, due to

[582] Plotnikoff and Wilson (n 67) 79
[583] Ibid. 105
[584] Ibid. 115

financial reality, is forced into mostly accepting the judgment of the administrative fact finders and therefore that quick nip into the case will have to do – at least for those defendants who do not pay them privately, so the *Power* model also gains ground here. This is not an absolute win for *Crime Control* and *Power* models though: because of the nature of the way this is achieved, defence lawyers may well feel that the overall criminal sanction is very unfairly applied, which ironically may strengthen their belief in the *Due Process* value of scepticism and contribute to low morale (see section 6.2.8), setting *Crime Control* back in the long run. We can see this *Due Process* fightback occurring when Solicitor E told me that, irrespective of the money, they nonetheless did some extra work for this client out of goodwill: *There's a certain amount – it's like this phone call I just took. I didn't really need to take that phone call, because he's had his advice and the case is finished really and I've run out of funding, but I feel for the guy.*

Lastly, there is an incentive to not train staff beyond the bare minimum, Solicitor E was blunt about how they expected their firm to react: *Where do you think they're gonna cut first? They're gonna cut in crime aren't they? Because we don't make enough money to justify training. So what you're gonna see is that more junior members of staff will not get the same training that I got a few years back because of the cuts. It's just, the money isn't there.*

In the past it would have been going to a lecture, an all day thing, where you were spoken to, had notes etc. Now, "Oh yeh yeh, just read that article and write down that you read it and that'll do"!

I feel much more of an obligation now to train my staff myself. I think I'm gonna do a trial training day with them.

Interviewer*: And of course you don't get paid for anything like that?*

Solicitor E*: No and of course that, you know, I've got targets to reach every month and that doesn't help me get to them, so [tut] it's tricky…*

And of course, what would be the natural way for me to go and test [them]? I'd go and watch them. There's not the money! There's <u>just</u> not the money! I can't justify a day going to watch [name] do something in court because the funds have been cut so badly that that's a whole day and we just can't afford it.

Hence, one option would be to give staff an article to read, which would seem a rather inadequate way to learn how to present cases in court on its own. A similarly laissez-faire attitude to training was found in Birdges et al's study: important periodic reviews of trainees were left to the last minute, with the supervisor involved not at all fazed: "It will not take a minute"![585] Even the committed lawyers like Solicitor E however, who plan to put on their own internal training days, suffer in the sense that it is taking them away from other work and will make it harder to reach their targets that month. This would provide an unwelcome incentive to make this lost time up in some of the other ways considered in this chapter. Much like when we considered this issue systemically, the only value-set incentivised here is lawyer finance.

6.2.4 Final Thoughts on Incentives

Much like when we considered this systemically, the overall picture from this section, which the toolbox approach allowed us to see, is an occluded one: no *conventional* value-set is promoted overall. Instead, subjectively, we can see that a range of conduct is incentivised, which has only one unifying subjective theme: lawyer financial self-interest. In terms of our analysis, it suggests that the habitus of high symbolic capital for a defence lawyer navigating this field is not one that accords with any of the conventional understandings of what the process ought to be about (represented by the various tools in our toolbox), rather it is purely about defence lawyer financial interest.

6.2.5 Work in-house

This issue is not so much something that appeared to change subjective value-sets very much itself, but it operates as an aggravating feature to the incentives just discussed and is a cause of something that certainly does impact on subjective value-sets: referral fees (considered below). Hence, this section will, in the main, explain the phenomenon and its impact on the incentives just looked at.

[585] Bridges et al. (n 64) 245

Essentially the claim is that, as cuts to litigators' fees have come into being,[586] firms have reduced the amount of advocacy work they brief out – preferring to do some of the advocacy work in-house and therefore increase their income. However, it is important to clarify what is being discussed here. This is not a "solicitors vs barristers" issue. There *are* potential issues on both sides with the differences in training and experience between the two professions, which have always been present, but this is not the issue considered here. Interviewees (whatever their profession) made it clear that there were both good and bad advocates in both professions. Some interviewees clearly thought one or the other was better,[587] but this is an eternal argument to which there is no definitive answer. The issue considered here, in relation to cuts to legal aid and subjective value-sets, is whether the advocate concerned (whether they trained as a solicitor or barrister) works in-house or independently.

Barrister E put it this way: *The result of [cutting solicitors' fees] has been that they haven't been able to run their firms and turn a profit without getting some of the advocacy fee, which is normally reserved for barristers. And that has just meant that a whole vast section of what we used to do has been taken away from us and it's gone in-house to the solicitors firm.*

Barrister A claimed this tied in with "swings and roundabouts" issues:

The advocates graduated fee scheme was designed on a swings and roundabouts basis, so you would do a certain amount of hearings where you would have to do a lot of preparation and wouldn't get paid very much, but that would be balanced in that you would get a certain number of guilty pleas and you would get a brief fee for that. So those quite remunerative hearings have largely gone for barristers because solicitors see them as a very easy way, effectively, of getting money in quickly without having to do very much work for it.

So there is this idea of a drying up of work for the Bar as a result of more cases being dealt with in-house by solicitors firms.[588] Not only that, but those cases that do get briefed out to the Bar are

[586] Which would have been aggravated even further by the (for the time being, shelved) two-tier duty contracts scheme

[587] Not always their own profession either, e.g. Solicitor L said they had never seen a good solicitor advocate!

[588] Note that this conclusion also accords with what members of the Bar told Sir Bill Jeffrey for his report (n 441): 37-38, para 5.11 and also some solicitors: 37, para 5.10. Jeffrey's conclusion on this was particularly

the difficult ones with a low effective hourly rate; the ones you would originally take on a "swings and roundabouts" basis.

That said, there was a sense that although this increase had happened, it may be reaching its peak:

Solicitor F: *what you can do in terms of magistrates and police station hearings in a short period of time might outweigh sitting all day in the Crown Court and not being paid very much until the case finishes.*

Solicitor J: *Two of us are qualified as Crown Court advocates. We don't do it anymore because we concentrate now on the lower courts. You need to be in the Crown Court at a certain level to make any money out of it. If you lose the capability then you have to take a judgement call of is it better to come away entirely from that, so therefore saving the cost of quite a lot of very expensive employees, and directing the other people, if you like, the high earners like me and my fellow director, into areas where we can guarantee fees rather than fees in the Crown Court.*

How might use of in-house counsel interact with the other subjective issues discussed? Barrister F (who worked in-house for a time) discussed the issue of in-house advocates being pushed to do work beyond their competence and also how this aggravates the financial incentives issues discussed earlier: *How are they supposed to say no [to acting in the firm's financial interest at the expense of clients']? They lack the independence to stand up to the people who try and give them a brief because it's their boss. It's not just someone who might brief them today or might not brief them tomorrow. Now looking back, did I accept briefs that I shouldn't have done? Not because I felt pressure from my bosses but because in my youthful arrogance if someone said I was good enough, I probably would do it? I don't <u>think</u> so, but I couldn't swear so! You know, there's always that… one tries to be self-critical, and alive to that sort of risk, but certainly that possibility exists.*

strongly put: "as it exists now, the market could scarcely be argued to be operating competitively": 42, para 5.24

Barrister L said similar: *the more junior the person is, the more vulnerable they are to pressure. I know in-house people who if the senior partner said, "you're not pleading the trial," they'll say, "fuck off, I'll plead it if that's what I'm doing". Whereas you're not necessarily going to have that attitude if you've just started out in your first job, you're struggling with your debts anyway etc. and you've been in your position for a year or less and you're being given the opportunity to go along on your most impressive case so far and you're excited, etc., you'll probably just do as you're told.*

Barrister O also provided a personal example: *I'm thinking about one particularly significant and serious case where sentence was in the range of seven years+, where I and other independent barristers maintained pleas of not guilty on behalf of our clients because the prosecution case hadn't been properly made out. But at least one barrister working in-house was under some pressure from his firm because of costs that the firm's bottom line in dealing with the case was probably better served by putting in a guilty plea and mitigating and that barrister could then be designated to another case. That client pleaded guilty on the basis of advice and subsequently there was a trial and all other defendants were acquitted and this defendant was sentenced.*

Obviously, some of the subjective analysis of this is just the same as for the financial incentives already discussed. The issue of encouragement to take cases that are beyond one's competence is new though. In one sense, this obviously sets back many of the values of the *Due Process* model. On the other hand, as Barristers A (quoted earlier) and K point out, incompetence can also lead to wasted time, which would set back the *Crime Control* model as well.

Barrister A: *There are advocates who will get into needless arguments with the judge and the lay client may be quite impressed by that because he'll feel his advocate is actually putting up a fight for him. What he won't realise is that the argument is pointless and avoidable and his advocate is in the wrong.*

Barrister K: *They run trials in order to show they've got such balls and they'll "always fight for you" and stuff and they'll pick those with some care so they make sure that they run the ones that will have the most effect for that particular group of people. They won't perhaps have done some of the applications earlier on that might have got the guy out of it anyway.*

This conduct could interfere with *Crime Control* values: efficiency, the presumption of guilt and faith in administrative fact finders. Hence, both of Packer's models are set back in order to, ultimately, further the financial survival of the business that persuades in-house advocates to do cases they are not ready for. For similar reasons, both of Roach's victim models are set back. Walker and Telford's institutional values of *Professionalism, Reflexive Coherence, Due Proces*s and *Audit* are also all set back, thus impacting all of the Ultimate Objectives to some extent. None of any of our models' interests are seen to be advanced by this.

This also has two elements that affect other issues. Number one: less work around (and of the work that is around, it is the badly paid work) obviously puts a financial pressure on self-employed barristers, which is going to strengthen the potency of any of the financial incentives we have already discussed. Secondly though: it leads to a situation where a practice known as "referral fees" is more tempting, to which we now turn.

6.2.6 Referral Fees

The idea of "referral fees" is a simple concept, but one that can have a large impact upon value-sets. The way it works is this. Fees paid for litigation and advocacy are separate. Hence, every case that goes through the courts is worth two fees to the lawyers involved: one for litigation and one for advocacy. A referral fee is where a litigator agrees to instruct a particular advocate to do the advocacy work for a case, on the understanding that they will give the firm a portion of the advocacy fee they receive, as the price of the firm instructing them. The firm therefore not only gains the litigation fee, but a bit of the advocacy fee as well. As noted above, when there is a drying up of advocacy work, as a result of more work going in-house, the temptation to pay a referral fee for work undoubtedly increases.

Barrister C gave the following example: *If a solicitors firm phoned up my chambers and said "we want* [name] *to represent Mr Bloggs, and from his advocacy fee, we would expect to take 20% for giving you the work"… as the rates go lower and lower the firms are being put under more and more pressure to create income from wherever they can.*

Does this actually go on? Barrister A said it could: *There is nothing to stop a colleague going to a solicitor and saying, "look, if you brief the case to me I will kick back 30% of the fee to you" on an informal basis and everyone will emerge happier.*

The problem is that it is an arrangement where the only people who really know it is happening in a case are the people who benefit from it: the litigator and the advocate (be they a solicitor-advocate, or a barrister). Everyone wins – except the client, who has an advocate assigned to them based, in the first instance, on financial concerns rather than fit.

Solicitor B realised it was going on, in a different firm, with implicit support from several chambers: *I did a case for this firm and then they told me their terms and conditions, and I just said no. I'm not gonna pay for the privilege of doing your work! And then they told me that there were several reputable chambers, one of which I use myself, doing exactly that and I was just absolutely stunned!*

Barrister C pointed out further practical issues of preventing this: *They might dress it up as what they call an "administration fee" because they say "well we let them use the photocopiers"; "we organised a diary for them" and all sorts of things like that, but often it's not even as complicated as that. Often they will just say you can have the work if you pay some of your fee to us.*

There was an air of resigned inevitability when discussing this topic. For example, Barrister A: *The incentive now for an individual barrister or advocate is to go to a solicitor and say "well look, I need your work and I'm not entitled to or allowed to pay a referral fee for it, but if I don't do that your work is going to go to someone else who will" and you do hear anecdotal stories about people undercutting the market by essentially paying bribes or referral fees to solicitors just to secure their work… It's prohibited. It's against our code of conduct and no one will ever admit to doing it out loud, but you would be naïve to think it doesn't go on.*

There was a government consultation on this issue and how to prevent it, which has led into broader consideration of the various fee schemes,[589] so we should not get too bogged down on the issue. What is important to note is that, for some lawyers, the temptation to offer (or, indeed, accept) one is enhanced as a result of the changes to legal aid. To that extent, it is necessary to evaluate the effect this has on defence lawyers' value-sets.

To start with, this is something that both the *Crime Control* and *Due Process* models would not be happy with. The primary concern of both models is freedom of the individual from crime and freedom of the individual from state oppression respectively. The primary concern in offering or accepting a referral fee is the lawyer's own financial gain.

In terms of the Meta-Model, we can see that this incentive discourages lawyers from prioritising institutional values: *Professionalism* (because they are breaching their regulatory code and selling the client short); *Due Process* and *Appropriate Disposal* (the most appropriate lawyer for that particular client is not necessarily being chosen, thus the most appropriate disposal may not be reached.) This translates to a setback to Ultimate Objectives: *Economy, Equity* and *Security*. This therefore reinforces our original finding that neither *Crime Control* nor *Due Process* value-sets are being incentivised, since a large variety of Walker and Telford's Ultimate Objectives are setback and *none* benefit.

What subjective value-set *is* being incentivised here then? Again, simply personal financial gain. The only value that is encouraged here is the lawyers' own personal audit and economy, but that sort of subjective value-set is not one that benefits the criminal justice process at all - in this situation, it operates at the expense of it. This is not necessarily to make a moral judgment on anyone. The moral issues are not black and white here. After all, as Barrister A pointed out above, the incentive works most persuasively because there is an understanding that, if you don't do it, some solicitors would simply go to someone else who would. Equally, solicitors making the offer

[589] Ministry of Justice, *Preserving and Enhancing the Quality of Criminal Advocacy* (MoJ 2015) Leading into on-going consultations on how fees are paid (n 16)

Nor is it the first time this issue has arisen: see Legal Services Commission, *Fee Sharing/referral fees: Important Guidance for holders of LSC Crime Contracts* (2010) where the Legal Services Commission (at the request of the Bar Council) saw fit to remind defence lawyers that this was prohibited by their contract with them (now Legal Aid Agency).

in the first place may be doing so to prevent their businesses folding, rather than out of greed. The important point is that this is not something that *any* of the value-sets we have considered would agree with.

6.2.7 Client Poaching

Both solicitor and barrister interviewees reported this. Barrister M outlined the issue: *You suddenly find yourself at the business end of an application to change legal aid and you've been getting on perfectly well with your client and suddenly someone's come along and whispered total bollocks in his ear and he's believing it. And that's an indirect consequence of the cuts because there's that much less money in the system. So people are resorting to the sort of tactics that were unheard of a generation ago.*

This should not be all that surprising. As Morrison and Leith's study reported, barristers are not *that* special. They are "inevitably caught up in many of the games and struggles that in different forms beset anyone else in a work environment".[590] Clients are "poached" in other marketplaces too. However, as Barrister M made clear, finances make this issue more acute. This therefore supports Moorhead's conclusion, following his survey of legal aid practitioners, that financial pressure "may incentivise behaviour that practitioners indulge in, but also recognise as distasteful, unprofessional, improper or dishonest".[591] Solicitors K and L provide further examples of this, highlighting some decidedly underhand tactics:

Solicitor K: *You do become very conscious of the fact that - I've got a client in [city] on a very serious case. Now, people are saying to me, 'oh, he might be poached'. I'm like, "well, he might be". I'll be surprised if he is because I see him lots, he's well looked after, he knows he's in safe hands, but I can't counter for the family being offered X amount of money if he instructs the firm, and that's the difficulty. You can do the best job in the world for your client but if there's outside influences, it's very hard for them when they're vulnerable to fight off that kind of incentive to go with a particular firm.*

[590] Morrison and Leith (n 65) 48
[591] Moorhead (n 97) 182

Solicitor L: *I had a big case a couple of years ago and I'd worked really hard, got on really well with him, got a barrister, we'd been to see him in prison, we were all ready for our first hearing, get to the first hearing and some girl rocks up at court and says "well, he's my client". She just wanted access to the funds and access to the case. I, obviously, spoke to the client to say "look, what's going on? Do you want to go?" And he said "no, I want to stay with you. She's just giving me a bit of a hard time." It happens a lot and it's very frustrating.*

Barrister M also pointed out that this could lead to delays: *with the big cases it happens quite a lot because the prize at the end of it is £40,000 or whatever. Some of these cases are massive, so one of the consequences is likely to be that the trial date is pushed back thereby to accommodate the reading time that is now required to get through all the material that's new to whoever's come to it.*

So, much like other questionable conduct considered already, we can see that defence lawyers being on tighter margins subjectively also incentivises client poaching. This effectively dis-incentivises the various audit and efficiency values of all of the various models and it is interesting to therefore note once again the rather intriguing outcome that funding policies aimed at saving money sometimes have the opposite effect in practice. On the other hand, if Solicitors K and L are to be believed, this condition does not necessarily assist the defendant's *Due Process* rights either, since they may well have been perfectly happy or better served with the lawyer they originally had. The decision to change is about profiting defence lawyers rather than providing the client with the lawyer that is necessarily best for them. Similarly, this would seem to set back Walker and Telford's institutional values of *Reflexive Coherence* and *Professionalism*, which ultimately hinders all of their Ultimate Objectives. The caused delays would not assist either of Roach's victim models either, nor any of Macdonald's ideal-types. Again, there is inconsistency: it is not so much a case of one hypothetical value-set being subjectively prioritised over another, but of a process which leaves none of these competing viewpoints at all satisfied. The only value-set subjectively encouraged by client poaching is the self-interest of client poaching lawyer. This matters because, in terms of our overall analysis, it again suggests that the habitus of high symbolic capital for a defence lawyer navigating this field is not one that accords with any of the conventional understandings of what the process ought to be about (represented by the various tools in our toolbox), but defence lawyer self-interest instead. This was certainly not what the changes set out to achieve.

6.2.8 Morale

The final subjective issue to consider is morale of defence lawyers. Obviously, someone's morale can affect the values they consider important. Many of the interviewees reported a fall in overall morale (confirming previous research into legal aid lawyers suggesting this was already something of a problem)[592], so it is necessary to consider what changes this might have had on their subjective value-sets. Before continuing, it is also important to briefly note that many interviewees considered morale was bad across the board in criminal justice, (CPS, defence, police etc.). Although this is beyond what the research question was looking at, it is an interesting field condition to note.

A very significant part of this that many barristers mentioned was the reluctance of the LAA and some solicitors firms to pay money owed for work done, so we will consider this in detail first.

6.2.8.1 Late Payment

Barrister D appeared to have a particular angst about this: *The Legal Aid Agency are very bad about paying. They will try and not pay as much as possible, so you have to keep on top of cash flow, so we've appointed a clerk specifically to chase the Legal Aid Agency. They just don't pay. If there's anything that they can quibble about, they will. If there's any problem at all you have to try and speak to them on the telephone. They will only answer their telephone for a certain number of hours per day and they will only deal with a certain number of cases per day… I mean to be honest, they're a bit like a shady backstreet garage! I've just won a case [against the LAA] in front of the costs master at the High Court, which has taken over two years to get the money out!*

The level of distrust between defence lawyers and the LAA not only lead Barrister D to look upon them as a "shady backstreet garage", but also meant that barristers felt the need to employ a dedicated clerk and, in some cases, take the agency to court.

[592] Kemp (n 116) 109; Somerland,(n 94) 356; Moorhead (ibid.), 175, one respondent called their work "a totally thankless task"

Barrister J also commented on the need for dedicated fee chasing clerks: *We're pretty good. We've got a pretty good set of fees clerks. And then they chase the money. But if you're not really well run then you can take six, nine, twelve months to get paid for a case. I mean, for me, I get paid roughly within six months, but that's pretty good generally.*

This illustrates the scale of the problem quite well: even being paid 6 months late is considered "pretty good"!

Many barristers also complained about similar issues getting money owed from work done for solicitors firms:

Barrister F: *The culture of solicitors not paying junior advocates,– sometimes not for a while, sometimes not for-ever – and the slug-like pace of the state institutions being very very slow to pay is as much a factor as the fact that fees were being cut because after all if you are struggling to make a rent payment or if you're trying to plot month to month how you're going to run your household budget, the fact the fee might be a bit lower is probably a bit less important than the fact that you may or may not get it.*[593]

Barrister F referred to numerous examples of not being paid for years (or not at all). Even the average was: *Probably around 3 months.*

Based on the discussions with junior barristers, little appeared to have changed since Barrister F had left e.g.

Barrister I (recently finished pupillage): *It's dire. There's no doubt about it. There are some solicitors that pay only once a year. Some pay quarterly. Having just left my chambers, I did a tally of where things were and I had four cases from when I started on my feet that I hadn't been paid for, ten [one month later] and the number just went up [two months later and] onwards.*

[593] Although one reason why money is paid late may be because, as we saw at Ch 5, 5.4.1.1 and 5.4.1.2, firms' margins are very tight

Barrister K: *Sometimes your aged debt is six to ten years' old. So the result is that you're running an overdraft on money that you're owed and you're paying the interest on it while someone else is holding onto it.*

Barrister H: *I actually had someone say to me in the last few days, he said "how can I manage one month making £200 and the next month getting £1,200? How am I supposed to manage bills this way?" That's the problem for people: the inconsistency. And that's a lot to do with how solicitors pay. Because they did the same number of cases each month. And then in some months you get solicitors who pay more timely and then another month you don't.*

Of course, there is a conflict here. Barristers are somewhat discouraged from making too much of a fuss, as Barrister C noted: *You're in a very difficult position because if you push too hard for your money and they're a firm that send your chambers work, if you end up upsetting the people that are sending you your future work, you might get your money but* [chuckles] *you'll end up out of work because you'll have upset your firm. It's always been a problem at the Bar, but since the cuts have come in it's become much much worse.*

To specifically deal with the issue of late payment by the LAA and solicitors,[594] this would suggest a problem for the *Bureaucratic* model. If lawyers' time is being wasted sorting out pay and chasing fees rather than doing case preparation etc. then there is a potential for the court system to slow down. Subjectively speaking, lawyers are dis-incentivised from valuing efficiency because they cannot trust the LAA or some solicitors to pay on time. They have to spend time that could be dedicated to efficiency chasing people for payment instead. One might be tempted to say that this subjective incentive (whether deliberate on the part of the LAA or not) to move away from efficiency is also showing a move away from the *Crime Control* model, to the gain of *Due Process*. This is not true though. The *Due Process* model loses out here as well because the incentive is to spend the time that might be spent preparing for trials, and working on the defence's case, on ensuring they are paid for work they have already done. This incentive leads to neither of those value-sets being encouraged.

[594] It should be noted that this occurs in a system where, although technically beyond the scope of the research question, other work Criminal Barristers do was often reported to have also not been paid on time, such as the CPS and probation service

The issue of these various arms of the criminal justice process not working harmoniously together also raises issues of *Reflexive Coherence* under the Meta-Model, which, in some ways, sets back nearly all of the Ultimate Objectives: Security is potentially set back, as less time is spent preparing trials and therefore less evidence is available for a judge to make well-informed decisions about it; Economy is set back because less time is spent preparing for cases and therefore the risk is that errors will be made which slow down the process; Equity and Equality are set back because this only applies to those doing legal aid work; Participation is set back because the lawyer has less time to listen to what the defendant has to say (time for conferences etc. is lost) and incorporate this into their case.

Being paid late also impacts morale in a general sense in that, as interviewees pointed out earlier, it leads to financial stress in itself. We will now consider further this issue of general morale.

6.2.8.2 Low Morale Generally

In terms of morale generally, perhaps the most succinct summary of the morale problem was a spontaneous comment made at the end of the interview with Barrister E:

Interviewer*: Right, I mean we've kind of gone through everything I wanted to specifically -*

Barrister E*: I bet we have! I feel like I've unloaded… it's cathartic! It's like going to the psychiatric couch… I feel, I've sort of unloaded full rant on you!*

Clearly there is a great deal of frustration with the current set up.

In general terms, the impression given was of a concerningly low level of morale amongst interviewees and their peers. For example, Barrister B believed the cuts to rates influenced this drastically: *You can see that you're earning less than you would have been earning only 5 years ago, which is disheartening. I'd say morale is at absolute rock bottom… I think people feel like we're doing quite tough jobs for not much money and it is a challenging job.*

Referring to the specific issue of elected cases we considered earlier (at 6.2.1), Barrister B again considered this to impact morale: *I don't know any barrister that would use that to influence them, I don't think it's worth their salt to let that influence them, it's more, you're aware of it as "right, I'm doing my job properly but isn't this rubbish."*

Barrister K referred to feeling "*de-professionalised*" before going on to point out issues of financial anxiety for an already difficult job: *The fees are so low that the financial anxiety is now impossible. It was difficult before and now it's impossible because you're always living… I used to live with this knot of tension in my chest, which was always really about money and would I be paid then and did I dare go on holiday at that point because in the summer a lot of very good briefs come through because a lot of other people are on holiday and it's not a very nice way to live and it's very stressful.*

Plus, I have to say, it's quite depressing, I mean, particularly the sex cases. It's absolutely ghastly. It's very stressful work, you know. I mean, to have to cross-examine a seven year old about why she's making up these wicked stories is no joke. So the money isn't enough to make up for that is what I'm saying.

Barrister M raised similar issues as to lack of morale: *If you're repeatedly told you are worthless, eventually one's enthusiasm for getting up in the morning and going to do that which is "worthless" wanes somewhat. We go to work, we do what we do, we try and do it with a smile but we don't do it with the spring in our step that we once did. I think that's pretty universal.*

This was not restricted to barristers. For example,

Solicitor B: *We have a profession which is demoralised from top to bottom.*

It's long hours, extraordinary stress and pressure and the rewards aren't there.

Both Solicitor G and Paralegal A pointed this out too and noted the detrimental effect it had on goodwill and case preparation in the system:

Paralegal A*: There was also an awful lot of goodwill, on both sides, because people believed in the system.*

Solicitor G*; Yes*

Paralegal A*: Both prosecutors and defence lawyers would go that extra mile, knowing perhaps that they wouldn't get paid for it. It was all part and parcel of what was believed to be a fair system.*

Solicitor G: [Agrees] *mmmm*

Paralegal A*: But because everybody's been ground down by various governments and what they've done to the legal aid system over the last 10 years in particular I think that goodwill to a large extent has gone and sadly what you have is almost a factory-like process of cases entering the system and going through and coming out the other end.*[595] *And whilst everybody does their best, erm, it is [sigh] I dunno how to describe it, it is [pause] there are fewer cases that really get [pause]*

Solicitor G*: Proper treatment*

Paralegal A*: Yes! Exactly*

Solicitor K pointed out how this made it more difficult to stand up to government malpractice, for example a recent issue of prosecutors not properly disclosing evidence – here there is an example of the *Crime Control* model values being incentivised. The lawyer in this example is incentivised to roll over and let the administrative fact finders do what they want: *Lots of people will dig their heels in and say, 'no, that's not acceptable,' but I'm sure equally there are others that are just browbeaten into getting on with it and that's difficult. Some people will just say "yeah, okay, the evidence must be there if the police say it's there" and tell their client to plead guilty. Now, I don't think there's many people that would do that nowadays but you are constantly fighting.*

[595] NB: whilst at first sight we might look at this and think of the *Crime Control* model's "assembly line", note that both A and G pointed out this was equally an issue for prosecutors too. Hence, both *Due Process* and *Crime Control* are set back here.

Generally, low morale could lead to a move towards the *Due Process* value of scepticism as to the utility and morality of the criminal sanction. We have seen that lawyers continuously contemplate leaving (and some do); the relevant agency is compared to a dodgy backstreet garage; there is a feeling that (as we have seen) there are incentives for yourself and your peers to do things that are unfair (like referral fees or giving inappropriate advice); people are "browbeaten" into submission; goodwill evaporates… this paints a general picture that the system is more than a little bit rotten. This is the kind of value that accords very strongly with a general feeling of discontent with the whole business, a scepticism as to the utility and morality of it: *Due Process* Value 6. Unfortunately, such an attitude is so strong that it runs the risk of becoming somewhat defeatist. Whilst some lawyers, like, for example, Barrister B and Solicitor K, no doubt use this in the conventional *Due Process* manner to fight all the harder, as we saw, many pointed out that this might not happen. Even one of Somerland's self-described "political" and committed legal aid lawyers eventually "lost the plot" as a result of financial pressure.[596] Everyone has a tipping point and the impact of finance reduction may be to push many to that point.

We have seen that the effect on many others is to consider leaving, or to take the "if you can't beat them, join them" approach and start doing morally questionable things: the referral fees, the crafty ways to drag trials out, and all the other underhand tricks we have seen in this chapter - or at the very least, as Solicitor G and Paralegal A pointed out, lose goodwill between defence, police and prosecution (thus setting back *Reflexive Coherence* and *Professionalism* and, through that, all of Walker and Telford's Ultimate Objectives). Low morale, after a certain level, leads to extreme cynicism. As we saw in the previous sections, this leads to selfish focus on financial concerns and therefore doesn't really enhance any of the value-sets we have been considering using the model approach, rather it sets back all of them in pursuit of financial self-interest.

Barrister F: provided a good example of this in operation, when we were discussing financial incentives: *The advocate has been paid so piss poorly, is having such a shit time, that he or she just wants to go home. You throw up your hand, giving the impression that you know the system better than the client – which you probably do – and say "well it's all looking very negative isn't it? Perhaps you should reconsider your plea". And that happens at the margin cases, the pickpocketing or the low-lying Public Order Act offence. Where the junior advocate, who's thinking <fuck this for a game of soldiers, I've lept across London to do this brief, I dunno if I'm ever gonna*

[596] Somerland (n 94) 356

get paid for it, when I started this brief was worth £150, now it's worth £75> [says] *"you should just plead guilty I think." Now <u>that</u> is the sort of culture, the early cynicism instilled in advocates which, yes, I definitely <u>did</u> see a bit of: these prematurely war-weary and cynical late 20-somethings who were just knackered and disillusioned. And they're a real danger to their clients at that point, because of course to the client they look like they know what they're doing, they're professional and so forth, but it could be the difference for example between having a criminal record or not. Yes it might be a low-lying offence, but if it's one of these marginal things – which may not matter very much to the advocate – but make a huge difference to the life of that person. It's the difference between being able to say, for the rest of your life, in answer to the question: do you have a criminal record? "No", rather than "Yes, but…"*

Barrister G came to a similar conclusion: *I think the state of morale across the criminal justice system is really low. The CPS in particular really struggle with the fee cuts on their side, so they now have a lack of bodies to do the work, but also a lack of incentive to do it properly and that is partly because they're stretched so thin, it's partly because there's just not enough money. And that all takes it toll on people just not feeling terribly enthusiastic about the job; not truly caring if they are going to stay late and do something that really needs doing, making sure that disclosure gets out on time etc. And it's the same for defence now, more recently, that you don't feel like the work you're doing is valued and so, like you say, when practitioners are faced with a decision, A's in my client's interests, B is in my financial interest, a lot of people might say "B" erm unfortunately. Simply because you don't get the recognition for the fact that you have sat up all night to prepare a particular case in a particular way or gone out of your way to do something that other people wouldn't necessarily do.*

Like the other nodes considered in this chapter, ultimately low morale leads to focus on financial concerns and therefore provides an occluded story: it doesn't really enhance any of the value-sets we have been considering using the model approach, rather it is purely about defence lawyer financial interest. In terms of our analysis, it again suggests that the habitus of high symbolic capital for a defence lawyer navigating this field is not one that accords with any of the conventional understandings of what the process ought to be about (represented by the various tools in our toolbox), but defence lawyer self-interest instead. We will now consider the implications of this issue and those raised by the other subjective sections' for the overall impact on subjective value-sets.

6.3 Conclusion

The impact on the subjective value-sets of lawyers can be seen to be a little different to what we observed about the systemic value sets the changes embodied. Here, there *is* a trend. The change in value-set *does* point in more or less the same direction. The trouble is that it is not really a direction that any of the value-sets under the models would approve of. In every section this chapter considered, the more or less general trend is that all value-sets are setback at various points. This is most obvious when we consider Walker and Telford's meta-model. Very often, most Ultimate Objectives are set back. None are improved. If we were being very generous, we could note that in two cases, the low morale and financial incentives, there is occasional priority given to the values of the *Crime Control* model, but this is also frequently set back due to wasted time and inefficiency and there are as many (possibly more) incentives to plead not guilty as guilty. Those two areas also occasionally advance isolated values of the *Due Process* model - but this is to an extent so extreme that it makes very little practical difference. For financial incentives, it is closer to the *Adversarial Reliability* ideal-type than anything else and, for morale, the only *Due Process* value being incentivised is extreme scepticism. Indeed, one might say it is more "cynicism" than "scepticism".

What this shows us here is an overall encouragement to move away from *all* other value-sets identified by the various tools and towards the most simple value-set of all: the *Rational Self-interest* model first introduced in Ch 4 and constructed as a result of this finding. Specifically, the self-interest of financially surviving. The application of the *Rational Self-interest* model here can be illustrated by applying the prisoner's dilemma theory it is based upon. The following exemplar diagram illustrates this point for the financial incentives subjective theme:

Financial Incentives

		Ministry of Justice			
		Cooperate (higher rates)		Betray (lower rates)	
Lawyers	Betray (follow financial incentive)	Ultimate Objectives	Lawyer Finance	Ultimate Objectives	Lawyer Finance
	Cooperate (advise properly/take junk case/investigate thoroughly etc.)	Ultimate Objectives	Lawyer Finance	Ultimate Objectives	Lawyer Finance

The Classic Prisoner's Dilemma

		Prisoner A			
		Cooperate		Betray	
Prisoner B	Betray	Prisoner A: 3 years	Prisoner B: free	Prisoner A: 2 years	Prisoner B: 2 Years
	Cooperate	Prisoner A: 1 year	Prisoner B: 1 year	Prisoner A: free	Prisoner B: 3 years

As will be recalled from Chapter 4, the prisoner's dilemma gives four potential outcomes: A, B, C and D, in order of desire - Outcome A is the best outcome (represented by green in the diagram); Outcome B is the second best outcome (yellow), Outcome C is the second worst outcome (orange) and Outcome D is the worst (red). Individuals can either cooperate or betray, but the individual acting purely rationally (i.e. out of self-interest) would always choose betray. If both individuals (as they inevitably must if acting "rationally") choose betray, Outcome C occurs to both. If one individual betrays and the other cooperates, Outcome A occurs to the betrayer and Outcome D to the co-operator. If both individuals cooperate, Outcome B occurs to both.

In these diagrams "Ultimate Objectives" simply refers to all the other models discussed. As the previous discussion established, it is these that are all set back in response to the cuts to legal aid. Another thing to note is that the particular context of this legal aid situation means that the consequences are not exactly the same as the classic prisoner's dilemma; but worse! Classically, if both sides betray they should each end up in Outcome C, the second worst state. In fact, the Ultimate Objectives must end up in their worst possible state, Outcome D, *whenever* the lawyer chooses betray, whether the MoJ chooses to cooperate or betray. This is because it is the lawyer's behaviour that controls what happens to the Ultimate Objectives at this point – i.e. relatively speaking it is no better for the Ultimate Objectives whether the lawyer betrays when the MoJ cooperates vs when they too betray. The fact that the lawyer betrays causes the same damage whatever the MoJ does. Conversely, again unlike the classic prisoner's dilemma, if both sides cooperate, instead of both achieving Outcome B, the Ultimate Objectives actually do better and achieve Outcome A for the same reason. Unlike the prisoner's dilemma there is no loss to the Ultimate Objectives by cooperating. These are all somewhat irrelevant details to the actual decision-making though. It doesn't change the fact that it is still in both individuals' self-interest to betray; it just means that the consequences are worse.

In that sense, this work provides a practical endorsement of economists Fenn et al's argument in relation to the change to fixed fees: "solicitors do respond to financial incentives; something that economic theory recognises, and current/future reform should acknowledge."[597] The same can be said for changes in rates. Once we understand that the changes to legal aid have the effect that they do in incentivising values entirely at odds with the other models discussed, it should not be at all surprising that lawyers are incentivised to behave in this way. Game theory tells us that this is the *rational* way to behave in such a situation. Evolutionary theory suggests that this is how to survive. We should, though, be careful to note that this may well mean that, just as with Dawkins' selfish gene,[598] the only defence lawyers left in the market (i.e. those who don't go bust or leave the profession) after a period of time with legal aid as it is are likely to be the ones willing to do what it took to financially survive: disregarding any values that are generally considered important for the criminal justice process. The ones who, as Moorhead identified, can willingly indulge in certain behaviour, whilst at the same time recognising that it is distasteful, unprofessional,

[597] Fenn et al. (n 87) 678
[598] See Ch 4

improper or dishonest.[599] Much like the poor conduct observed by Baldwin and McConville in the 70s, this actually "may well make sense within a system of values this warped",[600] because, after a period of time, that will be the state of habitus and field here.

To be clear, this is not necessarily a criticism of the lawyers involved. The issues are morally complex and the purpose of this work is not to judge them. We can, however, conclude that the incentive provided by these changes is to shift one's value-set away from all the value-sets people might want our justice system to be about. If you were to ask anyone (whether that person be a lawyer, police officer, probation officer, government minister, or a member of the public) what is most important in administering the criminal justice process, no doubt you would get a mixture of the views represented in the criminal justice process models we considered in Ch 3 and used here as our tools of analysis. What you would not expect them to reply is a *Rational Self-interest* model fanatic-esque: "the financial profit of lawyers is the most important part of our criminal justice process", yet that is precisely the subjective view point that these changes incentivise lawyers to take.

It is this element, the *Rational Self-interest* model, which has been the one constant in our analysis. We have therefore found that key part of the dominant habitus required to succeed in this field that we were looking for. Having the values of the *Rational Self-interest* model internalised as part of one's habitus, alongside the insider knowledge on how best to manipulate the system (and, based on the interviews, most lawyers clearly have *this* knowledge) provides the defence lawyer with the best chance of success in this field. Possessing this habitus would be both the ultimate form of symbolic capital and, consequently lead to the accumulation of economic capital at the expense of other lawyers who either voluntarily leave or slowly go out of business.

[599] Moorhead (n 97) 182
[600] Baldwin and McConville (n 54) 116

Chapter 7: Concluding Reflections

We have reached the end of our investigation. The purpose of this final chapter is to reflect on what we have seen along the way and, in doing so, answer the research question. We shall also consider what this might mean for the future.

7.1 Answers to our Original Questions

Our initial research question asked: what impact does reducing levels of criminal defence legal aid funding have on the professional criminal justice value-sets of defence lawyers? In the introductory chapter, we saw how the literature suggested that criminal justice practitioners have significant power to influence what goes on in the criminal justice process. Much of the previous work examined illustrated examples of this being exercised in a negative way by criminal legal aid lawyers, though there were some positive findings e.g. Telford and Santatzloglou's empirical research showing a reduction in youth imprisonment produced by the activities of practitioners in the youth justice system.[601] In that example, practitioner power undoubtedly changed the lives of their young charges for the better; realising Rutherford's earlier vision that "it is with them [practitioners] that hope must reside if… criminal justice is to be made a little more decent".[602] More recently still, policymakers and practitioners framed this phenomenon in positive terms: "healthy subversion".[603] Unfortunately, this work supports the view of previous work that such a positive understanding of the influence of practitioners may need to be tempered. A multitude of opportunities exist for defence practitioners to influence the criminal justice process in a negative way: whether that is by being part of a process by which defendants with private funds have a better chance of success;[604] taking advantage of the many arbitrary financial incentives currently on offer;[605] or any of the other numerous opportunities which this work has uncovered that can profit practitioners at the expense of defendants, victims and "The Taxpayer".[606] Indeed, very often at the expense of all three at once. So the first key thing to note is that unhealthy subversion exists too and this is a problem, bound up with any discussion of cuts to legal aid. That

[601] Telford and Santatzoglou (n 127)
[602] Rutherford (n 126)
[603] Annison, Boswell, Telford and Thornton (n 128) 3
[604] See Ch 5, 5.4.2
[605] See Ch 5, 5.4.3 - 5.4.5 and Ch 6, 6.2.1 – 6.2.3
[606] See Ch 5 and Ch 6

is not the end of the story, but it is an important realisation that ought to be borne firmly in mind when approaching policy in this area.

There were also several original insights provided by the interview discussions about the state of the criminal justice process in general that are significant. Firstly, it is very surprising to note the finding that, in many cases, lawyers are incentivised to run trials.[607] This would contradict the findings of previous work that, for example, advocates primarily provide "robust advice" and "improper pressure" to plead guilty, on behalf of the judge, as a cog in a state-induced guilty pleas machine.[608] This work has shown that that is in fact only sometimes the case. Having said that, it is not for the best of reasons! It is hardly an improvement to say "actually, your lawyer is not always going to give in to state pressure to advise guilty pleas; sometimes their own financial concerns will trump it!" Nonetheless, it is an important finding to note. This work instead *partially* endorses (and builds upon by showing that it is also true for solicitors) the point made by Tague: that barrister self-interest favours trials.[609] On the other hand, it also *partially* supports the general view in the literature that lawyer self-interest is served by guilty pleas rather than trials. The key insight this work provides here is that the operation of financial incentives to plead guilty is much more nuanced than previous research suggests. Sometimes financial pressure points in favour of a guilty plea and sometimes it points in favour of a trial. The operation of this incentive is arbitrary, but the data suggests it nonetheless has an effect as financial pressure bites. The operation is likely to be substantial, however, given the frequency with which decisions on plea advice can occur in situations of "ethical indeterminacy": where client interests are unclear, but lawyer interests are not.[610]

The ways that privately paying defendants currently have an advantage over publically funded ones in terms of the level of work that gets done on their case is also a concerning insight,[611] particularly given the general view amongst participants that more private work will need to be

[607] See Ch 5, 5.4.3 and Ch 6, 6.2.1
[608] McConville and Marsh (n 143) 121, 123. See also Newman (n 122) Ch 5, making a similar point about lawyers pressurising clients to plead guilty.
[609] Tague (n 114)
[610] Tata (n 113) 518-519, footnote 95
[611] Though given the vastly negative literature on the standard of legal aid work discussed in Chapter 1, this is simply a further step down the same road, rather than a new path. Indeed, previous research goes further, suggesting that simply switching method of payment from "contractor" to "salaried" had a significant effect - Tata et al. (n 104)

done to have any chance of a sustainable criminal law business model. The fact that Barrister J[612] could outline this difference in such a detailed and nonchalant way to a stranger they had never met suggests that, for lawyers at least, this is not unusual. The shock factor evaporated long ago. There is also the finding of the observed increase, by both prosecution and defence lawyers, of self-represented defendants in the criminal courts. This finding is particularly important in that it backs up other recent research findings on this problem from other areas of the country.[613] It is particularly pertinent given the recent controversy of the MoJ refusing to publish their own research findings on how this issue affects the Crown Court.[614] More generally, one could add most of the nodes discussed to this list of concerning current insights provided by this work: the crippling bureaucracy of the courts and prosecution services;[615] the problems with expert evidence;[616] the very problematic arbitrary incentives that the fee system provides; the brain drain from the criminal law professions;[617] the client poaching;[618] the referral fee bribes[619] etc. etc… Even on an entirely shallow analysis one might say that it is a bit of a mess, but the original analysis tools developed in this work also allow us to peer deeper than that.

The above is an important starting point, but there is scope for a deeper analysis and appreciation of the issues at stake here. Pursuit of this led us to a consideration of an epistemological conflict that had plagued earlier studies' discussion of the criminal justice process. We saw how the disputes between Travers[620] and McConville et al.,[621] building upon an initial attempt at reconciliation by Newman,[622] could be moved beyond with the help of Bourdieu's concepts of habitus, field and capital.[623] This original application of Bourdieu's work to the dispute provided the alternative view that there were two, equally valid, sides to the epistemological coin, rather than just one: habitus and field. It is not one or the other, but the interaction between them that can explain actors' practices. These allow us to understand the data in two unique, but equally crucial senses: the "systemic" analysis of the conditions of the field and the "subjective" analysis of the defence lawyer habitus. We simultaneously came up with an original way to address the

[612] See Ch 5, 5.4.1.2
[613] Gibbs (n 258)
[614] Fouzder (n 509)
[615] See Ch 5, 5.4.1.7
[616] See Ch 5, 5.4.1.4
[617] See Ch 5, 5.4.7 and Ch 6, 6.2.8
[618] See Ch 6, 6.2.7
[619] See Ch 6, 6.2.6
[620] Travers (n 77 and n 154)
[621] *McConville, Hodgson, Bridges and Pavlovic* (n 75); Bridges, Hodgson, McConville and Pavlovic (n 166)
[622] Newman (n 122)
[623] Bourdieu (n 184)

criticism that those concepts were a little too abstract: by grounding them in simplified analytical constructs, such as Packer's criminal justice process models.

This led to another problem: the many criticisms and limitations of Packer's approach, made out most forcefully by Macdonald.[624] However, as we saw in Ch 3, these criticisms often falsely equate issues of simplicity (which the models do have) with fundamental flaws (which they do not have). In reality, as the discussion in Ch 3 showed, these issues of simplicity are problems that will inevitably exist with any attempt to create simplified analytical constructs of a fundamentally complex system - like the criminal justice process. When you simplify something in order to make it easier to understand and analyse, details will be lost. However, it does not inevitably follow from this that simplified analytical constructs cannot nonetheless be both a useful and sensible way to analyse the criminal justice process. On the contrary, Packer's models, because of their simplicity allow us to make sense of a fundamentally complex system in a way that other approaches do not. In just the same way that, whilst the official map of the London Underground is a simplification of London's subterranean geography, it nonetheless helps us to navigate a very complex system of tunnels in a way that a "to scale" map does not. Just like Packer's models, it is because of this simplicity that it is a useful way to help us understand how to get from one station to another. Hence, another very important original point that ought to be borne in mind (and one of more general significance beyond legal aid in particular) is that understanding criminal justice urgently requires restoration of Packer's contribution to its rightful place as a useful analysis tool. The unique contributions to our understanding of legal aid provided by the models of *Crime Control* and *Due Process* in Ch 5-6 make it abundantly clear that in abandoning Packer's approach, we would be losing an important criminal justice analysis tool. This work has therefore also introduced and demonstrated a better and more useful way of comprehending Packer's simplified analytical constructs.

That is not to say that the flaws identified by critics of packer's approach do not matter. Indeed, we saw that the tools they came up with to counteract these problems (whilst suffering from similar issues in themselves) also provided unique perspectives of their own on criminal justice issues - perspectives that a Packer analysis alone would have missed; even if they themselves would miss things that a Packer analysis would pick up. This led to a consideration of whether we could attempt to get the benefit of all of these unique perspectives, whilst avoiding as far as

[624] Macdonald (n 280)

possible the flaws associated with using one simplified analytical construct. The result was, in Ch 4, the construction of an original, multi-layered, approach to criminal justice analysis: the toolbox approach. This allowed us to consider many different perspectives on the criminal justice process when analysing the issue of legal aid cuts; vastly beyond what that of simply using one tool, such as Packer's *Due Process—Crime Control* spectrum or Macdonald's ideal-types alone, would provide. The benefits of this new approach are clear from every section of Ch 5 and 6. The surprising finding that the story was, in the main, an occluded one, setting back many different conventional understandings of what the criminal process ought to be about, would not have been possible without a wide range of perspectives. The fact that this wide range of, often conflicting, understandings of what the criminal justice process ought to be about were frequently all equally set back tells us something important about the impact of changes that using one tool alone would not have. It also provides a valuable new approach for qualitative data analysis in criminal justice.

Linked back to our understanding of the habitus and field, the toolbox approach provided a far more enhanced and original understanding of the impact of criminal legal aid cuts. It allowed us to comprehend a criminal justice process whose field conditions were systemically sporadic and therefore a breeding ground for a habitus to develop and thrive that is fundamentally incompatible with every conventional understanding of what the criminal justice process ought to be about. Our subjective analysis confirmed this and helped us construct a model of what that habitus is: the *Rational Self-interest* model. In other words, the newly developed toolbox approach, coupled with our unique understanding of how Bourdieu's concepts of habitus and field operate in relation to it, allows us to go beyond stating that unhealthy subversion exists and to really drill down into why it exists and what it involves. It is not just that cuts to legal aid have created or encouraged unhealthy subversion; it is that cuts to legal aid have contributed to a field setup where the dominant habitus would be one that resembles the *Rational Self-interest* model. In game theory terms, to have a habitus that suggests one would "betray" the ultimate objectives of the process every time in order to further one's own interests. As we saw in Ch 4, this can result in a loop where both players continue to betray one another, despite it meaning that they both lose out in the long-term. This is not unlike the system McConville and Mirsky uncovered when researching public defence lawyers in New York, which institutionalised methods depending on routinized case processing and discouraged adversarial advocacy - [625] to which we could add

[625] McConville and Mirsky (n 64), 235

that the current legal aid landscape also occasionally institutionalises inefficient working. Such a state of affairs is incompatible with every conventional understanding of what the criminal justice process ought to be about (represented by the diverse variety of analysis tools in our toolbox). It is also incompatible with the aims of the MoJ in introducing the reforms – both self-stated[626] and in the view of critics[627] - the MoJ intended to build a more credible and efficient system; instead, lawyers were often incentivised to work inefficiently and the system became less credible. As we saw in Ch 5 and 6, inefficient working took many forms e.g. unprofitable cases being minimised, profitable cases being snapped up and poached, some unprofitable cases being made profitable by e.g. turning guilty pleas into trials etc. Equally, if the system were credible, we would expect it to be broadly acceptable to at least one of the conventional understandings of what the process ought to be about rather than setting them all back most of the time. Simply imposing cuts carte-blanch without thinking through these consequences in terms of practitioner behaviour is rather like consistently picking "betray" in a game of prisoner's dilemma and expecting the other player to pick "cooperate". Game theory tells us that such an approach is "irrational". The rational course is for both players to betray instead. There is no logical reason to expect lawyers to financially sacrifice themselves and their businesses for the sake of Ministry of Justice book balancing.

Nor can we simply lay the blame with "shameful" defence lawyers, like some of those exposed in Newman's ethnographic work in three defence firms.[628] There may well be lawyers across the country who, like some of Newman's research subjects, "moved away from client-centeredness and towards managerial, profit-centred concerns",[629] but even if many lawyers in the criminal justice process instead shared the laudable values present in the various models we have considered,[630] the problem would remain. The trouble is that lawyers are still operating in a Bourdieusian field where those laudable values are not conducive to success. Much like Bourdieu's rather tragic interviewees in *The Weight of the World*, such a habitus is out of sync

[626] The MoJ claimed the changes were about delivering a more credible and efficient system in the title of the first consultation on the legal aid changes

[627] For example, Michael Turner QC's (then head of the Criminal Bar Association) weekly Criminal Bar Association message as far back as 2013: "For many months we have been saying that these proposals are not about cuts, they are an ideological attack on the rule of law and our democracy." <https://www.criminalbar.com/latest-updates/news/q/date/2013/07/15/monday-message-15-07-13/> accessed 10th December 2015

[628] Newman (n 122) 159

[629] ibid.

[630] And in my view, many do. Certainly, the detailed concrete examples provided by interviewees of the many times they had worked against their own financial interests for the sake of their clients suggests so.

with the field conditions.[631] Sadly, Bourdieu's work would also suggest that such a habitus can only survive in those conditions for so long. This is likely why so many, from the most junior to the most senior, were moving away from criminal law.[632] On that basis, Newman's overall critique is a little harsh. Lawyers are trying their best to do a very difficult job, in very trying field conditions and on a shoestring budget. Calling for changes in legal education, lawyer self reflection or other attempts to teach lawyers the correct values to hold,[633] underestimates the potent influence that one's environment has on one's values and disposition – which Bourdieu's field--habitus approach makes clear. There is little point saying defence lawyers should subscribe to a particular value-set that we deem laudable, if having that value-set is setting them up to fail in the field they reside in. The problem is as much that the field does not accommodate (let alone encourage) the values that we think are important, as it is that some lawyers don't hold them. Indeed, Bourdieu's point was that these two are interconnected: the field contributes to (or even creates) and internalises the habitus and the habitus maintains that field - they cannot be looked at in isolation.[634]

7.2 New Questions

There are obviously limitations to what the findings here can do, which in turn opens up further questions to consider in future. This last section will consider these.

Firstly, in a methods sense, this data-set is limited in that, whilst a large variety of practitioners were spoken to, it nonetheless represents a small percentage of the total number of criminal practitioners in England and Wales. Hence, these findings are not *generalisable* in quite the same way that quantitative data would be. This is the trade-off for the fact that this deeper analysis tells us things that quantitative data could not. Hence, we cannot conclude that legal aid changes are having the effects discussed in this work *everywhere*. However, we can conclude that this effect is demonstrably *capable* of happening, and has happened, amongst a set of lawyers in various locations, firms and chambers, and at many different levels of experience. Nonetheless, it would be interesting to see whether, if someone were to interview another large group of

[631] *The Weight of the World* (n 194) e.g. 6-23, detailing the "restructuring" of the Western steel industry.
[632] See Ch 5, 5.4.7 and Ch 6, 6.2.8
[633] Newman (n 122) 159-162
[634] *Logic of Practice* (n 184) 67

defence lawyers, they would say the same. The perspectives of, for example, ethnic minority communities were touched upon here, but could be investigated further.

Secondly, the toolbox approach, harmonising as it does the tools used to analyse the criminal justice process, could provide useful insights in other areas. The research here is necessarily limited in the sense that it took defence lawyers as its focus – although we did also consider several other areas in Ch 5. There were good reasons for taking this focus when analysing cuts to legal aid, but it does mean that there are other, similar and connected, issues which we have become aware of in the course of this research that merit further investigation. For example, the unique strains that we saw the prosecution and courts services were under; the difficulties being granted legal aid and the knock-on effect and further difficulties caused by this in terms of self-represented criminal defendants. All of these areas would benefit from further examination, building on the initial inroads provided by Ch 5 - as part of a more comprehensive analysis of the financial pressures in the criminal justice process overall.

Thirdly, the penultimate question opened up by this work is what to do about the problems identified. Unfortunately, reform is a difficult issue. The fee system is complex and public funds are limited. Tinkering with the system may simply replace one set of opportunities for the *Financial Self-interest* habitus defence lawyer to manipulate with another, new, set.

There is also always the much considered, but more substantial, option of a comprehensive state "criminal defence service" (like the CPS); and small-scale use of this approach does suggest it has merits.[635] However, this is also not without its problems. Whilst it might address many of the issues discussed in this work, it might also simply substitute them for many of the other issues the barristers spoken to reported with work they did prosecuting for the CPS. We can recall the particularly pithy comments on this from Barristers M (about prosecuting a large drugs case: *five weeks of sheer, unadulterated hell*), and K (*the whole thing feels like it's run on the seat of your pants*). The general impression provided by those who have worked for the CPS suggests that using it as a model to base criminal defence on is something that should be approached with caution.[636] Likewise, although the latest area reports (June 2016 – February 2017) from HM CPS

[635] Bridges, Cape, Fenn, Mitchell, Moorhead and Sherr (n 3)
[636] See especially Ch 5, 5.4.1.7

Inspectorate do not show complete failure across the board, there is poor performance in many geographical areas. Victim communication was poor in the South West,[637] Wessex,[638] East Midlands[639] and Wales[640]. Even in those areas said to be doing well, such as Yorkshire and Humberside's victim treatment (labeled "Good" by the report), there is significantly less than a 100% adequate performance. E.g. for Yorkshire and Humberside, 79.5% of cases in the sample examined (58/73) fully met and took account of the rights, interests and needs of victims and witnesses.[641] Whilst the report clearly frames this in a positive light, that still equates to the job not being done properly for one in every five files!

On the other hand, one might say that the situation with legal aid is so bad that any potential way out of it merits further, albeit cautious, research and consideration. This also strengthens the case for research into the issues with the CPS discussed earlier. Learning more about those would also tell us something about the feasibility of a large-scale criminal defence service.

The prospect of reversing fee cuts would mitigate many of the effects described in this work, but that is unfortunately politically difficult. Nonetheless, if it is the only way out, something being politically difficult ought not to be surprising, or a bar to trying. Numerous historical examples of things that were (much more) politically difficult being accomplished show that important political causes are often, by their nature, not easy ones. One might say the same about Packer's concluding reform proposal: drastically cut back on the use of the criminal sanction, thereby saving vast amounts of public money.[642] If the justice budget remained the same, this would have the same effect as a departmental funding increase, allowing for fee cut reversals. Such detachment is also politically difficult, but, again, also possible: e.g. "gamblers, narcotics addicts, prostitutes, homosexuals [and] abortionists" (Packer's examples),[643] have, in many countries, been successfully detached from the criminal law since his book was published.

Across the dataset as a whole, without me even asking about the subject directly, Barristers B, C, D, E, G, I, K and M had negative things to say about the CPS (many with direct experience of doing work for the CPS), as did solicitors B, I and K. Regrettably, I never heard a single positive thing about it during the whole project.

[637] 'Area Assurance Inspection of CPS South West' (HM CPSI 2016) 1
[638] 'Area Assurance Inspection of CPS Wessex' (HM CPSI 2016) 1-2
[639] 'Area Assurance Inspection of CPS East Midlands' (HM CPSI 2016) 2
[640] 'Area Assurance Inspection of CPS Cymru-Wales' (HM CPSI 2016) 1
[641] 'Area Assurance Inspection of CPS Yorkshire and Humberside' (HM CPSI 2017) 41, para 5.9
[642] Packer (n 52) 366
[643] ibid.

In any event, having a system that sporadically favours and sets back many different value-sets in its operation is a problem. Consistency in the principles that are being prioritised in the running of the criminal justice process matters - perhaps more than we might immediately think. Law, like currency, only has effect because people believe in it. Bank notes have no power in the abstract; they do not compel people to give up their property when sufficient notes are given to them. People only allow these things to influence their behaviour because they believe in them. Similarly, without belief in their legitimacy, statutes and cases are simply words on a page. A key part of that belief in the law relies on people believing that it is based upon principles: principles that are at least broadly relatable – even if people might disagree with some of them. That is why Packer set up *Due Process* and *Crime Control* as "fanatics": there was this idea that most people would accept elements of both models were worth something, even if they might not agree with them all. That belief in the system is compromised when the criminal law is seen as arbitrary, unfair and unprincipled. We can see this lack of belief manifested in the collapse of practitioner morale and its corrosive effects discussed in Ch 6. Hence, the one strong recommendation for reform that this work makes is to bring principles back in to the discussion of legal aid. Reform documents from the MoJ necessarily focus very much on "how to get £X out of the budget" (because that is the Ministry's chief concern) rather than giving much thought to how to distribute limited funds in a way that respects principles like *Crime Control*, *Due Process*, victims rights etc.. However, in the long-term, this imbalance is unfortunate. Public funds will always be limited, but that does not mean they cannot be distributed in a principled manner.

The next stage then, which this work has not addressed, is to consider how it might be best to balance those competing concerns. That is another question that the toolbox approach opens up. Whilst we can accept that having none of the value-sets particularly advanced and many frequently setback in favour of lawyer self-interest is bad, how *should* we balance these often-competing interests? Is a sensible compromise even possible? Morally and logically coherent funding reforms cannot be made until these problematic issues of principle are confronted.

Appendix 1 - Interview Schedule

Introductions

- Explain information sheet and ask if any initial questions

General

- Information about interviewee's career, experience etc.
- In a general sense, what impact cuts to legal aid fees have on their work
- Changes in quantity or kind of work done
- Structural changes in firm/chambers? i.e. The way things are done

Specific

- Impact on advice given to clients/pressure to advise certain courses of action. Financial incentives. Refer to previous interviewees comments
- NB the second 8.75% cut is "suspended", what happens if Justice Secretary decides to "unsuspend"?
- Last time dealing with a client and what advised. How impacted by legal aid. E.g. *Could you take me through what happened the last time you were at court? What work did you do? What did you advise? What happened? What might have happened differently if the cuts were reduced? How does that differ to say, a few years ago?*
- Solicitors delaying advocate until quite late sometimes, because if it is a guilty plea, they want to use their own in-house advocate and only if it is to be a long trial may they prefer to brief counsel.
    a. Is this true?
    b. What is the significance, if any, of cuts to this?
- Impact on new entrants to the profession
- Impact on victims
- Client poaching

Appendix 1 – Interview Schedule

Finishing

Interviewee to be thanked for their time and asked two final questions:

1. *Is there anything that you think is really important that we haven't talked about yet?/What is the most important point to take away?*

2. *Any colleagues/friends they could recommend?*

Appendix 2 - Summary of Analytical Tools Used

Packer's Dichotomous Models

Ground Rules

1. No punishment without law
2. Separation of powers
3. Legislative supremacy – criminal conduct ought to be pursued
4. Rule of Law
5. Adversarial System

Crime Control

1. Freedom of individual from crime
2. Efficiency of process
3. Presumption of guilt and faith in administrative fact finders

Due Process

1. Freedom of individual from state oppression
2. Administrative fact finders not to be trusted
3. Quality control
4. Legal guilt and presumption of innocence
5. Equality
6. Scepticism about the morality and utility of the criminal sanction

Macdonald's Ideal-types

Crime Control Ideal Types

Investigative Efficiency

- Absolute faith in administrative fact finding
- Belief in no restrictions on administrative fact finding

Operational Efficiency

- Pre-supposes IE is correct
- Courts must run as quickly as possible. They are obviously guilty, so only a suitable sentence needs to be considered

Due Process Ideal Types

Administrative Reliability

- Ascertaining the truth is most important
- Administrative fact finders are not to be trusted

Adversarial Reliability

- Those charged are a random group of individual
- Tribunal is the only way to test the case against

King's Extra Models

Medical

- CJP as a crime clinic. Diagnosis, prognosis, treatment (needn't be pleasant) and cure

Bureaucratic

- Process must be predictable and rational
- Defendants to be treated equally, in accordance with pre-determined rules
- Speed and efficiency

Status Passage

- Courts to provide "us and them" mentality to strengthen community solidarity. Isolation of the defendant
- Ritual "status degradation" important in the courts

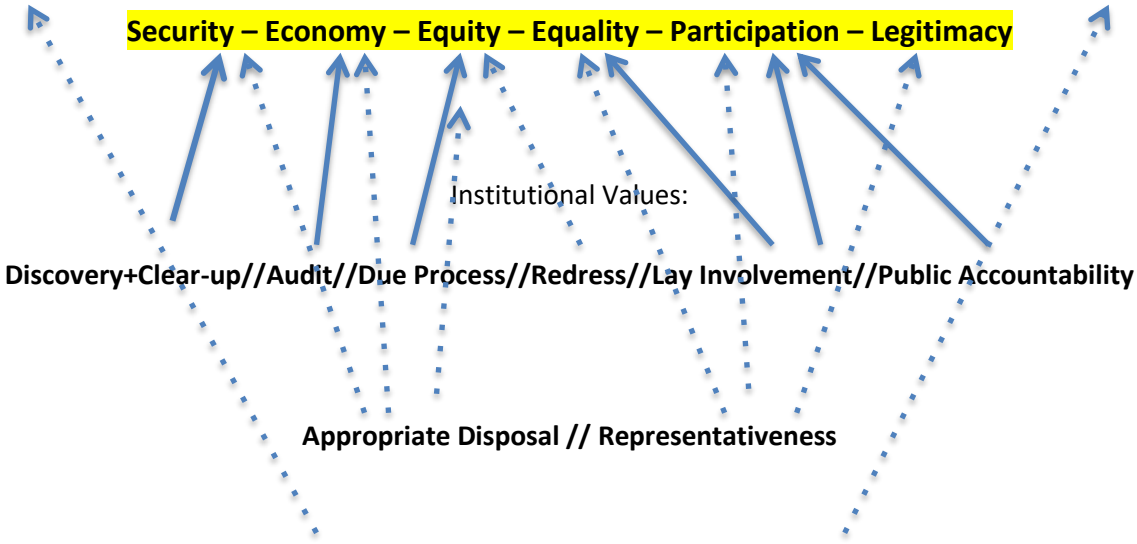
Power

- System ought to promoting interests of ruling class and keep everyone in their rightful place
- Formal rationality, but not substantive rationality

Walker and Telford's Meta-model

See page 68 of their paper:

Ultimate Objectives:



Professionalism (autonomy, expertise, integrity) // Reflexive Coherence

Roach's Victim Models

Rollercoaster Victim

- Wants to reduce crime and make sure victims are not badly treated by the system
- Tools of choice are further criminalisation and greater punishment
- Lack of trust in administrative fact finders
- Rejects guilty pleas

Circle Victim

- Prevention of crime and restorative justice
- Victim's choice not to invoke sanction or process (as we know it) ought to be respected

Rational Self-interest Model (Inspired by Tucker and Dawkins)

- Own personal advantage is most important consideration
- Would always pick "betray" in prisoner's dilemma game
- Instinctive self-preservation
- Cynical about entire criminal justice process – simply sees it as something to be manipulated for their own personal advantage

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