Magistrates, Managerialism and Marginalisation:

Neoliberalism and Access to Justice in East Kent

Lucy Charlotte Welsh

University of Kent

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"A nation's greatness is measured by how it treats its weakest members"
Mahatma Ghandi

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List of Abbreviations

CCTV	Closed Circuit television system
CJA	Criminal Justice Act
CJ: SSS	The Criminal Justice: Simple, Speedy, Summary initiative
Cr.PR	Criminal Procedure Rules
CPS	Crown Prosecution Service
DCA	Department of Constitutional Affairs
HMCS	Her Majesty's Courts Service
HMCTS	Her Majesty's Courts and Tribunals Service
IMF	International Monetary Fund
JP	Justice of the Peace
LAA	Legal Aid Agency
LSC	Legal Services Commission
LCD	Lord Chancellor's Department
MoJ	Ministry of Justice
MPS	Mont Pelèrin Society
NHS	National Health Service
PND	Fixed Penalty Notice for Disorder
PTR	Pre Trial Review
UK	United Kingdom
US/USA	United States of America

Abstract

This thesis examines access to justice in summary criminal proceedings by considering the ability of defendants to play an active and effective role in the proceedings. Summary proceedings are those which take place in magistrates' courts, and are decided by lay magistrates or a district judge (magistrates' courts) without a jury. The study uses ethnographic fieldwork to explore the structural/cultural intersection of public services by considering both the effects of structural changes in criminal proceedings in magistrates' courts and the agency of the courtroom workgroup.

While the cultural practices of magistrates' courts have always tended to exclude defendants from active participation in the process, I argue that the structural influences of neoliberalism, in terms of demands for ever more efficient practices and emphasis on individual responsibility as a function of citizenship, have exacerbated the inability of defendants to participate in the process of prosecution. I also observe that, for a number of reasons, the professional workgroup has tended to absorb and adapt to, rather than resist, the neoliberalisation of summary criminal justice. Thus, the combination of structural and cultural influences on magistrates' court proceedings perpetuates the marginalisation of defendants. Further, in light of neoliberalism's preference for market based approaches to government, there is little political motivation to address the identified problems of access to justice.

Introduction

The genesis and aims of the thesis

As a relatively newly qualified solicitor practising criminal defence work in magistrates' courts and bemoaning the implementation of another government initiative designed to encourage efficient case progression, I recall my then employer warning me that governments were always trying to change something in the criminal justice system and lawyers just have to "get on with it". Throughout my years in criminal defence practise, which are just shy of a decade, I have seen numerous changes to summary criminal procedure which appear to undermine traditional adversarial principles. However, I have also seen little meaningful resistance to such changes. Instead, advocates tend to adapt their working routines to accommodate change. As a lawyer, the changes troubled me but there appeared to be little ability to resist change while maintaining a service for clients. As an academic, I sought to consider possible explanations for these changes and their impact on access to justice. This thesis is therefore about access to justice in magistrates' courts in light of the neoliberal political agenda that has emerged since the late 1970s in the UK.

Magistrates' courts are where all criminal prosecutions enter the judicial system. They process summary-only charges[1] and either way offences[2] if magistrates' sentencing powers are deemed sufficient, and they send indictable-only cases[3] to be dealt with at the Crown court. Magistrates also commit either way

[1] Those which carry a maximum penalty on conviction of six months imprisonment
[2] Those offences that can be dealt with in either a Crown court or magistrates' court
[3] Offences which are considered too serious to be dealt with in the summary court

offences to the Crown court when their sentencing powers are considered insufficient. Given that all criminal defendants make their first appearance in the magistrates' court, it is the first court in which bail decisions are made for all those accused of crimes, save for defendants who have been charged with murder, in which case the magistrates have no powers except to send the case directly to the Crown court.[4]

Despite the fact that all criminal cases begin in the magistrates' courts and the vast majority of cases also conclude there, as a result of "the fascination that most lawyers have for jury trials",[5] magistrates' courts have been comparatively neglected in academic research. While recent works have considered the way in which neoliberal demands for regulation and efficiency have resulted in greater marginalisation and penalisation of those who come into contact with the agencies of criminal justice,[6] none of those studies consider the interaction of structural changes brought about by neoliberalism with the cultural factors surrounding the agency of the magistrates' courtroom workgroup. This thesis therefore investigates that structural/cultural intersection by considering the impact of neoliberal policies on the culture of magistrates' court proceedings and examines how this intersection affects defendants' marginalisation. Additionally, most recent work on neoliberalism and criminal justice appears to have concentrated on processes of criminalisation rather than the procedures to which accused people are subject once they become

[4] Sections 114 and 115 Coroners and Justice Act 2009, SI 2010 No.145 (c.18)
[5] Bell B and Dadomo C, 'Magistrates' Courts and the 2003 Reforms of the Criminal Justice System' (2006) 14(4) *European Journal of Crime, Criminal Law and Criminal Justice* 339; 341
[6] See, for example, Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011), Squires P and Lea J, 'Introduction: Reading Loic Wacquant - Opening Questions and Overview' in Squires, P and Lea, J (eds),*Criminalisation and Advanced Marginality. Critically Exploring the Work of Loic Wacquant* (The Policy Press 2012); Bell B and Dadomo C, 'Magistrates' Courts and the 2003 Reforms of the Criminal Justice System' (2006) 14(4) *European Journal of Crime, Criminal Law and Criminal Justice* 339

involved in the judicial process. The majority of significant studies of summary criminal justice were conducted in the 1970s and early 1980s,[7] which means that it is both original and timely to conduct a study of courtroom activities following the neoliberal political turn.

Furthermore, the majority of people now appearing in magistrates' courts (by contrast with the 1970s and early 1980s) are legally represented and, despite the fact that there have been significant changes to the provision of legally aided representation in summary criminal proceedings, there exists a paucity of research on criminal legal aid.[8] As Kemp has observed, "over the past 15 years there has been little empirical research into the take-up of legal advice and representation in police stations and magistrates' courts."[9] This thesis therefore aims to partially address the deficit in academic research relating to access to justice in magistrates' courts in particular.

Access to justice in magistrates' courts

My use of the term 'access to justice' in this thesis does not entail reference to an abstract philosophical idea. The concept of justice is difficult to define and is socio-culturally situated, and would merit discussion as a topic in its own right. For the purposes of this thesis, 'access to justice' refers to the ability of defendants to understand and effectively participate in summary criminal proceedings. I have considered the ways in which the neoliberal political turn has either facilitated or

[7] See, for example, Carlen P, *Magistrates' Justice* (Martin Robertson 1976), McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981) and Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976).
[8] Kemp, V. *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011; 3
[9]Kemp, V. *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011;15

hindered defendants' ability to play an active role in summary criminal proceedings because it is a vital principle of justice that "justice should not only be done, but should manifestly and undoubtedly be seen to be done"[10] by all participants in the process. Article six of the European Convention on Human Rights highlights the importance of defendant participation in the criminal justice process by requiring that case papers are served and interpreters and free legal advisors are present (when necessary) so that the defendant is able to understand the proceedings. The ability to understand the process affords the defendant the option to participate in the proceedings in a meaningful way, regardless of whether he or she wishes to exercise that option. If a defendant is marginalised from participation in the process because he or she does not understand the proceedings, the defendant appears to be unjustly treated by state authorities and the legitimacy of state-imposed punishment is questionable. As Tyler notes, defendants themselves are more likely to comply with sanctions imposed by criminal courts if they consider the procedure to be fair.[11]

As a result of the number of cases that they process, summary criminal courts have always been required to adopt efficient working practices, meaning that defendants have historically been marginalised from effective participation in the proceedings for a number of reasons.[12] The need to deal with cases efficiently has encouraged the development of co-operative working practices among advocates which has facilitated the creation of professional networks that share efficient case

[10] *R -v- Sussex Justices Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233
[11] Tyler T, 'What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22(1) *Law and Society Review* 103.
[12] Carlen P, *Magistrates' Justice* (Martin Robertson 1976); Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976).

progression as a common goal.[13] Representation levels are now higher than when earlier significant studies of summary criminal justice were conducted which, along with increased demands for efficiency, has strengthened professional networks and encouraged (albeit not explicitly) practices which continue to marginalise defendants and prevent effective participation in the proceedings. Such practices include references to law and procedure in implicit terms and the business imperatives of defence advocates in the face of reduced legal aid payment rates for criminal defence work.

Neoliberalism and criminal justice

Since earlier studies of summary criminal justice took place, successive governments have espoused neoliberal ideology in relation to the pursuit of a flexible, free market that requires minimal state intervention. Somewhat paradoxically, state intervention in, and regulation of, the criminal justice system has steadily increased since the early 1980s. There has been a welter of legislation which creates new offences, amends sentencing provisions or dictates how proceedings ought to be conducted. Ward argues that neoliberalism has resulted in transformations to criminal justice that can be celebrated for modernisation and efficiency but can also be criticised for drastically altering the delivery of criminal justice and reducing it to its bare bones.[14] Ward further notes that there is not much

[13] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 Common Law World Review 203.
[14] Ward, J 'Transforming 'Summary Justice' Through Police-led Prosecution and 'Virtual Courts' (2015) 55 *British Journal of Criminology* 341

academic work which connects such alterations to criminal justice procedure within the courts to neoliberalism.[15]

The incoming Conservative government of 1979 was able to capitalise on three factors in order to justify increasingly intrusive regulation of criminal proceedings. The first of those was the crisis of criminology and the apparent failure of welfarist approaches to reduce crime. The second was an ideological favouring of processes of individualism, responsibilisation and consumerism, which have created divisions in society meaning that those who do not participate in the market in accordance with a neoliberal agenda are pushed further towards the margins of society. These groups are labelled as undeserving of all but the most basic forms of state assistance. This 'othering' process occurs as a by-product to neoliberal culture. The third issue of significance is the desire to reduce state expenditure by encouraging efficient working practices via corporate management techniques. These three approaches enable governments to justify removing or undermining rights afforded to defendants via the adversarial system. Growing concerns about expenditure in relation to state funded agencies have increased governments' desire for efficiency and the withdrawal of state supported assistance to those agencies involved in criminal case progression. This procedurally punitive turn is also reflected in austerity measures via restrictions on the availability of publicly funded representation.

In order to examine the impact of neoliberalism on access to justice I have considered how neoliberalism's rise to political popularity affected governments'

[15] Ward, J 'Transforming 'Summary Justice' Through Police-led Prosecution and 'Virtual Courts' (2015) 55 *British Journal of Criminology* 341

approaches to summary criminal justice; how magistrates' courts, and the professionals working within them, operate; how political influences interact with the magistrates' court workgroup culture and how the resulting practices affect the ability of defendants to participate in the proceedings.

I argue that neoliberalism's preference for market inspired techniques of managerialism encouraged greater regulation of summary criminal justice in order to promote further efficiency. The culture of summary criminal courts has always tended to marginalise defendants from active participation in the process but I argue that demands for efficiency (and cost cutting) have exacerbated those processes of marginalisation. However, such processes of marginalisation are less likely to be regarded as ethically problematic to a political agenda that encourages individual responsibility, in which the criminal is master of his or her own fate and, consequently, is not entitled to more than minimal state support.

I also argue that, as a result of the strong workgroup culture that operates in magistrates' courts, there has been little resistance to the implementation of neoliberal policies. The solidarity that exists among members of the court workgroup means that they tend to co-operate rather than act in antagonistic ways, despite the adversarial nature of the proceedings. This co-operation coincides with lawyers' business interests on the basis that it enables advocates to maintain good working relationships and a good reputation with court personnel. Lawyers seemed to blame problems that they face on externally imposed policy, but they did not collectively resist those changes. This could result from the fact that they operate (and have been trained) in a system which is permeated with liberal bureaucratic principles which favour speedy case progression and high rates of early guilty pleas

but retain some due process protections, at least in name.[16] These principles encourage procedures that facilitate volume processing and efficiency, to which co-operative working practices are useful. As relative latecomers to feature in summary criminal proceedings (see above), defence lawyers appear to take the view that co-operation, as opposed to resistance, will be in their long term business and, by default, client interests. Furthermore, the competitive nature of the structure of criminal defence services discourages firms from working together to collectively resist policies which challenge their work.

It is clear that paradoxical relationships exist in the process of summary criminal prosecution. Firstly, during the twentieth century, the state came to recognise that the presence of publicly funded defence advocates could improve the appearance of legitimacy in the criminal justice process. Governments later noticed that the presence of advocates actually improved courtroom efficiency and so the availability of legally aided representation was expanded. As neoliberalism became the dominant political discourse in the UK, governments gave precedence to the idea that lawyers could improve efficiency, instead of their ability to enhance legitimacy. At the same time, the executive became increasingly distrustful of the use of professional discretion in public services. This meant that government strategy focused on the idea of increasing efficiency while concerns about access to justice were neglected. This has affected the way in which criminal justice policy has developed.

A further paradox exists in the tensions between lawyers' business needs, their relationships with government (upon which they depend for funding) and their

[16] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976)

relationship with their clients. While, to ensure their continued existence, lawyers must follow procedures imposed by government they are also aware, as is demonstrated in chapters four, five and six, that those procedures might undermine their clients' rights. Lawyers are also reliant on good relationships with their clients to ensure that their businesses are prosperous. Defence solicitors are therefore placed in a positon which requires them to manage both the needs of their clients and the needs of government, who are likely to have opposing views about how cases should be dealt with.

I therefore argue that neoliberalism's preference for mangerialism, combined with a strong and stable workgroup culture, exacerbates the inability of defendants to properly play a role in the process of summary criminal prosecution. However, the study is situated in time and place and so I do not make strong claims about the generalisability of the results. My argument is inductive in that, although I start with some basic premises and a particular understanding of the background from my time in practice, I work from detailed empirical data to draw conclusions about access to summary criminal justice in the area of study. I suggest that the conclusions may have broader applicability in light of findings contained in similar studies, but recognise there may be features of the local court culture and practices that limit their generalisability. Further research would be required to test this.

Method

- The case study

The research takes the form of a case study of magistrates' courts in east Kent. The case study method entails a focus on a specific organisation or community and

"is concerned with the complexity and particular nature of the case in question".[17] As such, the findings "generate an intensive examination of a single case",[18] which is likely to provide at least indications of what is happening in other court areas. While it is important to acknowledge that local practices and procedures may result in behavioural variation, many of the trends previously noted in other case studies, such as those conducted by Young[19] and Carlen,[20] demonstrate that common themes exist. Many of my findings resonate with previously identified themes, which indicates that this case study has the potential to stand for magistrates' court processes as a whole.

The reason for the focus on east Kent was pragmatic. To try and examine a national cross-section of magistrates' courts was beyond the time and resource parameters allowed by this project. There are 42 criminal justice areas across England and Wales[21] which are further divided into 144 local justice areas.[22] Nationally, magistrates' courts take, on average, 21 weeks to process a criminal case.[23]

East Kent is a local justice area[24] that runs to the east coast of Kent from Canterbury and incorporates courts in Canterbury, Margate, Folkestone and Dover. In east Kent, the average time taken to process a criminal case is 22 weeks, very

[17] Bryman A, *Social Research Methods* (Oxford University Press 2012); 66
[18] Bryman A, *Social Research Methods* (Oxford University Press 2008); 71
[19] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World* Review 203.
[20] Carlen P, *Magistrates' Justice* (Martin Robertson 1976).
[21] Ministry of Justice, *Transforming legal aid: delivering a more credible and efficient system* (Ministry of Justice CP14/2013, 2013)
[22] --'Criminal Cases' (2012) <www.openjustice.gov.uk/courts/criminal-cases/> accessed on 21 June 2015.
[23] --'Criminal Cases' (2012) <www.openjustice.gov.uk/courts/criminal-cases/> accessed on 21 June 2015.
[24] A local justice area is "a group of one or more magistrates' courts which are administered together" (--'Criminal Cases' (2012) <www.openjustice.gov.uk/courts/criminal-cases/> accessed on 21 June 2015)

close to the national average.[25] Dover houses the HMCTS East Kent Administration Centre and operates largely as an occasional (Saturday and Bank Holiday) court, which also deals with trials and revenue and customs matters alongside the enforcement of financial orders. The remaining three courts process all other types of summary criminal cases and initial appearances in relation to those matters that will ultimately be dealt with in the Crown court. Between January and September 2013, east Kent magistrates' courts completed 8,163 adult criminal cases, excluding motoring matters.[26] There are 11 firms which provide legally aided criminal defence representation in the east Kent area and one CPS office based in Canterbury. I have practised as a defence advocate in east Kent for nine years and, consequently, have a good understanding of how the magistrates' courts in the area operate and the procedural changes that have occurred, as well as knowledge about how to access documents and people who could usefully contribute to the research.

- The national and local context

The Ministry of Justice, of which the Legal Aid Agency is part, classifies local justice areas as urban, rural or London.[27] Rural areas tend to cover large geographical spaces, with scattered populations, a higher concentration of criminal defence service providers and an average legal aid spend of £4.6 million per year.[28] Urban areas are inclined to be more geographically concentrated and are at the lower end of legal aid market concentration, with an average criminal legal aid

[25] --'Criminal Cases' (2012) <www.openjustice.gov.uk/courts/criminal-cases/> accessed on 21 June 2015.
[26] Ministry of Justice. 'FOI-88467' (2014) <http://www.gov.uk/.../excluding-road-traffic-cases-number-adult-criminal-cases-at-specific-magistrates-courts> accessed on 9 September 2013. See appendices one and two for a full breakdown of cases processed in Kent magistrates' courts. As this information was obtained via a Freedom of Information ('FOI') request, it has not been possible to obtain similar data for other LJAs as no similar FOI has been made for other areas of the country.
[27] Ministry of Justice, *Transforming Legal Aid: Delivering a More Credible and Efficient System* (Ministry of Justice CP14/2013, 2013)
[28] KPMG LLP, *Ministry of Justice Procurement of Criminal Legal Aid Services: Financial Modelling* (2014)

spend of £13.4 million per year.[29] London represents the extreme of urban areas as it has the highest level of market fragmentation coupled with the highest criminal legal aid spend per area at £13.8 million per year.[30] The Legal Aid Agency ('LAA') classifies Kent as an urban area, and does not subdivide the county further.[31]

There exists, therefore, some inconsistency in the way that justice areas are categorised. The LAA designates procurement areas broadly on the basis of county boundaries. HMCTS further subdivides counties into local justice areas, which are mentioned above. Police forces further subdivide data on a different basis, according to districts within the policing area.[32] The lack of consistency in the way that areas are categorised and, consequently, the way that data is gathered means that a truly comparative analysis between local justice areas requires a significant amount of local knowledge about the division of court areas within counties and knowledge of which policing districts fall within each local justice area. As a result, it has not been possible to conduct a comparative analysis in this thesis, and, indeed, that was not aim of this work.

Generally, the more urban the area, the greater the level of fragmentation in the criminal legal aid provider market. The least fragmented area is Hampshire, where the top eight firms conduct almost 100 per cent of the work.[33] Predictably, Central London is the most fragmented market where the top eight providers only conduct between 20 and 30 per cent of the market share of work.[34] There are 62

[29] KPMG LLP, *Ministry of Justice Procurement of Criminal Legal Aid Services: Financial Modelling* (2014)
[30] KPMG LLP, *Ministry of Justice Procurement of Criminal Legal Aid Services: Financial Modelling* (2014)
[31] Ministry of Justice, *Transforming Legal Aid: Delivering a More Credible and Efficient System* (Ministry of Justice CP14/2013, 2013)
[32] See, for example Home Office. 'Crime in Canterbury District compared with crime in other similar areas' (2015) <http://www.police.uk/kent/275/performance/compare-your-area/> accessed on 16 July 2015.
[33] KPMG LLP, *Ministry of Justice Procurement of Criminal Legal Aid Services: Financial Modelling* (2014)
[34] KPMG LLP, *Ministry of Justice Procurement of Criminal Legal Aid Services: Financial Modelling* (2014)

criminal legal aid procurement areas, of which Kent has the 46th most fragmented market, where the top eight firms conduct about 50 per cent of criminal legal aid work.[35] Unfortunately, statistics held by the Legal Aid Agency refer to the procurement areas (the entirety of Kent as one unit) while HMCTS statistics refer to local justice areas, of which Kent has three. Data produced in relation to Kent as whole is much more readily available than data in relation to local justice areas because HMCTS information is held on their Performance Database, which is unpublished material and only available upon request under the Freedom of Information Act 2000.[36]

When the empirical research for this thesis was conducted, there were approximately 1600 firms providing publicly funded criminal defence services nationally.[37] However, the number of legal aid providers was not distributed evenly, with PA Consulting noting that more than 50 per cent of criminal legal aid firms were in nine regions; London, Greater Manchester, West Midlands, West Yorkshire, Thames Valley, Lancashire, Merseyside, South Wales and Hampshire.[38] Research by KPMG does however note that Kent operates with a relatively high number of active criminal defence service providers comparative to its criminal legal aid spend.[39] In the year to end September 2013 Kent had the fifteenth largest criminal legal aid spend of 62 procurement areas nationally.[40]

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[35] KPMG LLP, *Ministry of Justice Procurement of Criminal Legal Aid Services: Financial Modelling* (2014)
[36] Her Majesty's Courts and Tribunals Service 'Performance Database' <http://data.gov.uk/dataset/her-majestys-courts-and-tribunals-service-hmcts-performance-database> accessed on 17 July 2015.
[37] Ministry of Justice, *Transforming Legal Aid: Delivering a More Credible and Efficient System* (Ministry of Justice CP14/2013, 2013)
[38] PA Consulting, *MINISTRY OF JUSTICE. Assessment of the Financial Impact of the Proposed Fee Reductions on Criminal Legal Aid Law Firms* (2013)
[39] KPMG LLP, *Ministry of Justice Procurement of Criminal Legal Aid Services: Financial Modelling* (2014).
[40] KPMG LLP, *Ministry of Justice Procurement of Criminal Legal Aid Services: Financial Modelling* (2014).

Some of those figures may be explained by some of the demographic features of Kent and the South East of England. In mid-2013, the South East was the area with the largest population in England and Wales, followed by London, the North West, the East and the West Midlands.[41] Kent as a whole features in the top five areas of the country experiencing police recorded violent crime and criminal damage/arson[42] and is also generally positioned in the top half of the country in relation to rates of other types of recorded crime.[43] An analysis of population statistics[44] and police recorded crime[45] suggests that Kent has quite a high per capita crime rate across the three local justice areas, particularly for violent crime and criminal damage/arson.

Kent has three local justice areas; north, mid and east Kent. Of those areas, east Kent police forces recorded the highest crime rates to year end of March 2015.[46] During that period police in east Kent recorded 316.36 crimes per thousand residents, mid Kent police forces recorded 265.74 cases per thousand residents and

[41] Office for National Statistics. '2011 Census, Population Estimates by Single Year of Age and Sex for Local Authorities in the United Kingdom' (2013) <http://www.ons.gov.uk/ons/rel/census/2011-census/population-estimates-by-single-year-of-age-and-sex-for-local-authorities-in-the-united-kingdom/index.html> accessed on 24 June 2015.
[42] Office for National Statistics. 'Police Recorded Crime by Offence Group and Force Area, English Regions and Wales, Number of Offences, Year to December 2014' (2015) <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcmper cent3A77-373433> accessed on 24 June 2015.
[43] Office for National Statistics. 'Police Recorded Crime by Offence Group and Force Area, English Regions and Wales, Number of Offences, Year to December 2014' (2015) <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcmper cent3A77-373433> accessed on 24 June 2015.
[44] Office for National Statistics. '2011 Census, Population Estimates by Single Year of Age and Sex for Local Authorities in the United Kingdom' (2013) <http://www.ons.gov.uk/ons/rel/census/2011-census/population-estimates-by-single-year-of-age-and-sex-for-local-authorities-in-the-united-kingdom/index.html> accessed on 24 June 2015.

[46] Home Office. 'Crime in Canterbury District Compared with Crime in Other Similar Areas' (2015) <http://www.police.uk/kent/275/performance/compare-your-area/> accessed on 16 July 2015.

north Kent police recorded 145.78 crimes per thousand residents.[47] The following points should however be noted.

North Kent area comprises two districts (Medway and Dartford/Gravesham) while mid and east Kent each consist of five districts. North Kent is a geographically smaller area than the other two local justice areas. Further, Thanet (Margate area) disproportionately accounts for east Kent's crime rates in that it contributes to 28 per cent of the recorded crime rate and has the highest level of recorded crime of all of the county's districts.[48] Thanet, according to the poverty map, which was produced using information from the indices of multiple deprivation,[49] indicates that Thanet contains some of the most deprived areas in the country. While the indices of multiple deprivation suggest that Kent ranks at 103 of the 150 most deprived areas nationally,[50] the deprivation (in terms of places that are either the most deprived in the country or experience greater than average levels of deprivation)[51] exists in pockets towards mid and east Kent, such as Sittingbourne and the Isle of Sheppey (mid Kent) and Thanet, Dover and Folkestone (east Kent).[52]

The area comprising mid Kent consists of Tunbridge Wells, Tonbridge and Malling, Sevenoaks, Maidstone and Swale. The first three of these areas have low or very low levels of deprivation[53] and also rank lowest in Kent police crime records.

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[47] Home Office. 'Crime in Canterbury District Compared with Crime in Other Similar Areas' (2015) <http://www.police.uk/kent/275/performance/compare-your-area/> accessed on 16 July 2015.
[48] Home Office. 'Crime in Canterbury District compared with crime in other similar areas' (2015) <http://www.police.uk/kent/275/performance/compare-your-area/> accessed on 16 July 2015.
[49] Church Urban Fund. 'Poverty Map' <http://www.cuf.org.uk/poverty-england/poverty-map> accessed on 16 July 2015.

[51] Church Urban Fund. 'Poverty Map' <http://www.cuf.org.uk/poverty-england/poverty-map> accessed on 16 July 2015.
[52] Church Urban Fund. 'Poverty Map' <http://www.cuf.org.uk/poverty-england/poverty-map> accessed on 16 July 2015.
[53] Church Urban Fund. 'Poverty Map' <http://www.cuf.org.uk/poverty-england/poverty-map> accessed on 16 July 2015.

However, mid Kent's crime figures are boosted to the second highest in the county by Swale (Sittingbourne, the Isle of Sheppey and Faversham), which accounts for 27 per cent of crime in the local justice area.[54] As noted above, Swale contains several areas which either experience more deprivation than average or contain some of the most deprived areas in the country.

Despite servicing areas of relatively high deprivation, particularly in Medway,[55] north Kent experienced the lowest recorded crime rate in the Kent procurement area.[56] Given that it is geographically the smallest local justice area in Kent, I suggest that this apparent anomaly could be explained by factors such as population size, although I have not been able to gather population data for each district within the local justice area.

In essence, crime statistics, demographic data and deprivation data suggest that Kent as a whole suffers relatively high crime rates per capita and that it contains several areas which are either some of the most deprived in the country or experience more deprivation than average. Predictably, there appears to be a correlation between crime rates and levels of deprivation, with higher crime rates being found in areas experiencing greater levels of deprivation. This pattern appears to be particularly noticeable in east Kent. It seems therefore that, while Kent is a less densely populated area than some urban areas such as Greater Manchester, the West

[54] Home Office. 'Crime in Canterbury District Compared with Crime in Other Similar Areas' (2015) <http://www.police.uk/kent/275/performance/compare-your-area/> accessed on 16 July 2015.
[55] Church Urban Fund. 'Poverty Map' <http://www.cuf.org.uk/poverty-england/poverty-map> accessed on 16 July 2015.
[56] Home Office. 'Crime in Canterbury District Compared with Crime in Other Similar Areas' (2015) <http://www.police.uk/kent/275/performance/compare-your-area/> accessed on 16 July 2015.

Midlands and Yorkshire,[57] police recorded crime rates are comparatively high.[58] This means that there is a relatively high per capita crime rate and provides some explanation as to why Kent features in the top quarter of criminal legal aid expenditure across the procurement areas.[59] East Kent local justice area accounts for 43 per cent of crimes across Kent per thousand residents,[60] as well as containing several regions which experience high levels of deprivation.

- The empirical research

The empirical research consisted of observations followed by semi-structured interviews. I obtained ethical approval for the research from Kent Law School's Research Ethics Advisory Group. The purpose of the observation and interviews was to become "immersed in a social setting for some time… with a view to gaining an appreciation of the culture of a social group"[61] beyond my own experience as a defence advocate. While I am familiar with court proceedings and tactics employed in summary criminal cases in the area of study, it was important to empirically explore the effects of those procedures as viewed by advocates on both sides of the adversarial process.

Baldwin notes that the substantial advantage of observing criminal courts is that they are open to the public and so no difficulties arise in obtaining access for

[57] Office for National Statistics. '2011 Census, Population Estimates by Single Year of Age and Sex for Local Authorities in the United Kingdom' (2013) <http://www.ons.gov.uk/ons/rel/census/2011-census/population-estimates-by-single-year-of-age-and-sex-for-local-authorities-in-the-united-kingdom/index.html> accessed on 24 June 2015.
[58] Office for National Statistics. 'Police Recorded Crime by Offence Group and Force Area, English Regions and Wales, Number of Offences, Year to December 2014' (2015) <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcmper cent3A77-373433> accessed on 24 June 2015.
[59] KPMG LLP, *Ministry of Justice Procurement of Criminal Legal Aid Services: Financial Modelling* (2014)
[60] Home Office. 'Crime in Canterbury District Compared with Crime in Other Similar Areas' (2015) <http://www.police.uk/kent/275/performance/compare-your-area/> accessed on 16 July 2015.
[61] Bryman A, *Social Research Methods* (Oxford University Press 2008); 369

research.[62] As is demonstrated by studies conducted by, among others, Carlen[63] and McBarnet,[64] observation of court processes can assist in uncovering the nature of relationships between court personnel and patterns of workgroup behaviour.[65] While Baldwin notes that courtroom observers may feel a sense of "exclusion, estrangement, and alienation"[66] from the proceedings (akin to defendants), my previous experience working in these courts allowed me to understand the nuances of court personnel behaviour. Conducting observations also allowed me to step back from my ordinary involvement in summary criminal procedures to make a preliminary assessment of the behaviour of advocates and defendants in court. In addition, observations allowed me to focus the interviews on particular topics that required further exploration.

I conducted the equivalent of 20 days of observation (five days in each court) between October 2012 and February 2013, during which time I observed the daily practices of the east Kent magistrates' courts from the public galleries. I made notes of the proceedings using an observation template which is set out in appendix three, and the notes were typed up at the end of each day as a diary. Participants in the process were not named, but I noted the date and Court house to enable me to consider any emerging patterns. I was aware that this might enable certain members of Court staff to be identifiable to their colleagues so I verbally advised the actors of my presence and role, and that I might publish the results. There was a risk that, by

[62] Baldwin J, 'Research on the Criminal Courts' in King, R and E Wincup (eds), *Doing Research on Crime and Justice* (Oxford University Press 2000).
[63] Carlen P, *Magistrates' Justice* (Martin Robertson 1976).
[64] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981).
[65] Baldwin J, 'Research on the Criminal Courts' in King, R and Wincup, E (eds), *Doing Research on Crime and Justice* (Oxford University Press 2000).
[66] Baldwin J, 'Research on the Criminal Courts' in King, R and Wincup, E (eds), *Doing Research on Crime and Justice*(Oxford University Press 2000): 245

my presence, the usual rhythm of working life would be affected and that the participants may have altered their behaviour. However, the fact that I was effectively a participant observer did, I think, minimise that risk, as is discussed further below.

Of the 183 cases observed, the vast majority of defendants were represented; only 40 appeared without some form of representation. The ways in which defendants were represented is discussed in chapter six. Nineteen per cent of cases observed were dealt with by a district judge while the remainder were conducted by magistrates. Legal advisers and prosecutors were always present at each hearing observed. I did not record the details of the professional court personnel at each appearance for the sake of attempting to preserve anonymity. I cannot therefore say how frequently each individual prosecutor, defence advocate or legal adviser appeared in my observation sample. Guilty pleas were entered in 41 per cent of cases. Not guilty pleas were entered in 27 per cent of cases. No pleas were entered in 31 per cent of cases because, for example, the defendant did not attend, the case was listed for a pre-trial administrative or procedural hearing, or because the hearing considered the seizure of property. In the remaining cases, mixed pleas were entered (different pleas were entered to separate charges on the same charge sheet or summons). The types of hearings observed were as follows:

Hearing type	*Percentage observed*
Sentencing	37
Adjournments	14
Case Management	14
Trials	2
Defendant fails to attend; warrant issued	8
Breach of bail	3
Property seizure	2
Other*	21

* This can include hearings regarding applications for further evidence or to move the trial and applications to vary bail.

The fact that sentencing hearings were the most frequent type of case observed suggests that the magistrates' court conviction rate, be it by plea or following trial, is high. Trials appear to be an infrequent occurrence but it must be noted that there were frequently several courtrooms sitting in a single courthouse, one of which usually dealt with trials at the same time as another courtroom was conducted pleas, sentencing and directions hearings. The relatively high number of 'other' hearings could suggest that there is scope for more negotiation and provision of information by the parties outside the courthouse. That said, the number of simple adjournments did not give the appearance of being particularly frequent despite the relatively high percentage of adjournments recorded. Adjournments tended to occur when the Probation Service required more time to prepare a Pre-Sentence Report because particular assessments needed to be made, such as

suitability for accredited courses. It did not feel as though courts were wasting time as cases appeared to be processed quickly. As is noted above, magistrates' courts in east Kent take an average of 22 weeks to process a case while the national average is 21 weeks. There was no discernible difference in the way each of the four courts conducted their business.

As well as generating data in its own right, observation allowed the interview responses to be contextualised within the interviewee's usual working environment. By combining observation and interviews, I was able to notice things which the interviewee may take for granted. The semi-structured nature of the interviews still however meant that there was freedom to discuss each topic in broader terms. I was also conscious that I wanted to avoid imposing my own views and experiences on interviewees, which meant that a degree of openness in question formulation was necessary, while also seeking data on particular subjects. Semi-structured interviews were appropriate because the focus of the research was quite clear but they do also allow for some flexibility which was necessary when inviting someone to discuss their own experiences. This method allowed the interviewee to discuss issues which were of particular importance from his or her point of view and follow up questions were asked. This approach avoided 'pigeon-holing' participants' responses, which was important to limit interviewer bias. The interview schedule can be found in appendix four.

I used a purposive sampling strategy for my interviews. My research questions and parameters provided the guidelines about which categories of people needed to be the centre of attention[67] – magistrates' court advocates and legal

[67] Bryman A, *Social Research Methods* (Oxford University Press 2008); 416

advisers in east Kent. The Ministry of Justice, however, would not allow me access to consult court clerks/legal advisors,[68] and so interviews were conducted solely with prosecutors and defence advocates.

While my study is about the impact of neoliberal policy interventions in summary criminal courts on access to justice for defendants, I decided not to interview defendants themselves, but rather to interview advocates who had experience of the changes. I also drew inferences about the effects for defendants from the observation data. The reason for not interviewing defendants, aside from the fact that such interviews would have been both practically and ethically more difficult to manage, was that practitioners are able to make comparisons before and after reform and can identify the particular effects of specific interventions. Defendants, by contrast, are unlikely to be able to compare any experience that they might have had pre- and post-reform and are unlikely to know the detailed nature of policy interventions. While some defendants might have had long term experience of the processes of summary criminal justice, and may have been able to identify some changes (assuming that their memory was clear), they would not have the knowledge required to be able to make the necessary comparison for my analysis. Furthermore, there is no relevant pre-reform baseline data on defendants' experiences of summary criminal justice in their own words which could have been used to compare with defendants' experiences now. Thus, interviewing defendants would not, on balance, have produced the necessary data to answer my research

[68] I was aware that I would need permission from HMCTS to interview Court staff and so I emailed the Head of Crime Directorate at HMCTS to explain the status, nature and purpose of the research. HMCTS was concerned that it would breach legal advisers' duty of impartiality if they provided their views on the implementation of policy. Further, HMCTS was not prepared to release Court legal advisers from their daily duties to participate in the interview process. Consequently, HMCTS refused my request to interview Court clerks and legal advisers.

questions. As such, obtaining interview data from members of the courtroom workgroup provided the best information for analysis. I nevertheless recognise that defendants' opinions would have the potential to paint an entirely different picture of the process.

As I was keen to analyse the impact of changes to legal aid on defendants' ability to participate in the proceedings, the advocates selected for interview must have had experience of summary criminal proceedings both before and after the reintroduction of means testing for publicly funded representation, which was confirmed at the time of interview. My recruitment strategy was to write to all 35 defence lawyers and all 18 Crown prosecutors based in east Kent in Winter/Spring 2013 (bar my own colleagues – a further five solicitors) and those interviewed were those who responded positively to my enquiry. I accept that this will not necessarily be a representative sample and will provide indicative rather than generalisable findings. I decided that I would not interview solicitors from my own firm as I felt that I was too familiar with the firm's procedures and client matters to be able to conduct an impartial interview. I also did not want to upset or encroach on designated hierarchical patterns in my office. In essence, I was too close to the material, and risked upsetting work roles too much, to be able to conduct an appropriate analysis of the data that would have been produced. I did however send letters of invitation to all other summary court advocates based in the area at that time, and interviewed those who volunteered, and gave informed consent, to assist. I did not have to seek any further permission to interview those professionals, who, by their role, are expected to behave independently in accordance with their own professional rules of conduct. Crown prosecutors did however initially appear more

reluctant to be interviewed and I am aware that some interviewees spoke to their managers before agreeing to participate. Despite this initial reluctance, I was eventually able to interview a very slightly higher proportion of prosecutors than defence advocates. Interviews were recorded via a Dictaphone to be transcribed.

I interviewed 19 advocates (12 defence lawyers and seven prosecutors) between May and July 2013. There can be particular difficulty in interviewing colleagues generally, where the roles of the participants can cause some anxiety. The researcher has an advantage in terms of the research material, which may unsettle the ordinary dominant/subordinate role.[69] I was therefore careful to ensure that the purpose of the interview and safeguards were properly explained.[70] What may become apparent in conducting insider-research is that while straightforward anonymity may offer protection in terms of outside readerships, other colleagues may be able to identify the respondents from other information contained in the research. It is hoped that, by limiting the personal information elicited (gender, age, etc. were not recorded), confidentiality can be afforded greater protection.

- Data analysis

In analysing the data I made use of mid-range theories which "represent attempts to understand and explain a limited aspect of social life."[71] The relevant theories are about how magistrates' court culture works and the factors which influence access to justice for criminal defendants. I have considered how a particular group of people (the magistrates' court workgroup) interprets information and behaves in their working environment and thus I have tried to

[69] Bell J, *Doing Your Research Project* (Open University Press 2010).
[70] I decided that the best way to safeguard participants was by anonymising their replies in interview and sending them transcripts to approve prior to conducting the data analysis.
[71] Bryman A, *Social Research Methods* (Oxford University Press 2008); 7

analyse "social action in order to arrive at a causal explanation of its course and effects."[72] The social order of the magistrates' court is "an outcome of agreed-upon patterns of action that were themselves products of negotiations between the different parties involved".[73] This understanding allows us to appreciate the importance of workgroup culture to defendants' experience of the proceedings. As Kemp suggests, it is valuable to understand "interactions between different legal agencies, particularly between prosecutors and defence solicitors, when they seek to deal with cases more efficiently and effectively in court"[74] so that the impact of a range of influences can be considered. I therefore attempt to consider both the structural (politically motivated initiatives) and cultural (workgroup behaviour) influences on defendants' experiences of summary criminal prosecution.

Given that I have taken a qualitative approach, I conducted a thematic analysis of the data.[75] I thoroughly read and re-read the field notes and transcripts to identify themes and subthemes via "recurring motifs in the text" [76] which were then used to categorise and organise the data. However, it must also be remembered "that all accounts from interview can only be understood in the context of the interview and any information given cannot be taken to mean the 'truth'."[77] On this point, it is important to acknowledge my own role as practitioner-researcher/participant-observer. Undoubtedly I hoped to find advocates acting with the utmost integrity to defend their clients and uphold both the law and due process provisions. I am also

[72] Weber M, *The Theory of Social and Economic Organisation* (Free Press 1947); 88
[73] Bryman A, *Social Research Methods* (Oxford University Press 2008); 19
[74] Kemp, V. *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011; 15
[75] Lange B, 'Researching Discourse and Behaviour as Elements of Law in Action' in Banakar, R. and Travers, M (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005); 194
[76] Bryman A, *Social Research Methods* (Oxford University Press 2008); 554
[77] Bano S, ''Standpoint', 'Difference' and Feminist Research' in Banakar, R. and Travers, M (ed), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005); 103

however acutely aware of the ways that defence advocates feel that professional decision making has been constrained by rules of criminal procedure that have been introduced in the early twenty-first century. No doubt I feel somewhat protective towards my colleagues, who, in fairness, acknowledged that patterns of behaviour sometimes operate to the detriment of their clients' best interests.

My role as practitioner also had significant advantages. I was able to gain access to interview prosecutors – which I do not believe has been done in previous studies. I do not doubt that this was partly as a result of my familiarity with the courts I was examining. I think that I was viewed as a familiar and trusted face – someone who was already a member of the workgroup and could consider the workgroup's interests. I believe, given some of the comments made during the interviews, that I was seen as someone who would be able to understand whatever concerns were raised, and who would share genuine concerns about the system rather than as a passive but interested third party. This meant that I was able to examine the issues from both sides of the adversarial coin. As Kemp says, it is important that the effects of policy are understood, especially at a local level and on a 'whole system' basis.[78]

Participants also commented that they did not feel a need to be on their best behaviour when they saw me conducting observations in court, which they acknowledged they would have felt if a stranger was present. I had a similar experience to Flood, who said:

[78] Kemp, V. *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011

> "Being active in the field as participant can mean that others identify one as belonging to a particular group…My being so categorised meant that my situation was perceived as harmless and enabled me to observe things that I might not have been able to see if my position was different."[79]

Further, while the presence of a participant observer can result in reactive effects, several advocates (both prosecuting and defending) commented that, although my presence as observer was unusual, they did not pay a lot of attention to what I was doing because I was already an 'insider' or 'on their team'. This meant that, as well as benefitting from my own knowledge of how courts work, I was able to observe usual, as opposed to moderated, courtroom behaviour. This point does, however, have to be balanced against the risk of over-identification with the research subjects. It is therefore important for the researcher to retain reflexivity about his/her role and recognise potential bias that the role entails. I do however argue that some of my findings have been generated specifically as a result of my familiarity with the proceedings, particularly in chapter five. My position in the field meant that I was familiar with particular uses of language and procedures, which meant that I could recognise issues in the empirical data that may not be recognised by non-participant observers.

Chapter outline

This thesis contains six chapters – three which discuss the theoretical and background literature and three which analyse the findings of the empirical research. The first two theoretical chapters set out the political and cultural issues that affect magistrates' courts. The third chapter begins to draw those themes

[79] Flood J, 'Socio-Legal Ethnography' in Banakar, R and Travers, M (ed), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005); 43

together in an analysis of changes to the availability of legally aided representation in summary criminal proceedings. It was clear from those chapters that the central issues affecting the presentation of summary criminal justice were increased demands for efficient case management, austerity measures and the networks operating among the courtroom workgroup.

It was possible to identify similar issues when I analysed the empirical data and so I structured the chapters in such a way that there is a chapter dealing with the socio-political issues arising from neoliberalism and an empirical analysis chapter which considers the impact of those issues, a chapter discussing the influence of workgroup culture and an empirical analysis chapter dealing with how advocates have integrated law into the workgroup, and a chapter discussing administrative changes to legal aid coupled with an empirical analysis of the effects of those changes. The common themes which run throughout the thesis are the influence of neoliberalism in terms of demands for efficiency via managerial techniques, the influences of professional networks on the defendant's experience of proceedings and the political 'othering' of defendants which provides limited scope to challenge initiatives which undermine the ability of defendants to participate in summary criminal proceedings.

Chapter one deals with the political agenda and structural changes that have informed recent approaches to criminal justice. In this chapter I argue that neoliberalism became the dominant political agenda in the UK as government responded to crisis in the welfare state. Neoliberal governments capitalised on that crisis by arguing that public services were inefficient and that free market principles could deliver such services more effectively. The criminal justice system, while

remaining part of the state, was also subject to increasingly intrusive, managerial forms of regulation. That regulation was designed to improve efficiency in the criminal justice process. Furthermore, the preference for market based techniques of governance encouraged a culture of responsibilisation and individualisation in which state support became viewed as a crutch for those who were unable or unwilling to participate in the effective operation of the market. This led to the 'othering' of marginalised groups, including criminal defendants.

Chapter two examines the culture of magistrates' courts. In this chapter I consider the findings of studies that demonstrate how defendants were marginalised at a time when only a small number of defendants were legally represented. I then compare these findings to more recent studies which consider the nature of courtroom workgroup culture, particularly given the increasingly professionalised nature of magistrates' court proceedings. I argue that practises which marginalised defendants in the 1970s persist today, and that there are two factors which exacerbate such marginalisation; the court's desire to conduct cases at speed and the strength of the professional networks that operate in magistrates' courts. These factors operate to increase the defendant's inability to play an active role in the proceedings.

In chapter three I reflect on how changing political agendas have influenced the development of legally aided representation in summary criminal proceedings. I chart the early development of criminal legal aid before considering how neoliberal approaches to legal aid have demanded ever greater efficiency at reduced cost. I argue that a flawed belief in the value of market based approaches has led to a system of publicly funded representation which is fragile, reduces the number of

people able to access legally aided representation and has had a detrimental effect on the quality of representation that defendants are able to access.

The following three chapters consider the findings of my empirical research. In chapter four I examine how demands for efficiency detailed in chapter one have affected the ability of defendants to participate effectively in the proceedings. I argue that, while external demands for efficiency did disrupt the courtroom workgroup as described in chapter two, the workgroup largely absorbed and facilitated the changes encouraged by policy initiatives rather than resisting them. I suggest that the high degrees of co-operation exhibited by members of the workgroup allowed efficiency drives to become ingrained in the culture of the workgroup and that these processes have exacerbated the marginalisation of defendants while maintaining the relative stability of the local workgroup.

Chapter five details an unexpected outcome from the research. It has previously been suggested that magistrates' courts operate without much resort to legal provisions.[80] Instead, I found that the law permeates summary criminal proceedings but is used in routinised ways and referred to in implicit terms so that the frequent references to law made by court personnel would be difficult for a non-lawyer to identify. Neoliberal polices and legislation designed to improve efficiency at reduced cost have increased the legalisation of proceedings while the courtroom workgroup culture has adapted to such provisions and made them part of the routine business of summary criminal proceedings. As such, both of those factors have a role in intensifying the inability of defendants to effectively participate in the proceedings.

[80] Darbyshire P, *Sitting in Judgement: The Working Lives of Judges* (Oxford: Hart 2011).

The final data analysis chapter examines the effect of changes to legal aid provision on the construction of relationships in magistrates' courts. I argue that restrictions in the availability of legally aided representation and the bureaucratic nature of the application process have caused relationships between court personnel and defendants to become more strained. That strain results from solicitors being more prone to risk-taking behaviour in terms of whether or not they will be paid, which affects the level and quality of representation that defendants receive. Further, solicitors appear to feel somewhat aggrieved that low remuneration rates combined with the court's desire to act efficiently may mean that they are forced into decision making at what they consider to be a premature stage in the proceedings. I also argue that the bureaucratic nature of the legal aid application process both causes delay and excludes defendants from participation in the proceedings at an early stage.

Conclusion

On the basis of the above analysis, I conclude that the inability of defendants to effectively participate in summary criminal proceedings has intensified after neoliberal techniques of governance became politically popular. As governments have, in recent decades, made ever more urgent demands for greater efficiency in the criminal justice system, the culture of summary justice has adapted to political intervention in such a way that defendants are further marginalised from the proceedings. While workgroup culture has always had the effect of casting defendants as dummy players,[81] managerial demands for efficiency, the increased

[81] In 1976, Carlen described defendants as 'dummy players' in summary criminal courts to highlight the way in which defendants are unable to leave the 'game' which is the court process but, at the same time,

legalisation of proceedings and changes to criminal legal aid introduced by neoliberal governments have intensified that marginalisation as such initiatives have been absorbed into the day-to-day practices of summary criminal proceedings.

The second important feature of the neoliberal political agenda is the 'othering' process that results from a desire to promote individual responsibility for one's own success in the market. The promotion of such ideas has increased the othering of marginalised groups. The withdrawal of state support - including due process protections that were traditionally afforded to defendants – is not ethically problematic to a political agenda which encourages people to take responsibility for their own inability to participate in the market. As such, there is little political motivation to address the problems experienced by criminal defendants.

As noted above, the findings of this research displayed consistency with studies of courtroom culture which predated the neoliberal turn, as well as studies which have considered the effects of managerialism on public services and the neoliberal tendency to 'other' precariat groups. For that reason, I argue in conclusion, that the analysis and findings of my empirical study may be applicable to summary criminal justice beyond east Kent.

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are unable to actively exercise a role in procedures because they lack the skills necessary to fully engage with the nuances of the proceedings (Carlen P, *Magistrates' Justice* (Martin Robertson 1976)).

Chapter 1: Neoliberalism and Criminal Justice

Introduction

Neoliberalism is a complex and often contradictory set of political practices that tend to substitute economic market rationalities for welfare rationalities and, in the UK at least, have typically developed as a result of crises.[82] Neoliberalism is not however simply "an economic doctrine, but also…a comprehensive framework for understanding ourselves and the political reality we live in."[83] I take this as the starting point from which to analyse access to justice in summary courts. In this chapter I explore neoliberal philosophy to expose its complexities and contradictions as it operates within a particular arena; magistrates' criminal courts. I therefore respond to Larner's suggestion that the study of neoliberalism requires us to examine "different variants of neoliberalism… multiple and contradictory aspects of neoliberal spaces, techniques, and subjects."[84]

I argue that structural approaches to criminal justice fell into disfavour as welfarist ideology entered a period of crisis in the late 1970s, prompting Thatcher's Conservative party to craft policies which drew on neoliberal ideas in an attempt to provide appropriate responses to public concerns, and that these policies were continued, albeit with different emphases, by New Labour and the Coalition government.

My argument is that there have been two significant consequences of neoliberalisation for access to justice in summary criminal courts. Firstly, the

[82] Peck J, 'Zombie neoliberalism and the ambidextrous state' (2010) 14 *Theoretical Criminology* 104.
[83] Oksala J, *Foucault, Politics and Violence* (Northwestern University Press 2012); 117. Oksala draws on Foucault's understanding of neoliberalism "as an apparatus of knowledge and power" (Oksala J, *Foucault, Politics and Violence* (Northwestern University Press 2012; 118).
[84] Larner W 'Neoliberalism?' (2003) 21(5) *Environment and Planning D: Society and Space* 509; 509

Thatcher government promoted a market based ethos of individualisation and responsibilisation, which justified reductions in welfare provision and restrictions on state assistance for 'undeserving' citizens, including defendants. Some prominent sociologists and criminologists refer to this group as the precariat,[85] a term that I shall use here. As a consequence of the neoliberal conception of the criminal both as an outsider and as having made a rational choice to be a criminal, more severe punishment was justified, both procedurally and in disciplinary terms. This "process of de-citizenisation and ontological criminalisation provides….new discourses of nationality and citizenship"[86] because such groups are no longer seen "as fellow 'welfare citizens' with legitimate needs."[87]

Secondly, following Thatcherite discourse which presented public services as costly and ineffective, the subsequent New Labour government developed a culture of audit which placed the demands of efficiency and case management above the needs of defendants. This move prioritised economy and efficiency over traditional adversarial criminal justice principles.

These two outcomes highlight some of the contradictions of neoliberalism. Free market principles are favoured, which justifies a roll back of state provision. However the social dislocation which results from that roll back requires

[85] See, for example, Wacquant L, *Punishing the Poor. The Neoliberal Government of Social Insecurity* (Duke University Press 2009), Squires P and Lea J, 'Introduction: Reading Loic Wacquant - Opening Questions and Overview' in Squires, P and Lea, J (eds), *Criminalisation and Advanced Marginality. Critically Exploring the Work of Loic Wacquant* (The Policy Press 2012).
[86] Lea J and Hallsworth S, 'Bringing the State Back In: Understanding Neoliberal Security' in Squires, P and Lea, J (eds), *Criminalisation and Advanced Marginality. Critically Exploring the Work of Loic Wacquant* (The Policy Press 2012); 23. In this way, "democracy might be characterised as tyrannical majoritarianism that allows oppression of minorities." (Sanders A, 'Reconciling the apparently different goals of criminal justice and regulation: the 'freedom' perspective' in Smith, G. Seddon, T and Quirk, H (eds), *Regulation and Criminal Justice: Innovations in Policy and Research* (Cambridge University Press 2010); 61
[87] Lea J and Hallsworth S, 'Bringing the State Back In: Understanding Neoliberal Security' in Squires, P and Lea, J (eds), *Criminalisation and Advanced Marginality. Critically Exploring the Work of Loic Wacquant* (The Policy Press 2012); 21

management via interventionist, regulatory initiatives and punitive practices in the criminal justice process. As such, I argue that neoliberalism manifests itself in the policies that are applied at local level in order to effect that management.

I begin by examining the evolution of neoliberal political ideas from the mid-1940s. I will demonstrate how neoliberalism developed in response to crisis and became the dominant political agenda in the UK. I will then argue that a responsibilisation strategy led to the increased social marginalisation of defendants. Subsequently, I consider how the preference for market based practices led to the rise in popularity of managerialism and explain how this affected the criminal justice system. However, I am conscious that caution needs to be exercised to avoid overemphasising the influence of neoliberalism and hence I argue that other aspects of summary criminal justice also need to be considered before we can fully evaluate how neoliberalism has impacted upon summary criminal courts.

The development of neoliberalism

Neoliberalism developed in response to philosophical, sociological and economic concerns about collectivism and socialism.[88] In 1937, the American political commentator Walter Lippmann expressed the view that a 'good' society would require minimal state intervention.[89] Hamann later argues that neoliberalism developed as a critical response to interventionist forms of governmentality.[90]

[88] Mirowski, P and Plehwe, D, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009).
[89] Lippmann W, *An Inquiry into the Principles of the Good Society* (Little Brown and Company 1937)
[90] Hamann T, 'Neoliberalism, Governmentality and Ethics' (2009) February (6) *Foucault Studies* 37.

The development of neoliberalism slowed once war broke out in 1939.[91] However, shortly after World War II, a group of economic theorists, journalists, publishers and think tank executives met near Geneva and formed the Mont Pèlerin Society, funded by economic institutions such as the Foundation for Economic Education.[92] The members of the Mont Pèlerin Society were concerned that "state-led capitalism…was the first step on the road to communism".[93]

One prominent neoliberal economist and member of the Mont Pèlerin Society, Friedrich Hayek, was of the view that, because no agreement could be reached about how the allocation of state resources could alleviate the harmful effects of the market, there was not an appropriate basis for states to intervene in such outcomes.[94] Neoliberals believe that the market is the best forum for co-ordinating economic activity as the market represents choice and competitive economic efficiency,[95] but they also accept that a degree of state intervention is necessary.[96] Firstly, the state may need to intervene to create the conditions within which the market will operate. Those institutions which are governed by neoliberal ideology will be typified by a "framework characterised by strong private property

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[91] Mirowski, P and Plehwe, D, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009).
[92] Mirowski, P and Plehwe, D, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009).
[93] Leitner, H. Sheppard, E. Sziarte, K and Maringanti, A, 'Contesting Urban Futures: Decentering Neoliberalism' in Leitner, H. Peck, J and Sheppard, E (ed), *Contesting Neoliberalism: Urban frontiers* (The Guildford Press 2007); 6
[94] Pantazis C and Pemberton S, 'Harm Audit: the Collateral Damage of Economic Crisis and the Coalition's Austerity Programme' (2012) September (89) *Criminal Justice Matters* 42.
[95]Larner, W, 'Neo-liberalism: Policy, Ideology, Governmentality' *Studies in Political Economy*' <http://spe.library.utoronto.ca/index.php/spe/article/view/6724/3723> accessed on 10 July 2011; 5
[96] It worth noting however that during the traditionally thought of liberal eighteenth century in England, as people became more market dependant, the state used coercive power to impose markets through the use of the law in the form of enclosures which eroded previously existing rights on common land (Thompson E.P, 'The Moral Economy of the English Crowd in the Eighteenth Century' (1971) (50) *Past & Present* 76).

rights, free market and free trade."[97] Once those frameworks have been created the state should avoid the regulation of business which would stifle entrepreneurialism and therefore advancement.[98] It is through such (non-)intervention that neoliberalism becomes an art of "governance that encourages both institutions and individuals to conform to the norms of the market."[99] Secondly, the state may need to intervene to protect institutional frameworks (by coercion if necessary)[100] from the influences of socialism and collectivism. Those philosophies may pose a threat to the freedom of the market through what are considered to be unnecessary constraints on business objectives and free market trade such as price setting and employee rights.[101] In post war continental Europe, Credit Suisse and the Volker Fund provided funding for the members of the Mont Pèlerin Society to cultivate and disseminate these ideas.[102]

The philosophy of the post-war state in the UK

The post war British state however took a different trajectory and was characterised by a welfarist ideology which capitalised on the sentiments of collective social responsibility promoted during the war.[103] Under the welfarist approach to post-war government, social rights were delivered by agencies of the

[97] Harvey, D *A Brief History of Neoliberalism* (Oxford University Press 2005)
[98] Harvey, D *A Brief History of Neoliberalism* (Oxford University Press 2005)
[99]Larner, W, 'Neo-liberalism: Policy, Ideology, Governmentality' *Studies in Political Economy* <http://spe.library.utoronto.ca/index.php/spe/article/view/6724/3723> accessed on 10 July 2011; 12
[100] Rose gives an example of "Threats of public shaming and withdrawal of support are supposed to cajole or coerce welfare recipients into the responsibility of employment, no matter how menial, in order to reap the disciplining and moralizing benefits that flow through wage labour" (Rose N, 'Community, Citizenship and the Third Way' (2000) 43(9) *American Behavioural Scientist* 1395; 1407)
[101] Harvey, D *A Brief History of Neoliberalism* (Oxford University Press 2005)
[102] Mirowski, P and Plehwe, D, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009).
[103] Lowe, R *The Welfare State in Britain Since 1945* (2nd edn. Macmillan 1999)

state, such as the National Health Service.[104] There was some recognition that social structural forces may fail weaker individuals (less educated, sicklier for example) rather than failure being a product of individual inadequacy,[105] because, Rose argues, traditional liberalism had failed to cure the social problems caused by industrialisation[106] such as class division, unplanned urban expansion and uncertainty over social responsibilities. Keynes believed the role of the welfare state "was not only a moral duty but an economic remedy"[107] which would ensure that everyone had an equal opportunity to participate in the market and therefore promote growth.

The rationale was that by improving life chances via structural intervention such as improved access to education and healthcare, more people would be able to contribute usefully to society and, consequently, the well-being of society as a whole would improve.[108] Welfarist approaches, I argue, advocated state facilitated social inclusion and citizenship programmes such as free education and free healthcare. Keynesian principles suggested that communities would flounder if there were no restriction on market practices that could run free across the globe without concern for local labour markets.[109] Under welfarist techniques of governance social security could be enhanced and the risk of deviance could be reduced via state intervention in social domains such as education, health and employment. As such, specialist

[104] Stewart J, 'The Mixed Economy of Welfare in Historical Context' in Powell M (ed), *Understanding the Mixed Economy of Welfare* (Policy Press 2007)
[105] Stewart J, 'The Mixed Economy of Welfare in Historical Context' in Powell M (ed), *Understanding the Mixed Economy of Welfare* (Policy Press 2007)
[106] Rose N, 'Governing "Advanced" Liberal Democracies' in Barry, A. Osborne, T. Rose, N. (ed), *Foucault and Political Reason. Liberalism, Neo-liberalism and Rationalities of Government* (UCL Press 1996).
[107] Donzelot J, 'Pleasure in work' in Foucault, M. Burchell, G. Gordon, C and Miller, P. (ed), *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf 1991); 261
[108] Dean, J *Democracy and Other Neoliberal Fantasies* (Duke University Press 2009)
[109] Yeates N, 'The Global and Supra-national Dimensions of the Welfare Mix' in Powell, M. (ed), *Understanding the Mixed Economy of Welfare* (Policy Press 2007).

professionals were viewed favourably as expert knowledge could assist in structural reform and social stability, as well as protect individuals from institutionalism.[110]

It was therefore considered appropriate for state agencies to provide at least minimum levels of support for those who needed assistance in their socio-economic lives, which would thereby produce greater social cohesion.[111] Legal aid developed as part of those principles from 1949, bolstered by the growing recognition that social problems "were not necessarily the fault of the individual who experienced them."[112] Thus the view of the criminal at this time was as someone who was a product of structural failings. In this era, criminologists thought that crime could be remedied by state intervention in such domains as education, family and employment as criminologists attempted to understand the social features of the criminal.[113] This view was however challenged when economic difficulty arose in the 1970s.

Welfarism in crisis.

The existence of a significant range of social benefits requires government to manage the economic circumstances of the country in order to generate sufficient wealth to support the cost of social services.[114] These developments were undermined when, coupled with relatively weak economic growth, [115] recession struck during the 1970s. This marked the beginning of a crisis in public confidence about the ability of the welfarist state to appropriately manage the country's

[110] Marshall T, *Social Policy in the Twentieth Century* (Hutchinson and Co (Publishers) Ltd 1975)
[111] Stewart J, 'The Mixed Economy of Welfare in Historical Context' in Powell M (ed), *Understanding the Mixed Economy of Welfare* (Policy Press 2007)
[112] Stewart J, 'The Mixed Economy of Welfare in Historical Context' in Powell M (ed), *Understanding the Mixed Economy of Welfare* (Policy Press 2007); 31
[113] Dean J, *Democracy and Other Neoliberal Fantasies* (Duke University Press 2009).
[114] Lowe, R The *Welfare State in Britain Since 1945* (2nd edn. Macmillan 1999)
[115] Lowe, R *The Welfare State in Britain Since 1945* (2nd edn. Macmillan 1999)

economic resources. Financial crisis in British social policy led to the "the most comprehensive reorganisation of its administrative apparatus…since the creation of the welfare state."[116] Further, rifts developed within the Labour party as members disagreed about how to remedy the UK's economic problems.[117] The government had also agreed to costly measures to prevent strikes and had to make substantial cuts to the welfare state to avoid bankruptcy.[118]

In the circumstances, the Conservative Party argued that the welfare state was both morally and politically bankrupt.[119] The government fell into a period of crisis during which it lacked a consistent set of values[120] and the ideals of Keynesian macroeconomics were called in question. In response to crisis in the welfarist state, structural approaches to the management of state institutions, including the criminal justice system, fell into disfavour. In its 1979 manifesto, the Conservative Party highlighted rising crime rates in the late 1970s and indicated that they would seek better crime prevention measures.[121] Until this time, there had been little political argument about the institutions of criminal justice. This period marks a significant change in relation to criminal justice policy.

As part of the post-war consensus that dominated British politics from 1945, Rutherford argues that, "the direction of the criminal process in Britain reflected a broad consensus across the main political parties",[122] which meant that criminal justice issues tended to be politically non-contentious. The criminal justice system

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[116] Marshall T, *Social Policy in the Twentieth Century* (Hutchinson and Co (Publishers) Ltd 1975); 200
[117] Lowe, R *The Welfare State in Britain Since 1945* (2nd edn. Macmillan 1999)
[118] Harvey, D *A Brief History of Neoliberalism* (Oxford University Press 2005)
[119] Lowe, R *The Welfare State in Britain Since 1945* (2nd edn. Macmillan 1999)
[120] Marshall T, *Social Policy in the Twentieth Century* (Hutchinson and Co (Publishers) Ltd 1975)
[121] The Conservative Party. '1979 Conservative Party General Election Manifesto' <www.conservative-party.net/manifestos/1979/1979-conservative-manifesto.shtml> accessed on 18 January 2015.
[122] Rutherford, A *Transforming Criminal Policy* (Waterside Press, 1996)

was, for most of the twentieth century, regarded as 'above politics' because it dealt with fundamental principles (rights, justice, and punishment) which governments were reluctant to challenge.[123] This, alongside the belief that the state could facilitate social improvement, led to broad ideological agreement among the main political parties in terms of approaches to the criminal justice system.[124] The ideological consensus was informed by positivist approaches which believed that scientific method, along with political will, could improve society.[125]

However, the Conservative Party called the efficacy of the social democratic state into question and, as high crime rates became "a normal social fact,"[126] the structural rehabilitative stance taken by leftist politics was seen as failing to prevent crime.[127] Raine notes that between 1971 and 1984, nearly all types of offending were recorded as substantially increasing.[128] This paved the way, from the 1980s, for punitive policies of deterrent incarceration to become popular in political rhetoric, as both major political parties sought popularity via ideas of "resurgent penal populism."[129] Thus while post-1945 criminology assumed that criminal behaviour could be corrected, the late 1970s onwards saw the emergence of practices designed to control criminal behaviour by curbing rational choice. There was a move away

[123] Hughes G, McLaughlin E and Muncie J, 'Community Safety, Crime Prevention and Social Control' (Study Guide, The Open University 2001)
[124] Hughes G, McLaughlin E and Muncie J, 'Community Safety, Crime Prevention and Social Control' (Study Guide, The Open University 2001)
[125] Hughes G, McLaughlin E and Muncie J, 'Community Safety, Crime Prevention and Social Control' (Study Guide, The Open University 2001)
[126] Garland D, 'The Culture of High Crime Societies' (2000)(40) *British Journal of Criminology* 347; 348
[127] Garland D, 'The Culture of High Crime Societies' (2000)(40) *British Journal of Criminology* 347
[128] Raine J, *Local Justice. Ideals and Realities* (T & T Clark 1989).
[129] Hughes G, McLaughlin E and Muncie J, 'Community Safety, Crime Prevention and Social Control' (Study Guide, The Open University 2001); 18

from 'structural'[130] theories of crime control towards 'volitional'[131] theories of behaviour.[132] Garland notes that it was in the mid-1970s that the Conservative Party "began to give prominence to crime in their election manifestos. Several elections passed before the…Labour party opponents began to respond in kind, a response that raised the stakes rather than changed the game."[133] These changes cause Garland to state that "crime policy has ceased to be a bi-partisan matter that can be devolved to professional experts and has become a prominent issue in electoral competition."[134]

Crisis and the rise of neoliberalism

As a result of the crisis of welfarism, of which rising crime rates were a feature, neoliberal ideas began to achieve political dominance via the Conservative manifesto which preceded the 1979 election. The principles of the manifesto encouraged individual achievement via entrepreneurialism, privatisation of public services and restriction of state benefits to the 'most deserving'.[135] Thatcher stated that she wanted to move politics away from theoretical issues while criticising the Labour party for being bound in arguments about political philosophy. Rather, she

[130] Those theories which focus on social factors and alienation which contribute to criminal behaviour, often advocated by traditional criminologists (Feeley M, 'Crime, Social Order and the Rise of Neo-Conservative Politics' (2003) 7(1) *Theoretical Criminology* 111).
[131] Those theories in which the causes of crime lie in individual choice, often advocated by politicians and the public (Feeley M, 'Crime, Social Order and the Rise of Neo-Conservative Politics' (2003) 7(1) *Theoretical Criminology* 111). Garland refers to these theories as a criminology of the self (Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002)) `
[132] Feeley M, 'Crime, Social Order and the Rise of Neo-Conservative Politics' (2003) 7(1) *Theoretical Criminology* 111.
[133] Garland D, 'The Culture of High Crime Societies' (2000) (40) *British Journal of Criminology* 347; 352. Cavender notes how the rise of the mass media also contributed to the shift in political agenda (Cavender G, 'Media and Crime Policy' (2004)(6) *Punishment & Society* 335)
[134] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002); 13
[135] Harvey, D *A Brief History of Neoliberalism* (Oxford University Press 2005)

wanted politics to focus on the way people wanted to live, drawing on the idea of peoples' liberty under rule of law.[136]

The Conservative manifesto argued that excessive state intervention had undermined the rule of law and individual liberty and had brought society to the "brink of disintegration".[137] It was against this background that Harvey described a huge transformation of global social and economic policy in the late 1970s and early 1980s.[138] As such, even though the processes by which neoliberalism has been implemented are diverse and have "in many countries been only partial, on the level of historical and economic facts it is possible to identify a worldwide neoliberal turn in the 1970s."[139] Due to differing state needs, the neoliberal movement that followed was experimental in nature.[140] In the UK Thatcher, and later Blair, both appeared to have been influenced by both neoliberal and neoconservative principles[141] in which market based practices, state regulation of publicly funded agencies, entrepreneurialism, individualisation and responsibilisation have become key features of political philosophy with little resistance from traditional left politics.[142]

Neoliberalism requires subjects to assume responsibility for "navigating the social realm using rational choice and cost-benefit calculations grounded on market

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[136] The Conservative Party. '1979 Conservative Party General Election Manifesto' <www.conservative-party.net/manifestos/1979/1979-conservative-manifesto.shtml> accessed on 18 January 2015.
[137] The Conservative Party. '1979 Conservative Party General Election Manifesto' <www.conservative-party.net/manifestos/1979/1979-conservative-manifesto.shtml> accessed on 18 January 2015.
[138] Harvey, D *A Brief History of Neoliberalism* (Oxford University Press 2005)
[139] Oksala J, *Foucault, Politics and Violence* (Northwestern University Press 2012); 117
[140] Peck, J and Tickell, A, 'Conceptualizing Neoliberalism. Thinking Thatcherism' in Leitner, H. Peck, J and Sheppard, E (ed), *Contesting Neoliberalism: Urban Frontiers* (The Guildford Press 2007).
[141] Although neo-conservatism advocates some minimal state protections for the poorest members of society, it also advocated individual responsibility on the basis that state funded social welfare programmes create a dependency culture. These ideas are also partly rooted in neo-conservative ideas that were popular in the USA and promoted by Regan, with whom Thatcher had a close political relationship. See Ball, T 'Neo-conservatism' http://www.britannica.com/EBchecked/topic/1075556/neoconservatism/279451/Economic-and-social-policy Accessed 21 January 2015.
[142] Dean J, *Democracy and Other Neoliberal Fantasies* (Duke University Press 2009).

based principles"[143] which presupposes that people possess the tools to be able to make a rational cost-benefit judgement in all aspects of their lives. Dilts argues that this view of *homo economicus* allows "micro-economic analysis to be applied to…nearly any social phenomena,"[144] by promoting certain choices while discouraging others. However, Van Horn and Mirowski acknowledge that to place the citizen as consumer in fact requires "an elite cadre of experts…behind the scenes to shape and execute public policy,"[145] which is inconsistent with the idea of minimal state intervention that was originally proposed.

The way in which neoliberalism developed leads Peck and Tickell to argue that "while the utopian rhetoric of neoliberalism is focused on the liberation of competitive markets and individual freedoms, the reality of neoliberal programs is that they are typically defined by the tasks of dismantling those alien states and social forms that constituted their political inheritance."[146] As a result, Larner suggests that two forms of neoliberalism emerge[147] which coexist but are contradictory. The first advocates free market principles and limited state involvement in public services and therefore advocates a roll back of state provided services, while the second allows the state to govern citizens at a distance via roll out of interventionist regulatory practices. Thus the state in fact imposes interventionist practices via policy initiatives in the institutions that remain under its control and uses a range of techniques (persuasion, enticement, coercion for example) to

[143] Hamann T, 'Neoliberalism, Governmentality and Ethics' (2009) February(6) *Foucault Studies* 37; 37
[144] Dilts A, 'From 'Entrepreneur of the self' to 'Care of the self': Neoliberal Governmentality and Foucault's ethics' (2011) 12 (October) *Foucault Studies* 130; 131
[145] Van Horn, R and Mirowski, P, 'Neoliberalism and Chicago' in Emmett, R. (ed), *The Elgar Companion to the Chicago School of Economics* (Edward Elgar Publishing Ltd 2010); 199. See also Dean, J *Democracy and Other Neoliberal Fantasies* (Duke University Press 2009)
[146] Peck, J and Tickell, A, 'Conceptualizing neoliberalism. Thinking Thatcherism' in Leitner, H. Peck, J and Sheppard, E (ed), *Contesting neoliberalism: Urban Frontiers* (The Guildford Press 2007); 29
[147] Larner, W, 'Neo-liberalism: Policy, Ideology, Governmentality' Studies in Political Economy' <http://spe.library.utoronto.ca/index.php/spe/article/view/6724/3723> accessed on 10 July 2011

encourage people to engage in the free market.[148] It seems that neoliberalism has developed into an ideology that has become not just an economic doctrine but a way to regulate behaviour in order to deal with crisis. Taking this further, I argue that there are two main themes to the way that criminal justice policies altered following the rise of neoliberalism; the increased marginalisation of socio-economically disadvantaged members of society, from which group defendants in the criminal process are likely to come, and the increased use of managerial techniques to encourage efficiency in public services.

Responsibilisation and attitudes to criminal behaviour

Neoliberalism (and neo-conservatism) assumes that citizens are able to access resources for development equally, which means the criminal makes a choice to commit crime from a range of options.[149] As such, "the criminal is just another person who invests in an action, expects a profit from it and accepts the risk of a loss"[150] and must face the consequences of his/her actions. Criminals should not therefore necessarily expect state assistance with what is the outcome of poor decision making abilities. Furthermore, it is the criminal who is visible as the "ever present threat of loss, the losing that the fantasy of free trade disavows."[151] Such attitudes mean that it is, I argue, possible to see how neoliberalism is

> "part of a strategy of governmentality which attempts to subject individuals to self-regulation…but, rather than reintegrating them, the State intervenes in an

[148] Dean M, 'Liberal Government and Authoritarianism' (2002) 31(1) *Economy and Society* 37.
[149] Dean, J *Democracy and Other Neoliberal Fantasies* (Duke University Press 2009). See also O'Malley P, 'Risk and Responsibility' in Barry, A. Osborne, T. Rose, N. (ed), *Foucault and Political Reason. Liberalism, Neo-liberalism and Political Rationalities* (UCL Press 1996).
[150] Oksala J, *Foucault, Politics and Violence* (Northwestern University Press 2012); 143
[151] Dean, J *Democracy and Other Neoliberal Fantasies* (Duke University Press 2009); 67

intrusive way to neutralise the risk they represent by forcing them to modify their personalities and to become 'self-regulating'.''[152]

Such intervention further divides a law abiding, self-reliant majority from "an undeserving, feckless, welfare dependant and often dangerous minority… from which they need to be protected."[153] Garland also notes that intrusion in the lower regions of social space directs crime control policies towards the exclusion, rather than re-integration, of those who appear to threaten neoliberal socio-economic policies.[154] More intrusive practices have been used in attempts to manage the social division and instability created by the first phase of neoliberalisation.[155] It is through such processes that welfare concerns about offending behaviour have been supplanted by functional interests in managing risk and protecting victims.[156]

The Thatcher government's aim to "roll back the frontiers of the state"[157] worsened the marginalisation of precariat groups from the late 1970s. The welfare state was believed to be inefficient, to create a dependency culture which eroded any sense of social responsibility and to restrain the free market.[158] During the late 1970s and the 1980s,

"rightly or wrongly, welfare programs came to be seen as permanent crutches…Their beneficiaries did not express gratitude as their new found

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[152] Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011); 9
[153] Faulkner D, 'Policy and Practice in Modern Britain: Influences, Outcomes and Civil Society' in Green, P and Rutherford, A (eds), *Criminal Policy in Transition* (Hart Publishing 2000).
[154] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002).
[155] Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011)
[156] Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011).
[157] Stewart J, 'The Mixed Economy of Welfare in Historical Context' in Powell M (ed), *Understanding the Mixed Economy of Welfare* (Policy Press 2007); 28
[158]Drakeford, M 'Private Welfare' in Powell, M. (ed), *Understanding the Mixed Economy of Welfare* (Policy Press 2007) 61. Further, Thatcher "wanted her government to be remembered as the one which ...rejected the notion that the state is all powerful and the citizen is merely its beneficiary; which shattered the illusion that government could somehow substitute for individual performance" (Lowe, R *The Welfare State in Britain Since 1945* (2nd ed. Macmillan 1999); 3)

equality of opportunity did not translate into substantial gains…the gap between promise and expectation on the one hand, and cost, performance and effectiveness on the other created a chasm."[159]

The government took this view despite a lack of evidence which supported "the frequent assertion that state welfare, by misallocating resources and sapping the will to work, undermined economic efficiency."[160] As such, the Thatcher government advocated a shift from collective to individual responsibility. The unfortunate consequence of new limits placed on the welfare state and the shift towards individualism was that there remained a body of people who were unable or unwilling to cope with responsibilities that had, for years, been regarded as shared social obligations.[161]

Welfare reform was also a significant feature of the New Labour manifesto, which supports Dean's argument that left politics failed to adequately defend the idea that the state should provide for a minimum standard of living.[162] Reform was to be achieved by promoting the 'active' parts of the welfare state, such as education, which would help the economy and present the appearance of social justice.[163] In

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[159] Feeley M, 'Crime, Social Order and the Rise of Neo-Conservative Politics' (2003) 7(1) *Theoretical Criminology* 111; 123

[160] Lowe, R *The Welfare State in Britain Since 1945* (2nd edn Macmillan 1999); 299. However, in the UK, the social factors of an ageing population and high levels of unemployment meant that welfare spending in fact increased for a number of years despite a professed intention to reduce social spending (Lowe, R *The Welfare State in Britain Since 1945* (2nd edn Macmillan 1999)).

[161] Drakeford M, 'Private Welfare' in Powell, M. (ed), *Understanding the Mixed Economy of Welfare* (Policy Press 2007). It should be noted however, as a result of social solidarities promoted since World War II, Thatcher faced struggles both from within political circles and from the general public in cutting welfare and promoting privatisation to the extent that had been originally intended (Peck, J and Tickell, A, 'Conceptualizing Neoliberalism. Thinking Thatcherism' in Leitner, H. Peck, J and Sheppard, E (ed), *Contesting Neoliberalism: Urban Frontiers* (The Guildford Press 2007)).

[162] Dean, J *Democracy and Other Neoliberal Fantasies* (Duke University Press 2009). During her last parliamentary debate, Thatcher criticised the opposition for failing to offer any solid alternative policies while criticising those put forward by the Conservatives (--"Part two" Maggie: The First Lady. ITV3 London 20 Jan 2012)

[163] Powell M, 'New Labour and the Third Way in the British Welfare State: A New and Distinctive Approach?' (2000) 20(9) *Critical Social Policy* 39.

essence, the new government of 1997 showed increasing, although not absolute, ideological consistency with its predecessor.[164] While New Labour indicated that it wished to pursue policies that would reduce the rich/poor divide, Blair was also reported as seeking "the end of the something-for-nothing state"[165] and sought to impose financial penalties on those who 'chose' to avoid work.[166] As such, while Thatcher advocated state roll back, New Labour employed intervention to discipline those who did not engage with the system of reduced state funding in public services. New Labour sought to "design a modern welfare state based on rights and duties going together",[167] indicating the continued importance of individual responsibility to the new government.

In addition, as Garland observed in 2002, "there is a settled assumption on the part of a large majority of the public in the US and the UK that crime rates are getting worse …there is little public confidence in the ability of the criminal justice system to do anything about this."[168] In light of increased crime rates and falling public confidence in the criminal justice process, New Labour asserted that defendants' rights had been given too much priority in recent years.[169] In its 1997 manifesto, the incoming government asserted that "victims of crime are too often neglected by the

[164] Drakeford M, 'Private welfare' in Powell, M. (ed), *Understanding the Mixed Economy of Welfare* (Policy Press 2007).
[165] Powell M, 'New Labour and the Third Way in the British Welfare State: A New and Distinctive Approach?' (2000) 20(9) *Critical Social Policy* 39; 41
[166] Powell M, 'New Labour and the Third Way in the British Welfare State: A New and Distinctive Approach?' (2000) 20(9) *Critical Social Policy* 39.
[167] The Labour Party. 'New Labour because Britain Deserves Better' (1997) <www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> accessed on 24 June 2014.
[168] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002); 9
[169] Falconer, C. 'A Criminal Justice System for the 21st Century' (2004) <http://www.cjp.org.uk/news/archive/issues-in-criminal-justice-lecture-by-rt-hon-lord-falconer-29-01-2004/> accessed on 04 February 2012.

criminal justice system"[170] and consequently sought to give greater priority to victims' needs.[171] As Nash notes, "increasingly, it appears as if almost any risk related to public safety is not to be tolerated, thus those who put others at greater risk are by default to blame."[172] Consequently, further intervention has been applied to precariat groups in order to manage the risk of social instability.

As part of this process, and in its desire to be seen to support victims, New Labour created a number of new offences[173] and introduced 34 statutes which have had a significant impact on criminal justice and procedure, compared to only six criminal justice statutes between 1925 and 1985.[174] The effect of those statutes on criminal procedure is discussed in chapters four and five. New Labour's emphasis on the position of the victim also resulted in "a relaxation of concern about the civil liberties of suspects…and a new emphasis upon effective crime enforcement and control."[175] As such, New Labour's crime policies demonstrated the continuance of

[170] The Labour Party. 'New Labour because Britain Deserves Better' (1997) <www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> accessed on 24 June 2014.
[171] Silvestri A, 'Introduction' in Silvestri, A. (ed), *Lessons for the Coalition: an end of term report on New Labour and Criminal Justice* (Centre for Crime and Justice Studies 2010).
[172] Nash M, 'The Art of Deception - UK Public Protection Policy and the Criminal Justice 'Crisis' of 2006' (2010) 38(3) *International Journal of Law, Crime and Justice* 79.
[173] Davies M, 'A New Training Initiative for the Lay Magistracy in England and Wales - A Further Step Towards Professionalisation?' (2005) 12(1) *International Journal of the Legal Profession* 93. Between 1997 and 2006, over 3,000 new criminal offences were enacted (Ashworth A and Zedner L, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) (2) *Criminal Law and Philosophy* 21; 22), and this (predictably) increased criminal justice expenditure (Sanders A, 'What was New Labour thinking? New Labour's Approach to Criminal Justice' in Silvestri, A. (ed), *Lessons for the Coalition: An End of Term Report on New Labour and Criminal Justice* (Centre for Crime and Justice Studies 2010). This topic is discussed further in chapter 5.
[174] Baillie QC, A. 'Can England and Wales Afford Both Justice and the Ministry of Justice?' (Open Lecture Series University of Kent 7 December 2011). Baillie also draws attention to parliamentary debates which describe the Government's approach to criminal justice as 'legislative hyperactivity syndrome' (Baillie QC, A. 'Can England and Wales Afford Both Justice and the Ministry of Justice?' (Open Lecture Series University of Kent 7 December 2011))
[175] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002); 12

"an authoritarian, punitive, 'othering' approach."[176] The contemporary concern with risk also led to a resurgence of interest in mandatory sentencing provisions, "private policing, and 'law and order' politics,"[177] alongside increased police powers but decreased access to legal advice.[178]

New Labour's policies appear to resonate with neoliberal ideology in that, while the state "must provide the conditions of the good life,"[179] citizens "must deserve to inhabit it by building strong communities and exercising active responsible citizenship."[180] This adds an ethical dimension to individual behaviour.[181] Thus the ideology of the third way sought to "suture community and citizenship, collective belonging, and individual responsibility."[182] As Rutherford notes, responsibilisation is also about the state saying that it is not responsible for, and cannot be alone in effectively preventing crime.[183] Consequently, not only were offenders to take responsibility for their behaviour, but communities were encouraged to take responsibility for risk. As such, the criminal justice system

[176] Sanders A, 'What was New Labour thinking? New Labour's approach to criminal justice' in Silvestri, A. (ed), Lessons for the Coalition: An End of Term Report on New Labour and Criminal Justice (Centre for Crime and Justice Studies 2010); 12

[177] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002); 1. This statement can be contrasted with Martinson's later recanted assertion that 'nothing works' in crime control policy (Cavender G, 'Media and Crime Policy' (2004) (6) *Punishment & Society* 335).

[178] Sanders A, 'What was New Labour thinking? New Labour's approach to criminal justice' in Silvestri, A. (ed), Lessons for the Coalition: An End of Term Report on New Labour and Criminal Justice (Centre for Crime and Justice Studies 2010)

[179] Rose N, 'Community, Citizenship and the Third Way' (2000) 43(9) *American Behavioural Scientist* 1395; 1398

[180] Rose N, 'Community, Citizenship and the Third Way' (2000) 43(9) *American Behavioural Scientist* 1395;1398

[181] Rose N, 'Community, Citizenship and the Third Way' (2000) 43(9) *American Behavioural Scientist* 1395; 1398

[182] Rose N, 'Community, Citizenship and the Third Way' (2000) 43(9) *American Behavioural Scientist* 1395; 1403

[183] Rutherford A, 'An Elephant on the Doorstep: Criminal Policy without Crime in New Labour's Britain' in Green, P and Rutherford, A (eds), *Criminal Policy in Transition* (Hart Publishing 2000).

became a component in "a wider control complex of partnerships with private security, local authorities etc."[184]

New Labour's rights and responsibilities mantra, which was intrinsic to the reconciliation of welfarist and punitive approaches to all social problems, allowed its criminal justice policies to become ever more interventionist during its time in power.[185] This encouraged the use of coercive measures which threatened punitive sanctions for non-compliance with orders that required, for example, drug addicts or alcoholics, to "take responsibility for their actions and accept the help offered."[186]

It seems therefore that while New Labour did acknowledge the role of the state in assisting the poorest in society,

> "It shared the notion that responsibility ultimately lies with the poor themselves. Given that criminality was often cited as one of the distinguishing characteristics of the underclass, the responsibilisation of the poor was closely linked to the responsibilisation of offenders."[187]

It is this discourse which justifies the removal of traditional protections afforded to defendants in the criminal process - such as restrictions on publicly funded representation and the prioritisation of efficiency over due process goals.[188] The 'othering'[189] process serves to separate the defendant from members of society and thereby increases their marginalisation as token players in the proceedings. I suggest that criminal justice procedures also demonstrate increasingly punitive

[184] Young J, 'Searching for a New Criminology of Everyday Life: A Review of the 'Culture of Control' by David Garland' (2002) (42) *British Journal of Criminology* 228; 229. See also Garland D, 'The Culture of High Crime Societies' (2000) (40) *British Journal of Criminology* 347.
[185] Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011).
[186] Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011); 82
[187] Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011); 95
[188] Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011). This also partially explains why 'white-collar' and regulatory crimes have tended to avoid the gaze of most criminal justice interventions (Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011).)
[189] Bauman Z, *Globalization. The Human Consequences* (Polity Press 1998).

measures towards defendants who are required to take responsibility for the consequences of their actions. The notion that you can only receive support if you are also prepared to contribute to society[190] justifies the restriction or removal of traditional due process protections afforded to those accused of committing criminal offences, as they are people accused of acting outside the boundaries of society's interests. The focus on the responsibilisation of behaviour justifies undermining due process protections that have the potential to make prosecution more difficult and lengthier, and therefore more expensive.

The incoming Coalition government of 2010 initially appeared to refocus concern on rehabilitation of offenders as a form of risk management. The government stated that it viewed crime as not just about numbers but also about social justice.[191] The incoming government stated that it wanted to start a rehabilitation revolution,[192] but this was set against a need to control state expenditure.[193] The government sought rehabilitative measures via payment by results type schemes, which Silvestri refers to as the monetisation of rehabilitation.[194] As such, and via the subsequent privatisation of parts of the Probation Service,[195] the Coalition government demonstrated systematic commitment to free market principles. This reflects a continuing trend of contracting out services for the sake of competition and cuts in public spending although as,

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[190] Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011)
[191] Silvestri, A. (ed) *Critical Reflections: Social and Criminal Justice in the First Year of Coalition Government* (Centre for Crime and Justice Studies, 2012)
[192] Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (The Stationary Office , 2010)
[193] Silvestri, A. (ed) *Critical Reflections: Social and Criminal Justice in the First Year of Coalition Government* (Centre for Crime and Justice Studies, 2012)
[194] Silvestri, A. (ed) *Critical Reflections: Social and Criminal Justice in the First Year of Coalition Government* (Centre for Crime and Justice Studies, 2012)
[195] Travis, A. 'Chris Grayling to Press Ahead with Probation Service Privatisation' (2014) <http://www.theguardian.com/society/2014/dec/02/chris-grayling-probation-service-privatisation> accessed on 15 August 2015.

Faulkner and Burnett note, the rate of change in relation to criminal justice is slower and "the details are less fully developed."[196] Austerity drives therefore appear to have added another dimension to governmental approaches to criminal justice.

Furthermore, the government was keen to be seen as both tough on crime and to promote speedy summary case progression in the aftermath of the 2011 riots. These factors prompted a return to more neo-conservative 'tough on crime' policies[197] and provided extreme examples of speedy case progression.[198] As Reiner noted at the end of the first year of Coalition government, the deregulation of markets under neoliberalism had the effect of "intensified disorder and deviance that prompt resort to strong state controls."[199] Again, I argue, the response of government to the social dislocation produced by the initial roll back of the state has been to roll out ever more interventionist policies in an attempt to manage the risk of social instability.

Increasing reliance is therefore placed on the criminal justice system to discipline the labour market, to segregate groups that threaten to destabilise socio-economic order and to reinforce state authority and legitimacy.[200] It seems that increasingly punitive strategies were not pursued by a neoliberal agenda in itself, but rather as an attempt to cope with the socio-political outcomes of neoliberalism.[201] As such, "the ramping up of the penal wing of the state is a

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[196] Faulkner D and Burnett R, *Where Next for Criminal Justice?* (The Policy Press 2012); 165
[197] Reiner R, 'Return of the Nasty Party' in Silvestri, A. (ed) *Critical Reflections: Social and Criminal Justice in the First Year of Coalition Government* (Centre for Crime and Justice Studies, 2012)).
[198] Addley, E. Vasagar, J and Coleman, J 'UK riots: in courtrooms across country, there was little room for leniency' (2011) <http://www.theguardian.com/uk/2011/aug/11/uk-riots-courtrooms-country > accessed on 5 September 2014.
[199] Reiner R, 'Return of the Nasty Party' in Silvestri, A. (ed) *Critical Reflections: Social and Criminal Justice in the First Year of Coalition Government* (Centre for Crime and Justice Studies, 2012); 29
[200] Wacquant L, *Punishing the Poor. The Neoliberal Government of Social Insecurity* (Duke University Press 2009).
[201] Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011)

response to social insecurity, and not a reaction to crime trends."[202] The increasingly punitive nature of the criminal process in general is reactive rather than a scheme *designed* to segregate and discipline. Nevertheless, it has the effect of perpetuating the marginalisation of those accused of committing criminal offences and of casting defendants as responsible for their own situation and therefore undeserving of state funded assistance and protection.

These issues lead me to the view that limitations applied to state funded services resulted in greater social dislocation, which required management via the agencies of the criminal justice system. I further argue that one way that governments have sought to achieve management, and cost control, is via efficiency drives based in managerial principles.

The rise of managerialism in the criminal justice system

As Tonry argues,[203] it seems that while traditional views of criminal justice emphasise judicial independence from the executive and suggest that the management of financial resources should not affect judicial decision-making,[204] successive governments have placed efficient case progression at the core of their cost reduction strategy. Stenson and Edwards are of the view that governmental preference for management techniques has diverted attention from the traditional

[202] Wacquant L, 'The wedding of workfare and prisonfare in the 21st century: responses to critics and commentators' in Squires, P and Lea, J (Eds), *Criminalisation and advanced marginality. Critically exploring the work of Loic Wacquant* (The Policy Press 2012); 245
[203] Tonry, M *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy* (Willan Publishing, 2004). Further, Padfield argues that "saving money is at the heart of many initiatives. But concerns with efficiency and indeed also effectiveness lie behind many recent changes" (Padfield N, *Text and Materials on the Criminal Justice Process* (Oxford University Press 2008); 7) Indeed, the Attorney General recently asserted that the criminal justice system must modernise in order to reduce cost (Baksi C, 'Grieve spells out 'modernise or die' message' (2012) (10 May) Law Society Gazette 1).
[204] Rutherford, A *Transforming Criminal Policy* (Waterside Press, 1996). Laughlin also states that the judiciary should act "as a bulwark against executive power" (Laughlin M, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Hart Publishing 2000)).

welfare approach to criminal justice.[205] The altered approach views crime as "a technical and practical problem needing an administrative and apolitical 'solution'".[206]

Governments' concerns about the efficiency of the criminal justice system intensified as, under the Thatcher government, public services came to be seen as "ineffective, unnecessary and even harmful."[207] Subsequent governments therefore sought to impose intrusive forms of regulation.[208] As a result of governmental demands for efficiency, policies required "higher levels of performance from public sector workers on the basis of target driven objectives,"[209] thereby creating a performance management and audit culture.[210] As Faulkner and Burnett note, the criticisms of the criminal justice system were not in fact based on "any actual deterioration in the performance of the criminal justice system, but higher expectations of what it can or should achieve."[211]

Thus, as Jones argues, auditing has elevated the "achievement of economy, efficiency and effectiveness over principled criminal justice policy."[212] This means that, by focusing on value for money, political debate about what constitutes value in specific circumstances is increasingly ignored, including the value of access to

[205] Stenson, K and Edwards, A, 'Policy Transfer in Local Crime Control: Beyond naïve emulation' in Newburn, T and Sparks, R (ed), *Criminal Justice and Political Cultures* (Willan Publishing 2004).
[206] Hughes G, McLaughlin E and Muncie J, 'Community Safety, Crime Prevention and Social Control' (Study Guide, The Open University 2001); 10
[207] Rose N, 'Community, Citizenship and the Third Way' (2000) 43(9) *American Behavioural Scientist* 1395; 1405
[208]Jones C, 'Auditing Criminal Justice' (1993) 33 *British Journal of Criminology* 187
[209] Rawnsley A, *The End of the Party* (Penguin 2010).
[210] Yeates N, 'The Global and supra-national dimensions of the welfare mix' in Powell, M. (ed), *Understanding the mixed economy of welfare* (Policy Press 2007).
[211] Faulkner D and Burnett R, *Where Next for Criminal Justice?* (The Policy Press 2012).
[212] Jones C, 'Auditing Criminal Justice' (1993) 33 *British Journal of Criminology* 187; 188

justice.[213] Raine and Willson note that magistrates' courts were not exempt from this trend because "the incoming government of 1979 seemed to see criminal justice…as spendthrift, idiosyncratic and unaccountable."[214] Success was then redefined "by creating performance indicators which are not concerned with the reduction of crime but the internal assessment of the performance of the organisation."[215] Efficiency measures became increasingly important in the criminal justice system as "managerialism increased its influence over the courts in the late 1980s and early 1990s."[216]

Further, by increasing the level of scrutiny of agencies of the criminal justice system, co-operative working practices have been encouraged, which have weakened traditional adversarial boundaries despite the competing interests of courts, prosecutors and defence advocates.[217] As will be seen in the following chapters, advocates have always tended to act in co-operative ways but Garland notes that, in the 1980s and 1990s, the desire to encourage advocates and the court to co-operate was set against "a chronic sense of crisis, and professional anomie"[218] which resulted from "a welter of new legislation, constant organisational reform and an urgent, volatile pattern of policy development."[219] However, the workings of

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[213] Lacey N, 'Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991' (1994) 57 *Modern Law Review* 534.
[214] Raine J and Willson M, 'Beyond Managerialism in Criminal Justice' (1997) 36(1) *The Howard Journal* 80; 82
[215] Young J, 'Searching for a New Criminology of Everyday Life: A Review of the 'Culture of Control' by David Garland' (2002)(42) *British Journal of Criminology* 228; 238
[216] Sanders, A *Community Justice. Modernising the Magistracy in England and Wales* (Institute of Public Policy Research, 2000); 13.
[217] Jones C, 'Auditing Criminal Justice' (1993) 33 *British Journal of Criminology* 189. Further, the fact that there is "greater liaison between all agencies of the criminal justice system…also weakens traditional constitutional boundaries" (Jones C, 'Auditing Criminal Justice' (1993) 33 *British Journal of Criminology* 189; 199)
[218] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002); 4
[219] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002); 20.

public institutions will be affected not only by top down policy but also by the struggle and subsequent improvisation that follows.[220] The degree of co-operation appears to have increased as a result of the government's desire to increase efficiency via management techniques, which have encouraged greater routinisation of procedures. This is discussed further in chapters two and four.

The idea of the executive managing workloads in criminal justice had been alien in most courts until at least the late 1980s but gradually permeated the system of state-led prosecution.[221] In 1987 the Home Office produced a framework for statistics in summary criminal justice,[222] while Bell and Dadomo note that, in 1989, it was reported that "the system of summary justice was fairly haphazard, that courts often operated in isolation, and there was a distinct lack of accountability."[223] Such initiatives were also driven by growing confidence in the ability of managerialism as it "fed back into governmental concerns about the criminal justice system as just one more hopelessly inefficient and chaotic part of the public sector, and one in which the lack of a coherent framework was resulting in major fiscal waste."[224] Following that assessment, the Lord Chancellor's Department (LCD) took over control of criminal courts from the Home Office in 1992 and introduced a system of funding based on efficiency.[225] However funding schemes which result from performance

[220] Larner, W, 'Neo-liberalism: Policy, Ideology, Governmentality' Studies in Political Economy' <http://spe.library.utoronto.ca/index.php/spe/article/view/6724/3723 > accessed on 10 July 2011
[221] Raine J, *Local Justice. Ideals and Realities* (T & T Clark 1989).
[222]Raine J, *Local Justice. Ideals and Realities* (T & T Clark 1989).
[223] Bell B and Dadomo C, 'Magistrates' Courts and the 2003 Reforms of the Criminal Justice System' (2006) 14(4) *European Journal of Crime, Criminal Law and Criminal Justice* 339; 343
[224] Lacey N, 'Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991' (1994) 57 *Modern Law Review* 534; 540
[225] Bell B and Dadomo C, 'Magistrates' Courts and the 2003 Reforms of the Criminal Justice System' (2006) 14(4) *European Journal of Crime, Criminal Law and Criminal Justice* 339

create conflict between the requirements of managerialism and of justice[226] because it had previously been accepted that the interests of justice might require a degree of delay, which will increase cost.[227]

This trend towards managerialism continued after the election of New Labour in 1997, following which Garland commented that managerialism had become "all pervasive,"[228] affecting "every aspect of criminal justice…performance indicators and management measures have narrowed professional discretion and tightly regulated working practice."[229] As Jones noted in 1999, "there is now in the ascendant an ideology which wholly legitimates the pursuit of administratively rational ends over substantive justice goals."[230] As such, New Labour introduced a series of policies designed to ensure efficiency in the criminal justice system as "the concern with efficiency…has come increasingly to be approached on the assumption that the imposition of a market-type model can deliver improvements in the quality of public administration."[231] Falconer notes that New Labour professed a commitment to rejuvenating the criminal justice system and sought to focus less attention on socio-economic causes of crime,[232] while Sanders identifies "a 'managerialist', regulatory drive"[233] contained in New Labour's criminal justice

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[226] Bell B and Dadomo C, 'Magistrates' Courts and the 2003 Reforms of the Criminal Justice System' (2006) 14(4) *European Journal of Crime, Criminal Law and Criminal Justice* 339
[227] Padfield N, *Text and Materials on the Criminal Justice Process* (Oxford University Press 2008)
[228] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002); 18
[229] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002); 18
[230] Jones C, 'Auditing Criminal Justice' (1993) 33 *British Journal of Criminology* 187; 196
[231] Lacey N, 'Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991' (1994) 57 *Modern Law Review* 534; 534
[232] Falconer, C. 'A Criminal Justice System for the 21st Century' (2004) <http://www.cjp.org.uk/news/archive/issues-in-criminal-justice-lecture-by-rt-hon-lord-falconer-29-01-2004/> accessed on 04 February 2012.
[233] Sanders A, 'What was New Labour thinking? New Labour's Approach to Criminal Justice' in Silvestri, A. (ed), Lessons for the Coalition: An End of Term Report on New Labour and Criminal Justice (Centre for Crime and Justice Studies 2010); 12

policy initiatives. Therefore, the way that neoliberalism responded to the crisis of perceived inefficiency in state funded institutions of criminal justice was to move away from reliance on professional expertise and to introduce increasingly intrusive regulatory practices.

New Labour leader Tony Blair referred to his political agenda as the 'third way' which was designed to be a "new and distinctive approach...one that differs from the old left and Conservative right",[234] and to create distance from the internal ideological struggles of the Labour party.[235] Indeed, New Labour described itself as "a party of ideas and ideals but not of outdated ideology. What counts is what works."[236] Ashworth argues however that "despite its declared aspiration for evidence-led policies, Labour often ignored the evidence and listened to its political advisers."[237] Rose argues that the methods of government used by New Labour arose from a "naïve enthusiasm for the mantras of managerial gurus"[238] coupled with ingrained confidence in the strength of the free market.[239] This was demonstrated by the Party's desire to "work in partnership with the private sector to achieve our goals...efficiency and value for money are central."[240] The emergence of the 'third way' may be viewed as another neoliberal response to the crisis of recession and rising crime rates under the preceding Conservative governments and the crisis

[234] The Labour Party. 'New Labour because Britain Deserves Better' (1997) <www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> accessed on 24 June 2014.
[235] Rose N, 'Community, Citizenship and the Third Way' (2000) 43(9) *American Behavioural Scientist* 1395.
[236] The Labour Party. 'New Labour because Britain Deserves Better' (1997) <www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> accessed on 24 June 2014.
[237] Ashworth A, 'Avoiding Criminal Justice: Diversion and Sentencing' in Silvestri, A. (ed), Lessons for the Coalition: An End of Term Report on New Labour and Criminal Justice (Centre for Crime and Justice Studies 2010); 26
[238] Rose N, 'Community, Citizenship and the Third Way' (2000) 43(9) *American Behavioural Scientist* 1395; 1397
[239] Rose N, 'Community, Citizenship and the Third Way' (2000) 43(9) *American Behavioural Scientist* 1395
[240] The Labour Party. 'New Labour because Britain Deserves Better' (1997) <www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> accessed on 24 June 2014.

experienced by the Labour Party in the 1970s. The agenda's commitment to free market principles and responsibilisation strategies maintains its connection to neoliberal principles.

The government's continuing concerns about public sector services led, in 1999, to the introduction of measures designed to speed up the magistrates' court process.[241] This was the beginning of a series of initiatives designed to increase efficiency in summary criminal justice, which had begun when Home Office minister Martin Narey was commissioned to conduct a review of delay in criminal proceedings. Narey was of the view that magistrates lacked the robust decision making skills required for effective case management.[242] He suggested that more cases could be processed to conclusion in a single hearing and that Pre Trial Review hearings may alleviate the volume of ineffective trial listings that occurred.[243]

Building on this, in 2001, former senior presiding judge, Sir Robin Auld conducted a review of procedures within the criminal courts.[244] His review concluded that criminal court processes were inefficient, wasteful[245] and in need of streamlining. As a result of those concerns, Auld suggested that the parties should take a proactive and co-operative approach to case management, and was of the view that the widespread use of police administered cautions would make the criminal justice system more efficient by removing low level offending from the

[241] Narey, M 'Review of Delay in the Criminal Justice System' (Home Office, 1997)
[242] Narey, M 'Review of Delay in the Criminal Justice System' (Home Office, 1997)
[243] Narey, M 'Review of Delay in the Criminal Justice System' (Home Office, 1997). This was not however a new area of concern as the Thomson committee had previously suggested that more time should be allowed at the beginning of the process to identify issues that are agreed or disputed so that case preparation could be tailored to suit the case (McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981)).
[244] Auld, R. 'Review of the Criminal Courts of England and Wales: Executive Summary' (2001) <http://www.criminal-courts-review.org.uk/auldconts.htm> accessed on 05 October 2008.
[245] Zander M, *Cases and Materials on the English Legal System* (Oxford University Press 2007).

magistrates' courts.[246] Two statutes resulted from Auld's review which affected procedures in magistrates' courts; the Courts Act 2003 and the Criminal Justice Act 2003. Bell and Dadomo note that the effects of the Criminal Justice Act 2003 on magistrates' courts had their origins in the fact that Auld was "mesmerised by the idea of 'efficiency' and an increased rate of conviction."[247] Efficiency, in this context, meant streamlining court procedures.[248] I support Sanders' suggestion that efficiency is synonymous with cost in magistrates' courts.[249]

A criminal case management framework was issued to magistrates' courts in 2004 to provide advice about how to manage cases effectively and efficiently.[250] A year later, the DCA declared that magistrates' courts needed to be "a platform from which we deliver simpler, speedier justice for our communities. Cases take too long to come on. The process is too complex."[251] In 2006, the National Audit Office ('NAO') noted that delays in the magistrates' courts were attributable to problems within the CPS.[252] As will be seen in subsequent chapters, excessive burdens placed on

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[246] Auld, R. 'Review of the Criminal Courts of England and Wales: Executive Summary' (2001) <http://www.criminal-courts-review.org.uk/auldconts.htm> accessed on 05 October 2008. The government appeared to adopt this idea when, "in April 2006, it was reported that the Home Office had sent the police a document…as part of a strategy to widen the use of cautions" (Zander M, *Cases and Materials on the English Legal System* (Oxford University Press 2007); 257)

[247] Sanders A, 'Core Values, the Magistracy, and the Auld Report' (2002) 29(2) *Journal of Law and Society* 324; 341

[248] Bell B and Dadomo C, 'Magistrates' Courts and the 2003 Reforms of the Criminal Justice System' (2006) 14(4) *European Journal of Crime, Criminal Law and Criminal Justice* 339. Further, provisions of the Criminal Justice Act 2003 require defendants to provide the prosecution with full details of potential defence witnesses which could previously be kept from the prosecution until the trial. This change can be justified if the main concern of the criminal justice system is to ensure that cases are dealt with in a manner that is cost effective.

[249] Sanders A, 'Core Values, the Magistracy, and the Auld Report' (2002) 29(2) *Journal of Law and Society* 324

[250] Department for Constitutional Affairs, 'Supporting Magistrates' Courts to Provide Justice' (Cm 6681, 2005)

[251] Department for Constitutional Affairs, 'Supporting Magistrates' Courts to Provide Justice' (Cm 6681, 2005); 4. The DCA also felt that the "courtrooms should not be full of uncontested, low-level cases that do not require the magistrates and district judges to use their judicial skills to the fullest" (Department for Constitutional Affairs, 'Supporting Magistrates' Courts to Provide Justice' (Cm 6681, 2005); 28).

[252] National Audit Office, 'Effective use of Magistrates' Court hearings' (The Stationery Office 2006); 2. The NAO had earlier noted that the advent of the CPS had increased costs in the criminal justice system and

prosecutors continue to cause problems in magistrates' courts. By 2006, public confidence in the criminal process had fallen and this was ascribed to delays in the system.[253]

The concern to ensure efficiency was also manifest in the introduction of the Criminal Procedure Rules (Cr.PR). Their provisions mean that "magistrates are under constant pressure to avoid unnecessary hold-ups and to be especially wary of granting adjournments unless there are persuasive reasons."[254] Those rules require that the parties identify issues in the case at an early stage and place a duty on the court to actively manage cases.[255] This reflects a shift in adversarial approaches to criminal justice, which would have previously allowed a defendant to simply make the prosecutor prove the case against him or her without disclosing the nature of his or her defence, particularly in the magistrates' court. There is in fact evidence of the shift beginning prior to the commencement of the Cr.PR, as reflected in the case of *R –v- Gleeson*[256] which identified a duty on the parties to ascertain issues in a case at an early stage in the proceedings, and asserted that the same duty did not conflict with rules which protected the defendant from self-incrimination, nor did it offend solicitor-client privilege. These measures have again increased co-operative working

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that the existence of the CPS had in fact increased delay in magistrates' courts (Jones C, 'Auditing Criminal Justice' (1993) 33 *British Journal of Criminology* 187)

[253] Morgan, R. 'Summary Justice. Fast - but Fair?' <www.crimeandjustice.org.uk/summaryjusticefastbutfair.html> accessed on 10 February 2012.

[254] Grove, T *The Magistrate's Tale* (Bloomsbury Publishing, 2003); 49

[255] See also *R - v- Chaaban* [2003] EWCA Crim 1012. That duty extends to the defence, who the Court will now expect to indicate the likely issues at trial and confirm which parts of the prosecution case are not in dispute because justice does not allow "people to escape on technical points or by attempting… an ambush" (Per Thomas LJ in *DPP –v- Chorley Justices and Andrew Forrest* [2006] EWHC 1795 at paragraph 27).

[256] [2003] EWCA Crim 335

practices among the court workgroup and have prioritised efficient working practices over adversarial principles.[257]

A further initiative, specific to magistrates' courts, was introduced during 2006 and 2007 to try and combat perceived delay – Criminal Justice; Simple Speedy Summary ('CJ: SSS').[258] The policy sought to reduce the workload of magistrates' courts by advocating greater use of fixed penalty notices, cautions or warnings to rapidly conclude cases in which formal court proceedings were disproportionate.[259] Measures which diverted low level offending away from the court process were advocated on the basis of economic efficiency, but this approach does not recognise the procedural safeguards which are attached to the criminal court process, and evidence suggests that diversionary penalties are administered on occasions when behaviour would previously have merited no more than an informal warning.[260] The result is that the powers of criminal justice agencies have been enlarged "with little protection afforded to the vulnerable or innocent."[261] Ashworth and Zedner do however express the view that diversionary methods might have a number of advantages for would-be defendants, such as avoiding the stigma of conviction,[262] while Morgan notes that diversionary processes "arguably avoid expensive, slow and

[257] Cr.PR 3.2 explicitly states that the parties are expected to co-operate and assist the court (Ministry of Justice. 'Criminal Procedure Rules' (2011) < http://www.justice.gov.uk/courts/procedure-rules/criminal> accessed on 1 June 2012).
[258] Office for Criminal Justice Reform, *Delivering Simple Speedy Summary Justice. An Evaluation of Magistrates Court Tests* (2007)
[259] Zander M, *Cases and Materials on the English Legal System* (Oxford University Press 2007).
[260] Roberts, R and Garside, R. 'Punishment before Justice? Understanding Penalty Notices for Disorder' (2005) <http://www.crimeandjustice.org.uk/opus286/briefing1_march05.pdf> accessed on 16 February 2012); Ashworth A and Zedner L, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) (2) *Criminal Law and Philosophy* 21). Instead, police officers are able to exercise considerable discretion in deciding whether or not to issue a caution or penalty notice (Ashworth, A and Redmayne, M *The Criminal Process* (3rd edn, Oxford University Press 2005)).
[261] Roberts, R and Garside, R. 'Punishment before Justice? Understanding Penalty Notices for Disorder' (2005) <http://www.crimeandjustice.org.uk/opus286/briefing1_march05.pdf> accessed on 16 February 2012
[262] Ashworth A and Zedner L, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008)(2) *Criminal Law and Philosophy* 21

arcane court proceedings, thereby freeing up the courts to deal more effectively with serious matters."[263] Despite this, both the Police Federation and HHJ Cutler have expressed concerns about the blurring of roles within the criminal justice system, based on a desire to save money and yet record more crime as detected.[264]

CJ: SSS discouraged adjournments at the first hearing, as all necessary documents should be with the court and the defence advocate before the hearing, thereby allowing appropriate advice to be given.[265] There was some difficulty in reconciling this with simultaneous changes to legal aid provision which meant that funding for representation was uncertain, as is discussed in chapters three and six. The scheme also intended that Pre Trial Review ('PTR') courts should be abandoned in favour of more active case management by the parties outside the court.

CJ: SSS evolved via the introduction of streamlined processes, which were examined by the NAO in 2011. Subsequent to the streamlining initiative, the NAO reported that 53 per cent of police files reviewed failed to provide an adequate case summary.[266] Further, some file supervisors indicated they had insufficient time to properly consider file preparation.[267] These issues suggest that limiting cost in the name of efficiency has been at the expense of the sufficient provision of information.

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[263] Morgan R, 'Austerity, Subsidiarity and Parsimony: Offending Behaviour and Criminalisation' in Silvestri, A. (ed), *Lessons for the Coalition: An End of Term Report on New Labour and Criminal Justice* (Centre for Crime and Justice Studies 2010); 19

[264] Ryder M, 'Panorama: Assault on Justice' Stead, K. (ed) (British Broadcasting Corporation 2009). Garland similarly notes that demands for cost effectiveness have led to "gatekeeping to exclude trivial or low risk cases" (Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002); 19). The increased use of cautions may also be unpopular among the public, who view the administering of a caution as a 'soft' option (Walker J, 'Shock as huge scale of police cautions revealed' Kentish Gazette (2011) 2.)

[265] Office for Criminal Justice Reform, *Delivering Simple Speedy Summary Justice. An Evaluation of Magistrates Court Tests* (2007)

[266] National Audit Office, Crown Prosecution Service. *The introduction of the Streamlined Process* (2 November 2011, Comptroller and Auditor General HC 1584, 2011)

[267] National Audit Office, Crown Prosecution Service. *The introduction of the Streamlined Process* (2 November 2011, Comptroller and Auditor General HC 1584, 2011)

In essence, the provisions were designed to increase efficiency and reduce cost. However, as Jones predicted, justice may give way to speed as lawyers are given insufficient time to properly prepare cases.[268] The courts have attempted to cope with this conflict by means of "a stale application of generalised procedures",[269] the detail of which are discussed in chapter four. Generalised procedures direct the exercise of control over cases so that "routinised courses of action will seem appropriate and be facilitated."[270] Consequently, "bureaucratisation of decision-making…emerges in opposition to norms of 'individualised' treatment".[271] Standardisation thus becomes a key feature of bureaucratisation.[272] The result is that defendants are less able to play a distinct role in the proceedings, as is discussed in chapters two and four.

Despite these difficulties, the 2009-2010 business plan for the criminal justice system continued to assert that the system should be simplified and thus made more efficient.[273] The need to deal with cases efficiently was restated by the administrative court in *Persaud –v- DPP.*[274] The incoming Coalition government of 2010 appeared to recognise that the criminal justice system had become very

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[268] Jones C, 'Auditing Criminal Justice' (1993) 33 *British Journal of Criminology* 187.
[269] Howard, G and Freilich, J, 'Durkheim's Comparative Model and Criminal Justice Theory' in Duffee, D and Maguire, E (ed), *Criminal Justice Theory: Explaining the Nature and Behaviour of Criminal Justice* (Routledge 2007); 61
[270] Hosticka C, 'We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality' (1979) 26(5) *Social Problems* 599; 607
[271] Tepperman L, 'The Effect of Court Size on Organisation and Procedure' (1973) 10(4) *The Canadian Review of Sociology and Anthropology* 346; 346
[272] Tepperman L, 'The Effect of Court Size on Organisation and Procedure' (1973) 10(4) *The Canadian Review of Sociology and Anthropology* 346.
[273] Office for Criminal Justice Reform, 'Working Together to Cut Crime and Deliver Justice: Criminal Justice System Business Plan 2009-2010' (2007).
[274] [2010] EWHC 1682 (Admin). *Hereford Magistrates' Court (ex parte Rowland)* [1998] QB 110 also stressed the need for efficiency alongside fairness. These cases follow a long line of precedent including *R –v- Aberdare Justices (ex parte DPP)* [1990] 155 JP 324*, R (ex parte Walden and Stern) –v- Highbury Corner Magistrates' Court* [2003] EWHC 708 and *CPS –v- Picton* [2006] EWHC 1108. Similarly, these cases have reinforced a requirement for the defence to co-operate with the prosecution process. See, for example, *Malcolm-v- DPP* (2007) EWHC 363 (Admin).

bureaucratic, but felt that this resulted from fragmented working patterns, rather than from change brought about by political decision making.[275] This reaction must also be placed in the context of the public spending crisis, leading to further distrust of professional behaviour in state funded institutions and austerity measures. In essence, the new government of 2010 continued to pursue a desire to increase the speed at which magistrates' court cases are processed. These issues are examined further in relation to legal aid in chapter three.

Building on the CJ: SSS initiative, the Ministry of Justice introduced the Stop Delaying Justice! policy in 2012. The policy documents criticise the judiciary for failing to properly implement CJ: SSS,[276] even though the number of hearings per case had reduced and the speed at which cases were progressed had increased.[277] One of the key provisions of the initiative is that case management should occur at the first hearing. Riddle noted that lawyers were concerned that legal aid applications would not be processed in sufficient time for the first hearing, that adequate prosecution case papers would not be available and that trying to conduct case management at too early a stage in the proceedings could breach lawyer-client privilege if instructions are unclear.[278] Waddington goes on to describe the position in the magistrates' courts, which appears to undermine traditional adversarial principles, as follows:

> "The Crown makes inadequate disclosure on the day the defendant appears at court. Within a short period of time thereafter, the defendant (in person or

[275] Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (Ministry of Justice Command Paper CM 8388, 2012)
[276] --, 'Stop Delaying Justice!' (Delegate pack edn 2011).
[277] --, 'Stop Delaying Justice!' (Delegate pack edn 2011).
[278] Riddle H, 'Advancing the case for swift action' (2012) (18 October) Law Society Gazette 32. The cases of *Firth –v- Epping Magistrates' Court* [2011]EWHC 388 (Admin) and *R –v- Rochford* [2010] EWHC 1928 have effectively undermined this claim.

through his lawyer) is required to: identify the issues in the case (in effect advise the court and prosecution where the Crown's case might need more work to have the best or any chance of success); identify which prosecution witnesses are required to attend at trial (explaining why this should be permitted by the court); give an adequate account of his defence; identify his witnesses (at least in general terms) and be able to give a time estimate for any trial."[279]

By April 2012 defence lawyers complained that service of evidence was inadequate but defendants were still expected to enter a plea.[280] Interviewees voiced similar concerns during the course of empirical research, as discussed in chapter four.

All of the above initiatives have been designed to ensure a speedy through-put of cases in magistrates' courts, based on the use of management techniques in public services.[281] Management techniques were employed in light of the political crisis engendered by the perceived inefficiency of state funded services. However, Carlen,[282] Bottoms and McClean[283] and McBarnet[284] had earlier noted that summary proceedings were often conducted at speed, which left defendants confused. Measures designed to increase speed are likely to leave more defendants more confused. The Law Society has recently voiced its concern that, by placing emphasis on speed, the courts risk increasing the likelihood of miscarriages of justice.[285] It

[279] Waddington B, 'Rules of Engagement. Stop Delaying Justice!' (2012)(29 November) Law Society Gazette 21; 22

[280] Cave, R 'Lawyers Claim New Policy Causes Miscarriages of Justice' <http://www.bbc.co.uk/news/uk-17690404> accessed on 14 April 2012.

[281] Other initiatives are also being pursued to streamline proceedings, such as the use of virtual courts and greater reliance on technology (Baksi C, 'Lawyers Must Embrace IT, Says Minister' (2013) (25 February) Law Society Gazette 3; Ministry of Justice. 'Criminal Justice System Efficiency Programme' (2012) <http://www.justice.gov.uk/about/justice/transforming-justice/criminal-justice-efficiency-programme> accessed on 2 December 2012).

[282] Carlen P, *Magistrates' Justice* (Martin Robertson 1976).

[283] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976).

[284] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981).

[285] Baksi C, 'Speeding up cases 'risks miscarriages'' (2012) (29 November) Law Society Gazette 3.

seems that greater value is placed on lawyers' ability to improve efficiency rather than their ability to improve access to justice.

Further, when implementing those schemes, Waddington notes that it is impossible to fully engage all of the agencies of criminal justice, each of which have their own working methods that they seek to preserve.[286] We therefore begin to see the importance of the structural/cultural intersection which affects defendants' experience of the criminal justice system, because the way in which initiatives are actually implemented is dependent on the behaviour of courts and advocates. As Garland observes, "a new configuration does not finally and fully emerge until it is formed in the minds and habits of those who work in the system."[287] The tendency of criminal justice professionals to adapt and interpret rules so that they are congruent with situationally appropriate behaviour had previously been noted by Carlen.[288] I intend, in subsequent chapters, to demonstrate how the courtroom workgroup has adapted to demands for efficiency.

Nevertheless, the government pursues its desire to increase the speed at which cases are processed in the belief that the criminal justice system habitually tolerates delay.[289] The government's view in 2012 was that the defence benefited from causing delay in the system,[290] despite the fact that, as the Law Society pointed out,

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[286] Waddington B, 'Rules of Engagement. Stop Delaying Justice!' (2012)(29 November) Law Society Gazette 21.
[287] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002); 24. Garland further notes that "socially situated, imperfectly knowledgeable actors stumble upon ways of doing things that seem to work, and seem to fit with their other concerns" (Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002); 26)
[288] Carlen P, *Magistrates' Justice* (Martin Robertson 1976). This was an issue that was explored as part of the primary research, and is considered further in subsequent chapters.
[289] Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (Ministry of Justice Command Paper CM 8388, 2012)
[290] Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (Ministry of Justice Command Paper CM 8388, 2012)

"Defence practitioners have no interest in prolonging cases. Defence lawyers have been subject to significant reductions in legal aid fees, and are paid on the basis of a fixed, standard or graduated fee scheme for criminal cases. The incentive on them is for cases to proceed quickly."[291]

The government therefore expressed its wish to increase efficiency even though it recently recognised that "target chasing has replaced professional discretion and diverted practitioners' focus from delivering the best outcomes using their skill and experience."[292] It seems that one by-product of neoliberal efficiency drives may be the marginalisation of defendants' needs. However, the focus on individual responsibility promoted by neoliberal governments limits the ability to challenge that outcome.

Conclusion

The examination of various governments' approaches to criminal justice demonstrates that neoliberalism emerged in response to political crisis in the welfare state. Thatcher believed that the welfare state had undermined individual responsibility for development in the socio-economic world and therefore advocated the roll back of state funded services. This had the effect of further marginalising precariat groups, including defendants. The philosophy also demonstrated commitment to market based principles via managerial techniques designed to improve efficiency in light of suspicion about the effectiveness of public services.

[291] The Law Society, *Response of the Law Society of England and Wales to 'Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System'* (The Law Society, 2012). The fact that the legal aid funding regime encouraged efficient working practices is discussed in chapter 3.
[292] Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (Ministry of Justice Command Paper CM 8388, 2012); 5

As the philosophy advanced, crisis developed in terms of managing the risk of social instability created by the first, roll back, phase of neoliberalism. This prompted subsequent governments to introduce more interventionist, regulatory measures in order to manage threats of crime and anti-social behaviour, particularly in light of governments' rights and responsibilities strategies. Recent austerity measures have contributed to the process of marketisation, which has resulted in the further marginalisation of precariat groups. All of the above demonstrates that neoliberalism's responses to crisis have created a complex and, at times, contradictory system of governance. Those complexities have resulted in a system which exacerbates the marginalisation of defendants and their inability to participate in the criminal justice system.

Neoliberalism does not, however, provide the complete story of defendants' experiences of the summary criminal justice system. There are other rationalities and practices that will also have an impact on defendants' experiences of the criminal justice system, such as advocates' reactions to policy driven initiatives. I therefore turn to consider the practices of those professionals who are in a position to potentially challenge government demands for efficiency and intervention, or, in other words, the culture of the court workgroup.

Chapter 2: The Culture of Summary Criminal Justice

Introduction

In this chapter I examine the findings of socio-legal studies which have considered the behaviour of professionals who work in criminal courts in order to identify the ways in which workgroup culture and the agency of actors within the courtroom can affect defendants' experiences of the proceedings. Workgroup culture in public institutions presents a possible challenge to the implementation of policy designed to execute political philosophy, although many of the significant studies of summary criminal justice predate the neoliberal political turn. Processes of cultural adaptation to political policy have the potential to affect levels of marginalisation experienced by defendants, and to affect their ability to participate effectively in the proceedings.

Throughout this chapter I will use the term 'courtroom workgroup' when referring to the organisational culture of magistrates' courts.[293] The term was proposed by Eisenstein and Jacob[294] to assist in explaining how low level courts make decisions. The professional courtroom workgroup consists of magistrates, court clerks (also known as legal advisers),[295] prosecutors, defence advocates and probation officers. According to Young, "court actors patrol and defend the

[293] See, for example, Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203.
[294] Eisenstein. J and Jacob. H, *Felony Justice: An Organisational Analysis of Criminal Courts* (Little Brown 1977).
[295] There are different types of court legal adviser – Justices' clerks and legal advisers. In order to be a Justices' clerk, one must be a solicitor or barrister of 5 years' experience. Legal advisers do not need to be a member of the legal profession but are required to have undergone alternative training.

boundaries of workgroup power."[296] Those boundaries may be interrupted by political policies that attempt to alter workgroup practices. The courtroom therefore becomes a potential site for struggle as actors negotiate the nature of their role within the proceedings. Once equilibrium is reached, the introduction of external pressures (such as efficiency drives) has the potential to upset the negotiated relationships as the site of struggle changes.[297]

Successive studies have however demonstrated that the culture of magistrates' courts is powerful. I argue that several cultural factors in the operation of summary justice have proved enduring despite significant political change. Thus it appears that the professional actors who participate in the criminal justice process in the magistrates' courts work in such a way that the status quo is largely maintained, despite being subject to increasingly politicised intervention since the 1970s. Therefore, although the demands placed on, and the composition of, the workgroup may have changed, some features of summary criminal justice remain constant.

I have identified two important features of magistrates' courts that appear to have a significant impact on defendants' experience of the proceedings; the networks that operate among court personnel and the speed at which cases progress. Following the neoliberal turn, the exclusion of defendants has been exacerbated by the political othering of precariat groups. The resultant 'them and us' attitudes operate to strengthen the pre-existing court personnel networks from

[296] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203; 218

[297] Young argues that change is most likely to be achieved by disrupting the relationships that constitute the workgroup itself because this would cause the most disturbance to pre-existing practices (Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203).

which the defendant is excluded. Secondly, neoliberal demands for efficiency have increased the speed at which proceedings take place, which further undermines the ability of defendants to participate in a meaningful way.

Those two features interact to limit the ability of defendants to effectively participate in the process, as is set out more fully in chapters four, five and six. In order to demonstrate this, I begin with a brief explanation of the nature and structure of the workgroups in magistrates' courts and contextualise the workgroups within models of adversarial justice. Several commentators have suggested models of the criminal process[298] which are useful to provide descriptions of overarching issues in summary criminal justice. I then move on to conduct an analysis of features of magistrates' court workgroups and their effects on defendants.

Magistrates and models of adversarial justice

The criminal justice process exists to determine whether a person accused of committing a criminal offence is to be found guilty of the crime and, if so, what their punishment ought to be.[299] As McBarnet notes, "the criminal justice process is the most explicit coercive apparatus of the state and the idea that police and courts can interfere with the liberties of citizens only under known law and by means of due

[298] In addition to those offered by Packer, King suggested a further six models of the criminal justice system (King M, *The Framework of Criminal Justice* (Croom Helm 1981)). Two of those models – the justice model and the punishment model – have features which resonate with Packer's due process and crime control models. The third model is one of rehabilitation which relies on the expertise of professionals who will consider appropriate methods of diagnosis and treatment. The fourth model is the bureaucratic model, which is concerned with the management of crime and of criminals. The fifth model focuses on the necessity to degrade the criminal and is called the status passage model. Finally, the power model concerns itself with the maintenance of class domination.

[299] I do not agree with Sander's assertion that "criminal justice processes seek to discover the truth about alleged offences" (Sanders A, 'Core Values, the Magistracy, and the Auld Report' (2002) 29(2) *Journal of Law and Society* 324; 325) because the burden of proof applied in criminal trials is whether the Crown has proved its case beyond a reasonable doubt, not what the adjudicators believe the truth to be. In *R –v- Gleeson* [2003] EWCA 3357, Auld LJ described a criminal trial as a search for the truth, but added caveats in relation to the burden and standard of proof.

process of law is thus a crucial element in the ideology of the democratic state."[300] The processes by which guilt is determined and punishment imposed operate within limits set by law[301] which are designed to prevent both unfair treatment and wrongful conviction. Sanders is of the view that the priority given to acquitting the innocent is manifest in the existence of rules designed to ensure due process such as the burden and standard of proof and rules about the admissibility of evidence.[302]

However, the simple existence of rules may not be sufficient to protect accused people from the devaluation of due process provisions because, as Bourdieu notes, law operates in a field of practice within which professionals use established procedures to resolve any conflict that may arise[303] via the "internal *politics of the profession* which exercises its own specific and pervasive influence".[304] The courtroom operates via rituals which are executed on a daily basis by the professionals who work therein.[305] It is via such procedures that the cultural practice of law evolves in criminal courts, and such practices affect the way that defendants experience the proceedings. This is not to suggest that "overt collusion to manipulate justice exists; what does exist are the shared understandings of habitués"[306] which "may become so routine and commonplace that the habitué forgets that the outsider finds them strange."[307]

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[300] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981); 8
[301] Sanders, A and Young, R, *Criminal Justice* (Oxford University Press 2007).
[302] Sanders A, 'Core Values, the Magistracy, and the Auld Report' (2002) 29(2) *Journal of Law and Society* 324
[303] Bourdieu P, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38(July) *The Hastings Law Journal* 805; 816. Emphasis in original.
[304] Bourdieu P, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38(July) *The Hastings Law Journal* 805; 806
[305] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976).
[306] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976); 55
[307] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976); 55

There are a number of actors in the courtroom workgroup, the most prominent of which are magistrates, clerks or legal advisers, prosecutors and defence advocates. However, before considering how these actors affect the operation of summary justice, it is important to acknowledge the local nature of magistrates' court proceedings. The level of familiarity among members of the courtroom workgroup will affect its stability[308] and, I suggest, the extent to which advocates are prepared to risk damaging relationships which, in turn, affects the advocates' negotiating power. As Eisenstein and Jacob noted, in a courtroom workgroup which had low levels of familiarity among members, there was a greater number of contested cases and less emphasis on negotiation than in courtroom workgroups which they regarded as stable and familiar.[309]

Although familiarity is thus a significant feature of magistrates' court workgroup culture, and Young notes that the local context can vary "enough to make a discernible difference to court outcomes",[310] previous socio-legal scholars have identified some features of courtroom culture that appear to be of general relevance when considering how magistrates' courts operate. Indeed, Young acknowledges that an organisational perspective "can readily be applied to a wide range of courts, as all typically rely on workgroups of one kind or another."[311] There are therefore certain common features of membership of the magistrates' court workgroup. In order to understand the way that summary justice operates, each of these subgroups

[308] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203.
[309] Eisenstein. J and Jacob. H, *Felony Justice: An Organisational Analysis of Criminal Courts* (Little Brown 1977). Tepperman similarly noted that the courtroom typically contains "networks of friendship that moderate conflicts" (Tepperman L, 'The Effect of Court Size on Organisation and Procedure' (1973) 10(4) *The Canadian Review of Sociology and Anthropology* 346; 364) that may arise.
[310] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203; 204
[311] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203; 217

is considered in turn alongside an examination of models of summary criminal justice.

The most obvious members of the magistrates' court workgroup are the magistrates themselves. While it was historically desirable for magistrates to be legally qualified,[312] professional legal qualification is no longer necessary.[313] This led Bottoms and McClean to note that magistrates are seen by advocates as "amateurs without training who could not be expected to do a decent job".[314] Magistrates are also frequently criticised for failing to represent various socio-cultural groups,[315] in that "the lay magistracy is overwhelmingly drawn from managerial and professional occupations,"[316] and disproportionately represents those who are retired.[317] Clements asserts that, because they are not socially representative, magistrates have an "inability (and sometimes indifference) to see the injustice that confronts the defendants in their daily lives and…lack…life experience of what it is like to be socially excluded by poverty."[318] There thus exist different socio-cultural expectations between those who often constitute the Bench and "the overwhelmingly socio-economically disadvantaged defendants appearing before

[312] Davies M, 'A New Training Initiative for the Lay Magistracy in England and Wales - A Further Step Towards Professionalisation?' (2005) 12(1) *International Journal of the Legal Profession* 93
[313] Davies M, 'A New Training Initiative for the Lay Magistracy in England and Wales - A Further Step Towards Professionalisation?' (2005) 12(1) *International Journal of the Legal Profession* 93
[314] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976); 89
[315] Morgan R, 'Magistrates: The Future According to Auld' (2002) 29(2) *Journal of Law and Society* 308; Darbyshire P, 'For the New Lord Chancellor - Some Causes for Concern About Magistrates' (1997)(Dec) *Criminal Law Review* 861
[316] Davies M, 'A New Training Initiative for the Lay Magistracy in England and Wales - A Further Step Towards Professionalisation?' (2005) 12(1) *International Journal of the Legal Profession* 93
[317] Morgan R, 'Magistrates: The Future According to Auld' (2002) 29(2) *Journal of Law and Society* 308; Darbyshire P, 'For the New Lord Chancellor - Some Causes for Concern About Magistrates' (1997)(Dec) *Criminal Law Review* 861
[318] Clements L, 'Little Justice - Judicial Reform and the Magistrates' in Thomas, P (ed), *Discriminating Lawyers* (Cavendish 2000); 207. As Carlen noted in 1976, magistrates interpretation of legal and social rules is bound up in "pre-existent regulative elements of a capitalist social formation" (Carlen P, *Magistrates' Justice* (Martin Robertson 1976); 100)

them."[319] This means that defendants are likely to be viewed by the Bench as a different category of citizen to its members and the professional workgroup that operates in court.

Compared to the Crown court, magistrates' courts hear more trials, convict 30 per cent more defendants following trial and imprison more people (both on remand awaiting case resolution and when sentencing) than Crown court judges.[320] Research indicates that magistrates often require defendants to prove their innocence, contrary to the legal burden of proof, [321] and despite specific training about the importance of the burden and standard of proof.[322] Magistrates are also criticised for inconsistent decision making, but Davies suggests that this can be addressed by increased training and provision of guidelines,[323] the supply of which is discussed later, in chapter five.

Perhaps as a result of magistrates' court conviction rates, defence advocates view magistrates as 'pro-prosecution'.[324] Sanders notes that magistrates "regard defence solicitors as representing a particular viewpoint, but see the Crown Prosecution Service (CPS) as neutral…In reality, the CPS represents the police side of the adversarial system as enthusiastically as most defence solicitors do their

[319] Sanders, A *Community Justice. Modernising the Magistracy in England and Wales* (Institute of Public Policy Research, 2000); 11
[320] Sanders A, 'Core Values, the Magistracy, and the Auld Report' (2002) 29(2) *Journal of Law and Society* 324; 328
[321] Sanders A, 'Core Values, the Magistracy, and the Auld Report' (2002) 29(2) *Journal of Law and Society* 324; 328. See also Darbyshire P, 'For the New Lord Chancellor - Some Causes for Concern About Magistrates' (1997) (Dec) *Criminal Law Review* 861 and Sanders, A *Community Justice. Modernising the Magistracy in England and Wales* (Institute of Public Policy Research, 2000)
[322] Grove, T *The Magistrate's Tale* (Bloomsbury Publishing, 2003)
[323] Davies M, 'A New Training Initiative for the Lay Magistracy in England and Wales - A Further Step Towards Professionalisation?' (2005) 12(1) *International Journal of the Legal Profession* 93
[324] Mulcahy A, 'The Justifications of `Justice': Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts' (1994) 34(4) *British Journal of Criminology* 411; 420

clients."[325] Darbyshire also notes that "magistrates too readily believe police witnesses. Research and commentaries on this point all substantiate this defence lawyers' claim."[326] Bottoms and McClean noted similar concerns which meant that magistrates' consideration of matters was rarely sufficiently thorough.[327]

Magistrates are further described as processing cases at high volume, with little consideration given to individual cases. These features of magistrates' courts resonate with Packer's crime control model of criminal justice, in which the efficient disposal of cases is the paramount concern. The model anticipates high numbers of guilty pleas that can be dealt with swiftly. The criminal justice system is regarded as inherently able to process a large number of early guilty pleas because preliminary controls can be trusted to adequately discard weak or inappropriate prosecutions.[328]

The contrast to Packer's crime control model is the due process model,[329] which concerns itself with the power of the state versus the power of the individual, and is concerned with "quality control."[330] Quality control means ensuring strict compliance with the rule of law, the burden and standard of proof and the defendant's rights. The model promotes the use of defence advocates, even if such advocates infrequently raise due process issues.[331] Atiyah observes that the due process model establishes an adversarial obstacle course which the prosecution must take time to complete in order to maintain a just system.[332] Despite this

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[325] Sanders, A *Community Justice. Modernising the Magistracy in England and Wales* (Institute of Public Policy Research, 2000); 33
[326]Darbyshire P, 'For the New Lord Chancellor - Some Causes for Concern About Magistrates' (1997)(Dec) *Criminal Law Review* 861; 871
[327] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976)
[328] Roach K, 'Four Models of the Criminal Process' (1999) 89 *Journal of Criminal Law and Criminology* 671.
[329] Packer H, *The Limits of Criminal Sanction* (Oxford University Press 1968)
[330] Roach K, 'Four Models of the Criminal Process' (1999) 89 *Journal of Criminal Law and Criminology* 671; 3
[331] Ashworth, A and Redmayne, M, *The Criminal Process* (3rd edn, Oxford University Press 2005).
[332] Atiyah P, *Law and Modern Society* (Oxford University Press 1995); 226.

rhetoric, McBarnet noted many years ago that magistrates' courts operate "as courts freed from the due process of the common law."[333] Galligan also observes that due process considerations do not appear to be supported by firm legal rules (for example, the right to silence under police questioning is not absolute) or by legal practice itself.[334] I shall discuss the culture of practitioners below.

While lay magistrates deal with 91 per cent of all cases in the magistrates' courts,[335] legally qualified district judges (formerly known as stipendiary magistrates) also sit in summary criminal proceedings. Morgan and Russell, and Sanders, are of the view that district judges are more efficient[336] than lay justices[337] and apply legal rules more fairly.[338] Darbyshire reports that district judges' "working style was characterised by speed, command and readiness to challenge CPS representatives and lawyers (compared to lay justices)."[339] District judges make greater use of custody than magistrates do, but this may be a result of the fact that they tend to hear the most serious cases that are dealt with in magistrates' courts.[340] Dennis found that "professional court users have significantly greater levels of confidence in stipendiaries …they regard stipendiaries as quicker than lay justices,

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[333] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981); 143
[334] Galligan D, 'Regulating Pre-Trial Decisions' in Lacey, N (ed), *A Reader on Criminal Justice* (Oxford Readings in Socio-Legal Studies, Oxford University Press 1994).
[335] Sanders A, 'Core Values, the Magistracy, and the Auld Report' (2002) 29(2) *Journal of Law and Society* 324.
[336] Sanders, A *Community Justice. Modernising the Magistracy in England and Wales* (Institute of Public Policy Research, 2000)
[337] Zander states that magistrates "slow down the system and cost a fortune" (Zander M, *Cases and Materials on the English Legal System* (Oxford University Press 2007); 21) while Morgan and Russell note that district judges deal with 22 per cent more cases than lay Benches in a standard court session, and this is not at the expense of inquisition and challenge, and there are fewer adjournments before district judges. (Morgan, R and Russell, N. 'The Judiciary in the Magistrates' Courts' (2000) <library.npia.police.uk/docs/homisc/occ-judiciary.pdf> accessed on 08 February 2012). By 2002, Morgan had increased this estimate from 22 to 30 percent (Morgan R, 'Magistrates: The Future According to Auld' (2002) 29(2) *Journal of Law and Society* 308).
[338] Sanders A, 'Core Values, the Magistracy, and the Auld Report' (2002) 29(2) *Journal of Law and Society* 324
[339] Darbyshire P, *Sitting in Judgment: The Working Lives of Judges* (Hart 2011); 160
[340] Dennis I, 'Judging Magistrates' (2001)(Feb) *Criminal Law Review* 71

more efficient and consistent in their decision-making."[341] As a result, defence lawyers prepare cases more thoroughly and do not make unrealistic submissions to district judges that they might attempt when addressing lay magistrates.[342] District judges are however a more costly option than magistrates, because magistrates are volunteers.[343]

Whether a district judge or a lay Bench is sitting, the court is assisted by a clerk or legal adviser who provides advice to unqualified, or lay, magistrates,[344] and assumes a more administrative role when a district judge is hearing cases. Darbyshire has raised concerns about the consistency of clerks' behaviour, stating in the late 1990s that "Court clerks' practices are, in my observation, just as varied and sometimes perverse as they were in the 1970s."[345] Sanders also notes that magistrates' clerks play a highly influential role in decision-making processes.[346] In this context, Astor notes the clerk's responsibility is "for managing the court organisation and most magistrates' courts operate under a considerable amount of pressure…The clerk in court has to achieve a balancing of competing interests."[347] Astor further notes that clerks tended to place greater importance on compliance

[341] Dennis I, 'Judging Magistrates' (2001) (Feb) *Criminal Law Review* 71; 71. See also Morgan R, 'Magistrates: The Future According to Auld' (2002) 29(2) *Journal of Law and Society* 308 and Darbyshire P, *Sitting in Judgment: The Working Lives of Judges* (Hart 2011). My findings support this claim.
[342] Morgan R, 'Magistrates: The Future According to Auld' (2002) 29(2) *Journal of Law and Society* 308; 311.
[343] As Lord Woolf has indicated, the management of part-time, volunteer justices carries greater administrative burdens than the use of full time district judges (Grove, T *The Magistrate's Tale* (Bloomsbury Publishing, 2003)) and when indirect costs are taken into account, the cost gap is less than £10 per appearance (Morgan, R and Russell, N. 'The Judiciary in the Magistrates' Courts' (2000) <library.npia.police.uk/docs/homisc/occ-judiciary.pdf> accessed on 08 February 2012).
[344] Davies M, 'A New Training Initiative for the Lay Magistracy in England and Wales - A Further Step Towards Professionalisation?' (2005) 12(1) *International Journal of the Legal Profession* 93.
[345] Darbyshire P, 'For the New Lord Chancellor - Some Causes for Concern About Magistrates' (1997)(Dec) *Criminal Law Review* 861; 873
[346] Sanders, A *Community Justice. Modernising the Magistracy in England and Wales* (Institute of Public Policy Research, 2000)
[347] Astor H, 'The Unrepresented Defendant Revisited: A Consideration of the Role of the Clerk in Magistrates' Courts' (1986) 13(2) *Journal of Law and Society* 225; 228

with rules as opposed to ensuring that defendants understood the process.[348] As such, defendants remained bystanders in the proceedings because "explanations would have taken time in a busy list."[349]

The court clerk plays an important role in Bottoms and McClean's liberal bureaucratic model of summary criminal justice, which is a hybrid of the crime control and due process models.[350] In this model, which Astor's views appear to support, the "humane and enlightened clerks to the justices"[351] agree that there is a need for formal procedures which ensure justice is seen to be done, but also require restricted protections so that the system does not become over-burdened and collapse.[352] The system of a reduction in sentence in exchange for entering an early guilty plea (formalised by s.144 Criminal Justice Act 2003) is an example of the liberal bureaucratic model in operation[353] because it offers an inducement to plead guilty without removing the defendant's right to plead not guilty. Such systems encourage swift case progression, which has become increasingly important to governments since 1979.

Packer[354] was astute to acknowledge that any criminal justice system is likely to display features of more than one model at any point in time. The fact that it is hard to identify a single dominant model indicates that relationships between criminal law, criminal justice and politics are not clear-cut. Broad themes can

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[348] Astor H, 'The Unrepresented Defendant Revisited: A Consideration of the Role of the Clerk in Magistrates' Courts' (1986) 13(2) *Journal of Law and Society* 225.
[349] Astor H, 'The Unrepresented Defendant Revisited: A Consideration of the Role of the Clerk in Magistrates' Courts' (1986) 13(2) *Journal of Law and Society* 225; 233
[350] Bottoms A and McClean J *Defendants in the Criminal Process* (Routledge 1976)
[351] Bottoms A and McClean J *Defendants in the Criminal Process* (Routledge 1976); 228. Darbyshire would probably disagree with this statement given her comments about court clerks/legal advisers below (Darbyshire P, 'A Comment on the Powers of Magistrates' Clerks' (1999)(May) *Criminal Law Review* 377)
[352] Bottoms A and McClean J *Defendants in the Criminal Process* (Routledge 1976)
[353] Atiyah P, *Law and Modern Society* (Oxford University Press 1995)
[354] Packer H, *The Limits of Criminal Sanction* (Oxford University Press 1968)

however be identified, which are likely to reflect political approaches to criminal justice. This notion was recognised by Carlen when she stated "a magistrates' court is an institution rhetorically functioning to perpetuate the notion of possible justice in a society whose total organisation is directed at the maintenance of the capitalist exploitation of labour, production and control."[355] As such, the rhetoric of summary justice differs from its practice in that, so far as magistrates' courts are concerned,

> "the legal process allows the trial to fulfil simultaneously two functions: the ideological function of displaying the rhetoric of justice in action by being tipped (visibly) in favour of due process and the accused, (and) the pragmatic function of crime control by being tipped (invisibly) but decisively in favour of conviction."[356]

These observations demonstrate that socio-legal scholars of the 1970s and 1980s viewed summary justice as performed by institutions in which little regard was given to defendants' rights.

The culture of magistrates' courts became a focal point for socio-legal study in the 1970s and early 1980s. However, contrary to Bourdieu, who considered that the field of legal practice was characterised by resistance and competing forms of professional judgement,[357] magistrates' courts appear to operate with high degrees of co-operation and negotiation among personnel, particularly among advocates.

Defendant experiences and the culture of summary justice

In 1976, Carlen argued that the culture of summary justice operates to prevent defendants from being able to engage properly in the criminal justice process. There

[355] Carlen P, *Magistrates' Justice* (Martin Robertson 1976); 98
[356] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981); 100
[357] Bourdieu P, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38(July) *The Hastings Law Journal* 805

are three major contributory factors to this assessment. Firstly, the volume of magistrates' court business requires the participants to manage cases strictly. Secondly, defendants lack understanding about legal rules and procedures and, thirdly, professional participants are concerned to preserve their own roles within the criminal justice system.

It should be noted that, when some significant studies of summary justice were conducted in the 1970s and early 1980s, defendants were normally unrepresented.[358] Unrepresented defendants were unaware of the relevant legal rules, and often silenced by magistrates who would not take the same tactical or professional routes to cross-examination as a defence advocate.[359] This created "the paradox of a legal system which requires knowledge of procedural propriety in making a case, and a legal system that denies access to it."[360] Carlen had earlier noted that defendants in the magistrates' courts were required to behave in ways unfamiliar to normal social settings, such as the appropriate use of particular forms of language.[361] These factors, combined with nervousness, might have a paralysing effect on unrepresented defendants.[362]

Since the mid-1980s, levels of representation in magistrates' courts have increased so that the vast majority of defendants appearing there are now legally represented.[363] This coincides with the professionalisation of summary justice. Prosecutions are now conducted by lawyers, rather than police officers, and there

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[358] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981)
[359] McBarnet D, 'Two Tiers of Justice' in Lacey, N (ed), *A Reader on Criminal Justice* (Oxford Readings in Socio-Legal Studies, Oxford University Press 1994).
[360] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981); 124
[361] Carlen P, *Magistrates' Justice* (Martin Robertson 1976)
[362] Carlen P, *Magistrates' Justice* (Martin Robertson 1976)
[363] See, for example, Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> 2010 accessed 12 December 2011

are more defence advocates in court. Therefore, while the English and Welsh system is unique in its use of lay justices, the workgroup has become increasingly professionalised. Magistrates' court proceedings have also increased in complexity since the 1970s[364] and "represented or not, greater complexity serves to further remove the defendant from active engagement in the criminal process."[365]

In the studies of the 1970s and 1980s,[366] there was an implicit argument that if defendants were legally represented, fewer of the difficulties identified might exist because the defence lawyer's role would be to ensure equality of arms and enhance the defendant's understanding about and during the proceedings. However, Carlen was concerned that the provision of defence advocates would not, of itself, alleviate problems with summary justice, but rather a cultural shift would be necessary to ensure that defendants were able to properly have a role in the magistrates' courts.[367] McBarnet also thought that, because the institutions of criminal justice are workplaces, they create networks and routines that the defendant is not a part of[368] and therefore "to simply prescribe lawyers on tap for the lower courts as a solution to the defendant's dilemma is...to ignore the much more fundamental structural and ideological realities which lie behind the courtroom situation".[369] Newman's evidence suggests that this is still the case as he observes, "the legal system does not work for outsiders. It is a member's only club, the world of lawyers and jurists."[370] Despite the neoliberal political turn, both Newman's and my own findings suggest

[364] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[365] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013); 9
[366] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981); Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976); Samuels A, The Unrepresented Defendant in Magistrates' Courts (Justice 1971)
[367] Carlen P, 'The Staging of Magistrates' Justice' (1976) 16(1) *British Journal of Criminology* 48
[368] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981).
[369] McBarnet D, 'Two Tiers of Justice' in Lacey, N (ed), *A Reader on Criminal Justice* (Oxford Readings in Socio-Legal Studies, Oxford University Press 1994); 203
[370] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013); 10

that there remains a strong culture of co-operation among magistrates' court advocates which continues to marginalise defendants from proceedings.

Prosecutors and defence advocates; Networks and co-operation

Defending and prosecuting advocates have particular roles but those roles are constrained by a broader pattern of courtroom procedure. As Snipes and Maguire note, although actors in court "are from different institutions, have different goals and are formally arranged in an adversarial relationship, they often bind together in mutually convenient informal networks."[371] The networks that operate to form court workgroup culture develop as a result of the existence of shared goals among the workgroup members. The goals that exist may provide symbolic meaning to activities (such as seeing that 'justice' is done or maintaining group cohesion) or they may exist to ensure the smooth functioning of the proceedings (that is, expeditious case handling and controlling uncertainty).[372] This analysis, while useful, is not necessarily straightforward because different types of goal may come into conflict. As Young notes, not only does 'doing justice' mean different things to different groups, but also for most defence solicitors

> "while delay might help them win a case...most clients bring with them only modest fees...and a fast aggregate turnover is the only way to make a living and/or to cope with the caseload. At the same time their institutional and market position requires them to maintain a reputation for effective representation."[373]

[371] Snipes, J and Maguire, E, *Foundations of Criminal Justice Theory* (Routledge 2007); 30
[372] Eisenstein. J and Jacob. H, *Felony Justice: An Organisational Analysis of Criminal Courts* (Little Brown 1977).
[373] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203; 209

As such, while instrumental goals of reducing uncertainty and dealing with cases expeditiously are usually complementary, the goals of maintaining group cohesion and 'doing justice' may come into conflict, and the balance performed between crime control and due process may vary on a case by case basis. This leads Young to hypothesise that "expressive goals are merely rhetorical notions that are invoked by courtroom actors to legitimise their roles and activities"[374] and so to state the issues as 'goals' might be misleading, although I will continue to use the term here.

In an attempt to meet the court workgroup objectives of maintaining cohesion, doing 'justice', controlling uncertainty and efficient case progression, negotiation is commonly used to accommodate the wishes of those who are partially dependent on each other to ensure expeditious case progression.[375] Indeed, lawyers in Newman's study commented that there is a need to co-operate to ensure swift case progression.[376] Furthermore, there exist specific provisions, such as the disclosure of initial prosecution evidence and Pre Trial Review Hearings that are designed to encourage early discussion about cases and, in McConville, Sanders and Leng's words "achieve a settlement without recourse to contested trial."[377] The Criminal Procedure Rules encourage further co-operative practices (as discussed in chapter one) to assist negotiation in terms of identifying the matters in issue and relevant witnesses. As such, courtroom behaviour is characterised by high degrees of

[374]Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 Common *Law World Review* 203; 210. This is a significant point to remember in the context of interviewing advocates about their actions.
[375] Eisenstein. J and Jacob. H, *Felony Justice: An Organisational Analysis of Criminal Courts* (Little Brown 1977).
[376] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[377] McConville M, Sanders A and Leng R, *The Case for the Prosecution* (Routledge 1991); 6

negotiation and routinisation which enable the "courtroom workgroup to move though its long list of cases at great speed."[378]

The networks and routines operating in magistrates' courts provide an example of the different relationships between one's "knowledge of the rules…and their ability successfully to employ them to achieve a variety of …meanings."[379] In seeking to employ various legal rules, Carlen noted the existence of an uncomfortable compromise between court personnel.[380] Similarly, Sudnow reported a high degree of interaction and negotiation among prosecuting attorneys and public defenders in American criminal courts.[381] Thus, during an adversarial hearing, the advocates "must temporarily step outside their typical modes of mutual conduct and yet, at the same time, not permanently jeopardise the stability of their usual team like relationship."[382]

One way in which the networks manifest themselves (and interact with a desire for speedy case progression) is via the use of plea negotiations.[383] Newman noted that most defence advocates tended to consult prosecutors about cases before speaking to their clients.[384] While plea negotiations may place undue pressure on defendants to plead guilty (as does the system of credit, or "reward"[385] for entering an early guilty plea and the provisions which allow for an advance indication of

[378] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203;229
[379] Carlen P, *Magistrates' Justice* (Martin Robertson 1976); 10
[380] Carlen P, *Magistrates' Justice* (Martin Robertson 1976)
[381] Sudnow D, 'Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office' (1965) 12(3) *Social Problems* 255
[382] Sudnow D, 'Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office' (1965) 12(3) *Social Problems* 255;275
[383] Mulcahy A, 'The Justifications of `Justice': Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts' (1994) 34(4) *British Journal of Criminology* 411
[384] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013)
[385] Grove, T *The Magistrate's Tale* (Bloomsbury Publishing, 2003); 32.

sentence)[386] they may also "allow the defendant to return to a normal routine…provide the prosecution with the desired conviction, and allow the defence to claim success in the form of a sentence discount or other concession."[387] These incentives also enable not guilty pleas to be kept at a manageable level[388] and operate as part of the liberal bureaucratic model. As Mulcahy notes, heavy workloads encourage routine, minimal practices in which plea-bargaining is a useful tool which may subordinate the needs of defendants to managerial imperatives.[389] As will be seen in chapter four, the use of plea negotiations remains a significant feature of summary criminal proceedings.

Similarly, Sudnow notes, in the context of the American Public Defender, that explicit forms of plea bargaining are used to manage cases and produce 'normalised' or common types of offending.[390] This also produces, via negotiation, "a set of unstated recipes for reducing original charges to lesser offences."[391] This effectively excludes defendants from participation in the process because they are unaware of the 'ingredients' necessary for the recipe, which exacerbates the othering process. Similar patterns emerge in English and Welsh courts and as such, the use of plea

[386] See *R -v- Goodyear* [2005] 2 Cr.App.R. 20

[387] It is important to note that this research did not take some important factors into account, such as the amount of work that had been put into a case outside of the courtroom and the nature/strength of the evidence concerned. Thus it may be argued that Mulcahy's conclusions are based on limited data. (Mulcahy A, 'The Justifications of `Justice': Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts' (1994) 34(4) *British Journal of Criminology* 411; 414)

[388] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976).

[389] Mulcahy A, 'The Justifications of `Justice': Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts' (1994) 34(4) *British Journal of Criminology* 411. Mulcahy noted that plea negotiations tend to take place at Pre Trial Review hearings, which have been re-formed as Case Management Hearings in east Kent. The resort to plea bargaining, and the system of credit for the entry of an early guilty plea is considered by Bibas to be an example of insiders in the criminal justice system redirecting standard practices in order to dispose of more cases in less time (Bibas S, *The Machinery of Criminal Justice* (Oxford University Press 2012)).

[390] Sudnow D, 'Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office' (1965) 12(3) *Social Problems* 255.

[391] Sudnow D, 'Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office' (1965) 12(3) *Social Problems* 255; 262

negotiations reinforces the co-operative networks that operate in summary criminal courts. As Baldwin and McConville noted, such practices operate to exclude defendants from the process.[392]

Worryingly, McConville, Sanders and Leng note that weak cases also tended to elicit guilty pleas via bargaining techniques.[393] They suggested that this occurs because the defence advocates are a "*part of*, rather than challenger to, the apparatus of criminal justice...As officers of the court they are captured by crime control, not due process".[394] Bottoms and McClean were less critical of the advocates' behaviour in this regard, suggesting that lawyers advise possibly innocent people to plead guilty not

> "because of any commitment to a crime control ideology, nor because they are the subservient hacks of the court system ... They provide it because they are operating within a system heavily imbued with liberal bureaucratic rules and values, and they know that their clients might indeed receive heavier penalties if they are found guilty rather than plead guilty."[395]

It should also be noted that Bottoms and McClean found that the majority of defendants who had pleaded guilty said they had done so because they were in fact guilty or because the police had a good case.[396] While Newman's more recent study would support Baldwin and McConville's observations[397] in that he similarly

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[392] Baldwin J and McConville M, *Negotiated Justice: Pressures on Defendants to Plead Guilty* (Martin Robertson 1977).
[393] McConville M, Sanders A and Leng R, *The Case for the Prosecution* (Routledge 1991)
[394] McConville M, Sanders A and Leng R, *The Case for the Prosecution* (Routledge 1991); 167. Emphasis in original. It must however be noted that the writers do not appear to have been privy to the actual discussion that took place among the advocates nor to the advice given to the defendant by his or her advocate in cases that they assessed as being evidentially weak.
[395] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976); 231
[396] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976).
[397] Baldwin J and McConville M, *Negotiated Justice: Pressures on Defendants to Plead Guilty* (Martin Robertson 1977).

considered that defence solicitors placed pressure on defendants to enter negotiated guilty pleas, he did not interview defendants and accepted that he did not have the legal training necessary to evaluate the strength of the case.[398]

Carlen had earlier noted that court personnel presented coercive tactics as no more than the routine and mundane way of conducting court business, because those who work regularly within the courts are able to exercise greater control over the social space than those who pass through the system.[399] The exercise of such control "infuses the proceedings with a surrealty which atrophies defendants' abilities to participate in them."[400] Furthermore, the design of the courtroom (as a result of poor acoustics) along with the use of jargon[401] and inter-personnel signalling ostracise the defendant, which leaves defendants unable to understand or follow proceedings.[402] All parties are aware that such compromises exist while simultaneously trying to preserve their professional integrity, which is itself undermined by the very existence of inter-professional compromise.[403] Again, these problems appear to persist in summary criminal justice, as is discussed in chapters four and five.

Compromise is therefore a significant feature of professional relationships among advocates and, as Carlen noted, "the tacit knowledge among all players that strict adherence to the formal rules would slow down and…probably stop play altogether puts those who are prepared to put the game at risk…in a very strong

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[398] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[399] Carlen P, 'The Staging of Magistrates' Justice' (1976) 16(1) *British Journal of Criminology* 48; Carlen P, *Magistrates' Justice* (Martin Robertson 1976)
[400] Carlen P, *Magistrates' Justice* (Martin Robertson 1976); 19
[401] That is not to say that court personnel did not make attempts to explain the rules to unrepresented defendants, although this often simply added to the confusion (Carlen P, *Magistrates' Justice* (Martin Robertson 1976)).
[402] Carlen P, 'The Staging of Magistrates' Justice' (1976) 16(1) *British Journal of Criminology* 48.
[403] Carlen P, *Magistrates' Justice* (Martin Robertson 1976)

position."[404] However, strict adherence to rules might also damage professional relationships, and, in turn, affect negotiating powers and reputation. In a more recent study, Young refers to literature that supports the notion that defence lawyers tend to refrain from performing "legal manoeuvres that would aggravate other members of the workgroup".[405] As such, the view taken by socio-legal scholars tends to be that "the daily round of cases in the magistrates' court is remarkably free from legal interest",[406] as is highlighted by Darbyshire's assertion that formal legal issues arise infrequently in magistrates' courts.[407] This issue is discussed in greater detail in chapter five, in which I accept that co-operative working practices mean that formal legal argument is rare, but I argue instead that legal provisions are referred to in particular ways that only members of the workgroup understand.

Carlen's concern about the absurdity of "the judicial rhetoric of an adversary justice"[408] clearly remains relevant today. Consequently, due process becomes a "gloss"[409] used to legitimise proceedings rather than actually allowing the defendant a fair opportunity of comprehension and participation. This situation is exacerbated when one considers the speed at which cases are processed, which is also dependent on co-operative networks among the workgroup and knowledge of routine case handling procedures.

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[404] Carlen P, *Magistrates' Justice* (Martin Robertson 1976); 69
[405] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203;232
[406] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976); 150. See also McBarnet D, 'Two Tiers of Justice' in Lacey, N (ed), *A Reader on Criminal Justice* (Oxford Readings in Socio-Legal Studies, Oxford University Press 1994) and Darbyshire P, *Sitting in Judgement: The Working Lives of Judges* (Oxford: Hart 2011).
[407] Darbyshire P, *Sitting in Judgement: The Working Lives of Judges* (Oxford: Hart 2011).
[408] Carlen P, 'The Staging of Magistrates' Justice' (1976) 16(1) *British Journal of Criminology* 48; 49
[409] Carlen P, *Magistrates' Justice* (Martin Robertson 1976); 87

Speed and bureaucratisation

Carlen noted, in 1976, that the volume of business which passes through the magistrates' courts means that the proceedings need to be carefully managed.[410] This meant that the police prosecutors made value judgements about which cases were worthy of being dealt with early in the day, often based on whether the defendant was pleading guilty alongside an assessment of the defendant's demeanour based on certain court accepted stereotypes.[411] Those stereotypes limited the ability of the defendant to present him or herself in another way.[412]

Similarly, McBarnet was concerned about "bureaucratic pressures pushing the police into acceptable arrest rates, lawyers into negotiating pleas, court officials into a speedy rather than necessarily a just through-put of cases."[413] Such speed denies defendants the opportunity to understand the proceedings and consequently does not necessarily persuade them that just procedures are followed.[414] Further, the police were aware that a less serious charge would be more likely to elicit a guilty plea and pressure to save police time was evident.[415] This meant that lesser charges might be offered to speed up the court process. Courts have themselves noted that prosecutors might prefer summary charges in the name of expedition but also in order to elicit early guilty pleas.[416] Conversely, defendants often spent protracted periods of time waiting for their cases to be called, which only increased

[410] Carlen P, 'The Staging of Magistrates' Justice' (1976) 16(1) *British Journal of Criminology* 48
[411] Carlen P, *Magistrates' Justice* (Martin Robertson 1976)
[412] For example, 'nuts'. This technique means that when a defendant does something which is regarded as inappropriate (i.e. something which threatens the legitimacy of the proceedings), remedial methods classify defendants as acting out of time, place, mind or order. (Carlen P, *Magistrates' Justice* (Martin Robertson 1976))
[413] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981); 3
[414] Carlen P, *Magistrates' Justice* (Martin Robertson 1976)
[415] Carlen P, *Magistrates' Justice* (Martin Robertson 1976)
[416] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976).

their anxiety.[417] More recently, not only have prosecutors offered lesser charges but police have made more use of diversionary measures in order to increase efficiency and save money, as is discussed in chapter five. It is via processes such as these that "the ideal of adversary justice is subjugated to an organisational efficiency"[418] as legal ideology becomes subordinate to economic and bureaucratic ends.[419] As a result, McBarnet argues that the rules of criminal justice are "neither necessary nor relevant for the lower court at all."[420]

Such situations occur because the volume of court business requires a quick, routinised approach to case management which also legitimises institutional power;[421] all the more so since the proliferation of managerialist techniques as discussed in the preceding chapter. In the early twenty-first century, Leverick and Duff also noted "the concern of courtroom workgroups to progress through the work of the day with minimum levels of confrontation and maximum levels of speed."[422] Further, Darbyshire noted in her recent study that district judges favoured "the speed of the proceedings, the *summary* nature of summary proceedings."[423] The speed at which the proceedings operate coupled with low levels of publicly-funded remuneration for defence lawyers means that defendants are, in Newman's view,

[417] Carlen P, *Magistrates' Justice* (Martin Robertson 1976)
[418] Carlen P, *Magistrates' Justice* (Martin Robertson 1976); 20
[419] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981)
[420] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981); 124
[421] Carlen P, *Magistrates' Justice* (Martin Robertson 1976)
[422] Leverick F and Duff P, 'Court Culture and Adjournments in Criminal Cases: A Tale of Four Courts' (2002) 39(Scotland) *Criminal Law Review* 39; 44
[423] Darbyshire P, *Sitting in Judgment: The Working Lives of Judges* (Oxford: Hart 2011); 154. Indeed, until the early 1950s, magistrates' courts were known as courts of summary jurisdiction (McBarnet D, 'Two Tiers of Justice' in Lacey, N (ed), *A Reader on Criminal Justice* (Oxford Readings in Socio-Legal Studies, Oxford University Press 1994)).

offered fragmented access to legal services.[424] This is discussed further in the following chapter.

The speed of the proceedings also creates an air of informality which, to McBarnet, "would seem to be rather one-sided: the defendant's *role*…is still governed by formal procedures, but the defendant's *rights* are greatly reduced."[425] The result is that lawyers tend, according to McConville, Sanders and Leng, to opt into a crime control model.[426] Thus the speed at which cases progress is likely to be assisted by the presence of a greater number of defence advocates than observed by Carlen[427] because those specialist practitioners are equipped with the tools for negotiating case outcomes and understand the procedural issues involved in case management. This adds a degree of specialisation to the proceedings which, Castellano notes, allows the workgroup to routinise procedures.[428] Routinisation appears as a by-product of demands for efficiency and is manifested by a desire to process cases in standardised ways. As Garland notes, management measures are designed to limit professional discretion and closely regulate working practices,[429] such that they become standardised, and such standardisation is encouraged by the use of forms.

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[424] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[425] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981); 140. O'Barr and Conley have similarly noted that the level of formality affects the way that participants behave, often to the detriment of the non-professional participant who is unable to utilise the formal language of dispute. Thus "a litigant who is unable to structure his or her case in this familiar form may be at a serious disadvantage" (O'Barr W and Conley J, 'Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives' (1985) 19(4) *Law and Society Review* 661; 686)
[426] McConville M, Sanders A and Leng R, *The Case for the Prosecution* (Routledge 1991).
[427] Carlen P, *Magistrates' Justice* (Martin Robertson 1976).
[428] Castellano U, 'Beyond the Courtroom Workgroup: Caseworkers as the New Satellite of Social Control' (2009) 31(4) *Law and Policy* 429.
[429] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002)

Brenneis discusses how neoliberal governments' distrust of public services created a desire for efficiency to be both maximised and monitored through forms in public institutions. He asserts that the propagation of standardised forms occurred in the 1990s, which "was a period during which both new kinds of managerial models and, especially given the constrained resources and political climate, a new stress on accountability were quite evident."[430] It is via such mechanisms that bureaucracy (to which processes of document completion are integral) allows the state to exercise some control over the functions of publicly funded institutions.[431] Such bureaucratisation and standardisation has the effect of undermining individual rights in favour of speed.

Bourdieu has noted that routinised practices are also important in encouraging stability within workgroups.[432] Thus standardisation becomes important to the habitus which provides actors with a sense of appropriate actions to take in particular circumstances. As such, the form may be a way of ensuring that policy initiatives become integrated in the habitus, and the use of forms may be seen as one of the practices within neoliberal techniques of governance. There are, however, competing agendas to the working practices in the criminal justice system. The adversarial nature of the process – even when undermined by bureaucratic procedures - means that defence advocates and prosecutors assume different roles, which may explain why advocates raised concerns about the routinisation of proceedings (particularly case management) during the empirical research. This is discussed in chapter four.

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[430] Brenneis D, 'Reforming Promise' in Riles, A (ed), *Documents. Artifacts of Modern Knowledge* (University of Michigan Press 2006); 60

[431] Murphy M, 'Bureaucracy and Its Limits: Accountability and Rationality in Higher Education' (2009) 30(6) *British Journal of Sociology of Education* 683; 689

[432] Bourdieu P, *The Logic of Practice* (Stanford University Press 1990).

All of the above is not, however, to say that defendants would necessarily prefer the proceedings to be conducted at a slower pace. Bottoms and McClean note that many defendants seek swift case conclusion for a number of reasons, including issues with employment, the trouble of attending court and the anxiety it causes.[433] There is therefore a balance to be struck between the swift conclusion of cases and enabling defendants to be included in the process while also protecting their rights.

Conclusion

Magistrates' courts have, for the latter half of the twentieth century at least, operated with voluminous caseloads. This has required techniques that encourage efficient case progression. A high degree of co-operation among courtroom personnel is central to those techniques, which not only adds to the speed at which cases are progressed but also creates an air of informality. This, along with the specialised use of language and technical decision making, operates to exclude defendants from effective participation in the proceedings.

As seen in chapter one, since the 1970s there have been demands for greater efficiency in summary criminal courts. Such initiatives not only place greater emphasis on speed over just processes but also encourage even greater degrees of co-operation in court. Thus, while magistrates' courts have a long history of co-operative working practices, the advent of concerns about both efficacy and efficiency in the criminal justice system has the potential to exacerbate the inability of defendants to effectively participate in the proceedings, particularly when workgroups are familiar with one another and therefore stable.

[433] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976).

Those co-operative practices are assisted by increased levels of representation, which seems to act as a 'double-edged sword' for defendants. Kemp and Balmer's study records that represented defendants had much greater understanding of what was happening in court than unrepresented defendants.[434] However, while increased levels of representation are beneficial in that unrepresented defendants were previously excluded from participation in the proceedings by lack of specialist knowledge in relation to law, procedure and jargon, the advocate's presence also serves to strengthen networks and allow for increased routinisation, greater degrees of professional negotiation and compromise and quicker case progression, which may also leave defendants confused and alienated. This, in turn, reinforces the othering process in relation to defendants as they are excluded from effective participation in the process. Therefore, the culture of summary justice can actually exacerbate the effects of neoliberal policies in terms of the marginalisation of defendants. The data that is presented in the following chapters appears to support those assertions.

The existence of *effective* defence representation is crucial to ensure defendants' rights are not undermined. However, the ability of defence solicitors to provide the best service may be compromised not only by both bureaucratic and professional pressures but also by low levels of remuneration via legal aid, which is another important feature of summary criminal proceedings and is discussed in the following chapter.

[434]Kemp, V and Balmer, N *Criminal defence services: users' perspectives* (Legal Services Research Centre 21, 2008)

Chapter 3: Legal Aid in the Magistrates' Courts

Introduction

Publicly funded representation is an important component of an adversarial system. It exists to ensure equality of arms, to ensure that the presence of defence lawyers protects both the accused and the system from potential state abuse of power (or the appearance of abuse) and to legitimate punishment so that the defendant is not presented "as a helpless person persecuted by a Kafkaesque system."[435] The state must be seen to support access to justice in order to provide some legitimacy to state instigated, and funded, processes of prosecution.[436]

This chapter therefore considers the provision of publicly funded representation in summary criminal proceedings, the most common of which are the Court duty solicitor (who provides advice, assistance and advocacy assistance in the magistrates' courts on a single occasion) and representation in full proceedings which is granted under a Representation Order following application made to the Legal Aid Agency.[437] I reflect on how changes to public funding have affected the

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[435] Regan F, 'Criminal Legal Aid: Does Defending Liberty Undermine Citizenship?' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 104

[436] The importance of legal aid is well summarised by Young and Wall, who say that the legitimacy of the adversarial process "presupposes that the two sides have access to roughly equivalent resources and expertise, or that the prosecution will behave in such a way which negates the need for 'equality of arms'…. For defendants of modest means, the state must either fund their representation or perpetuate injustice." (Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds*), Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 5)

[437] There are five other types of legal aid in criminal proceedings; 1. Duty solicitor to provide advice and assistance at the police station which is not means tested and coverage is allocated by rota. 2. Own solicitor at the police station, which is the same assistance as under the duty solicitor scheme but the accused requests a particular solicitor's firm. 3. Representation in the Crown court is allowed under a Representation Order. 4. Free-standing advice and assistance can be allowed to provide initial advice up to a fee limit as long as no claim is made under a Representation Order. 5. Advocacy assistance can be claimed for certain proceedings in the magistrates' courts which fall outside the scope of the other funding schemes, such as an application for further detention of an accused at the police station for

culture and behaviour of defence advocates, and the implications for defendants. My examination of legally aided representation at this level enables a more detailed exposition of the effects of neoliberalism on summary criminal justice. Development on issues that arose in chapter one demonstrates how neoliberal governments' approaches to publicly funded representation have been inconsistent with traditional neoliberal approaches to state funded services.

This chapter tells the last of three interweaving stories about lawyers, defendants and access to justice, before these stories are empirically interrogated. I go beyond a descriptive account of the contractions in legal aid in order to make three arguments. Firstly I argue that tracking the provision of publicly funded representation allows us to examine different phases of liberalism and to challenge the idea that neoliberalism is a monolithic framework.

Secondly I argue that, within current British society, lawyers have multiple identities – as self-serving business people, professional experts and champions of access to justice. Such multiplicity leads to confusion about roles both in the minds of lawyers themselves and in the minds of civil servants with responsibility for making and administering criminal justice policy.

Thirdly I suggest that debates about the meaning of access to justice have been lost in neoliberal concerns about efficiency, and in austerity measures initiated by recent government policy. Further, the promotion of individualism by neoliberal techniques of governance erodes the sense of collective responsibility for access to

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questioning. These can be further subdivided according to payments schemes via fixed fee, standard fee, graduated fee, hourly rate or according to page count. Some of these schemes are means tested while others are subject only to an interests of justice requirement. I will concentrate on those types of funding which are commonly utilised in the magistrates' courts – the court duty solicitor scheme and publicly funded advice, case preparation and representation at court under a Representation Order granted on behalf of the Legal Aid Agency ('LAA').

justice promoted by the welfare state. Both of these features inadvertently contribute to the increased marginalisation of precariat groups.

A detailed examination of legal aid funding can demonstrate some of the paradoxes at the heart of state governance – a desire to fund representation to provide legitimacy for a form of state force but resentment towards funding a system that has the ability to challenge its authority, particularly in light of increased demands for efficiency in public institutions.[438]

It is difficult to neatly separate these complex issues and so they are interwoven into the story of different phases of liberal and neoliberal government throughout the chapter. I begin by examining the modern liberal origins of legal aid and I note how it has developed during different political phases. I suggest that the pace of change accelerated since the 1970s, as different governments, who have emphasised different aspects of neoliberal philosophy, became more distrustful of advocates' behaviour. At the same time, governments have required lawyers' assistance to ensure that the process of summary criminal justice is efficient. The measures introduced, which have been designed to both regulate advocates' behaviour and control cost, have further marginalised defendants from being able to participate in the proceedings.

The development of legal aid, liberalism and welfarism

Goriely, who has done some of the most significant work on the history of legal aid, notes that, by the late 1800s, it was becoming apparent "that

[438] Peck and Tickell would advocate such an approach which considers not only different phases of neoliberalism but also considers the philosophy in different political and social realms (Peck, J and Tickell, A, 'Conceptualizing Neoliberalism. Thinking Thatcherism' in Leitner, H Peck, J and Sheppard, E (ed), *Contesting Neoliberalism: Urban Frontiers* (The Guildford Press 2007).

unrepresented defendants damaged the image of English justice."[439] During this period, the existence of the British Empire and Commonwealth necessitated approaches to governance that appeared to provide examples of liberalism as an appropriate political, economic and social philosophy. As such, governments began to recognise that facilitating access to legal advice provided the criminal justice process with a sense of legitimacy which enabled liberal politics to live up to its claim of creating the conditions necessary for individual liberty and reason.[440]

In the early 1900s, the Poor Prisoners Defence Act 1903 enabled some defendants to request free legal advice via an Order from the magistrates which would allow funds to be drawn from local monies, but only if the defendant was prepared to disclose the nature of his or her defence. At this time the government "worried that more representation would encourage defendants to contest trials…trials would become longer and more expensive."[441] This statement provides early evidence of the tension that exists between the state's desire to present the criminal justice process as legitimate and its desire to control expenditure. As shall be seen below, this tension is manifest in all governments' approaches to legal aid, with the pendulum swinging either more towards due process, defendant rights and legitimacy or more towards efficiency, popular penalism and austerity, depending on the particular needs of, or crisis faced by, government, and the extent to which liberal or neoliberal political philosophy has been endorsed as an appropriate art of governance.

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[439] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 34
[440] Adams I, *Political Ideology Today* (Politics Today, Manchester University Press 2001).
[441] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 35

In 1930, following victory in the First World War and in an endorsement of liberal welfare principles, the availability of legal aid was expanded via the introduction of an 'interests of justice' test which allowed magistrates discretion in determining whether an individual should, in exceptional circumstances, be represented at public expense in summary criminal proceedings.[442] However, magistrates often remained reluctant to grant legal aid,[443] particularly in summary proceedings.[444] Hynes and Robin note that only 327 of the 19,079 people that magistrates sent to prison in 1938 had benefitted from legally aided representation.[445]

Legal aid development slowed until the late 1940s, when the report of the Rushcliffe Committee (which led to the enactment of the Legal Aid and Advice Act 1949) made a number of recommendations.[446] Those recommendations formed the founding principles for wide access to publicly funded legal advice, supported by welfarist approaches to government that prioritised social inclusion over cost in the belief that social cohesion would assist long term economic and social stability.[447] Its objectives included that legal aid should be available to people of small or moderate means, that contributions should be payable and a merits test should be applied and judged by legal practitioners, who should receive adequate remuneration for such work.[448]

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[442] Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005)
[443] Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005)
[444] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).
[445] Hynes S and Robins J, *The Justice Gap. Whatever happened to legal aid?* (Legal Action Group 2009); 9
[446] Lord Chancellor's Department *Report of the Committee on Legal Aid and Legal Advice in England and Wales* (Cmd. 6641) (1945)
[447] Smith, R *Proposals for the Reform of Legal Aid in England and Wales. Response* (Justice, February, 2011)
[448] Legal Action Group, *A Strategy for Justice: Publicly Funded Legal Services in the 1990s* (Legal Action Group 1992); 4

So far as criminal legal aid was concerned, the Rushcliffe Committee proposed that the exceptional circumstances provisions should be removed to encourage magistrates to grant legal aid where the interests of justice so required, and any doubt should be exercised in favour of the defendant. The recommendations also included allowing solicitors at least four days to prepare cases, that the scheme should be widely advertised,[449] that fixed fees should be abolished and costs should be borne nationally rather than locally.[450] Several of Rushcliffe's recommendations were gradually adopted by parliament in subsequent years. However, by 1950 there remained "no acceptance…that lawyers were needed in summary courts, where the number of certificates was only 0.3 per cent of all those dealt with"[451] and, until the 1960s, defence advocates were paid by way of a fixed fee drawn from local taxes. The government then recognised that it would be more equitable to pay solicitors by hourly rate, and that the scheme should become state funded.[452] The government felt that legal aid was granted so infrequently that the scheme would be easy to manage centrally.[453]

In 1963, the 'exceptional circumstances' requirement in summary proceedings was removed,[454] which allowed a greater number of criminal defence advocates to access the market. Historically, criminal defence services have tended to be provided by private practitioners in high street firms. The government did not seek to alter that framework and the removal of the exceptional circumstances

[449] Information slips were produced in 1948
[450] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).
[451] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 43
[452] Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005)
[453] Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005)
[454] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).

requirement allowed the growth of private practice in this field. This can be contextualised within a period of government during which specialist opinion and expertise were highly valued in public services and such professionals were assumed to act in a public-spirited fashion.[455]

In 1966, Lord Widgery's committee produced a report on legal aid in criminal proceedings ('the Widgery report').[456] While the Widgery report concluded that the legal aid system worked adequately, it also provided guidance to magistrates about when the interests of justice test would be satisfied.[457] The criteria were based either on the risk of loss of liberty or livelihood, complexity or the inability of defendants to properly follow the proceedings. [458] The guidance was drafted widely in order to encourage greater levels of representation in a range of situations rather than simply when a defendant was at risk of being sent to prison. The Widgery report therefore sought to persuade government to take an even more benevolent approach to publicly funded representation to bolster the appearance of fairness and legitimacy.

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[455] This attitude in relation to public service professionals has been identified by Le Grand J, 'Knights, Knaves or Pawns? Human Behaviour and Social Policy' (1997) 26(2) *Journal of Social Policy* 149 and, more recently in the context of legal aid, by Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).

[456] Home Office, 'Report of the Departmental Committee on Legal Aid in Criminal Proceedings' (H.M.S.O. Cmnd 2934 1966)

[457] The suggested criteria were given statutory recognition in s.22 Legal Aid Act 1988, and have been repeated in s.17 Legal Aid, Sentencing and Punishment of Offenders Act 2012, subject to a proviso that the Lord Chancellor can amend the criteria by order. The Divisional Court has, at times offered assistance in interpreting the criteria. For example, in the case of *R –v- Havering Juvenile Court ex parte Buckley* Lexis CO/554/83 the Court commented that it was appropriate to take into account the fact that the prosecution authority is legally represented.

[458] The full criteria are; the case involves a substantial question of law, conviction would be likely to lead to loss of liberty or livelihood, conviction would cause substantial damage to the defendant's reputation, the defendant may be unable to understand the proceedings or to present his own case due to a language barrier, mental illness, or other incapacity, the nature of the defence requires that witnesses need to be traced, or prosecution witnesses will need to be expertly cross-examined, it is in the interests of someone other than the defendant that the defendant should be represented (Home Office, 'Report of the Departmental Committee on Legal Aid in Criminal Proceedings' (H.M.S.O. Cmnd 2934 1966))

However, the lawyer-led pressure group Justice disagreed with the Widgery report's assessment of the adequacy of legal aid provision and reported that, in 1969, only four per cent of those charged with criminal offences applied for legal aid (with significant local variation in grant rates), even though the legitimacy of the adversarial "system of trial depends entirely on both sides being adequately equipped to present their cases."[459] Zander found, in 1969, that the majority of people sent to prison by magistrates had been unrepresented, despite the guidance issued in the Widgery report.[460] Justice therefore advocated the introduction of a duty solicitor scheme,[461] which had been specifically rejected by the Widgery report on the basis that the system functioned adequately as it was. Justice argued that the unrepresented defendant was "scared, inarticulate, unfamiliar with the procedure and commonly unable to understand what is going on"[462] which had the potential to damage public perceptions of justice.

Despite this, the interests of justice criteria were not widely circulated due to fears over rising cost.[463] "The courts and government were agreed that legal aid was a dangerous innovation which was bound to lead to more contested cases."[464] As such, despite various parliamentary reports suggesting legal aid expansion, governments remained reluctant to relax the criteria which must be met to obtain

[459]Justice, *The Unrepresented Defendant in Magistrates' Courts* (British Section of the International Cmssn of Jurists, 1971); 4. It should however be noted that Justice also accepted that certain types of case, such as minor motoring offences, do not require legal representation.
[460] Zander M, 'Unrepresented Defendants in the Criminal Courts' (1969) *Criminal Law Review* 362. These findings were supported by Borrie and Varcoe (Borrie G and Varcoe J, *Legal Aid in Criminal Proceedings. A Regional Survey* (Institute of Judicial Administration 1970))
[461] Justice, *The Unrepresented Defendant in Magistrates' Courts* (British Section of the International Cmssn of Jurists, 1971)
[462] Justice, *The Unrepresented Defendant in Magistrates' Courts* (British Section of the International Cmssn of Jurists, 1971); 15
[463] Justice, *The Unrepresented Defendant in Magistrates' Courts* (British Section of the International Cmssn of Jurists, 1971)
[464] Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 4

publicly funded representation. Thus the tension between cost and efficiency as against due process and legitimacy was evident even during periods in which welfarist political philosophy prevailed.

The expansion of legal aid provision

By the early 1970s, a different form of welfarism was becoming dominant, which supported the expansion of legal aid in principle. That stage of governance was influenced by greater interest in equality and individuals' rights.[465] This phase presaged neoliberalism in its focus on individualism, which meant that the political left subsequently had difficulty in effectively opposing neoliberal politics.[466] Increased interest in individual rights also, however, paved the way for the expansion of legal aid and, in 1973, the Law Society introduced the 'green form' scheme which allowed solicitors to perform a simplified means test in order to assess initial eligibly for publicly funded advice in relation to any matter of English law.[467] Further, Section 37 Criminal Justice Act 1972 prohibited magistrates from sending first time offenders to custody if unrepresented. In 1976, Bottoms and McClean found that, of applications for legal aid made, 82 per cent were granted nationally, subject to local variation on the basis of publicity.[468] Later, legal aid

[465] Examples of this phase in action include the enactment of various statutes designed to protect and promote individual rights, such as the Race Relations Act 1976 and the Equal Pay Act 1970.
[466] Dean J, *Democracy and Other Neoliberal Fantasies* (Duke University Press 2009).
[467] Legal Action Group, *A Strategy for Justice: Publicly Funded Legal Services in the 1990s* (Legal Action Group 1992). In 1994-1995, 397,169 green form bills were paid (Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996))
[468] They also found that defendants were 17 per cent more likely to plead guilty when unrepresented. Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge, 1976)

eligibility on income grounds was revised so that 79 per cent of the population was eligible by 1979.[469]

Duty solicitor schemes were also introduced under the Legal Advice and Assistance Act 1972, and entitled defendants charged with imprisonable offences or appearing in custody to receive free advice and advocacy assistance. A defendant is only entitled to use the services of a duty solicitor on a single occasion and the right to instruct the duty solicitor does not extend to conducting trials.[470] The emergence and expansion of the duty solicitor scheme effected "a considerable improvement in legal aid provision."[471] Duty solicitor schemes were placed on a more formal statutory footing by the Police and Criminal Evidence Act 1984, having previously been conducted on a voluntary basis.[472] Such schemes provided less well established solicitors' firms with another useful entrance into the 'market',[473] marking a period of further expansion in the provision of legally aided criminal defence services.

State crisis and legal aid

The expansion of eligibility for publicly funded representation in magistrates' courts, combined with a rise in the number of people prosecuted, meant that by

[469] Legal Action Group, *A Strategy for Justice: Publicly Funded Legal Services in the 1990s* (Legal Action Group 1992).
[470]See, for example, Liberty. 'Your Rights. The Liberty Guide to Human Rights' <www.yourrights.org.uk/yourrights/the-rights-of-defendants/representation-and-funding.html accessed on 13/11/2013> The duty solicitor is a qualified lawyer who has undertaken specific further qualifications in order to provide representation at magistrates' courts (and the police station) and who is deemed eligible to belong to a panel of local criminal defence advocates. (The Law Society 'Criminal Litigation' <http://www.lawsociety.org.uk/accreditation/specialist-schemes/criminal-litigation/> accessed on 13 November 2013. Those advocates are allocated to act as duty solicitor in their local magistrates' courts via a rota which is devised by the Ministry of Justice (Ministry of Justice 'Duty Solicitor Information' http://www.justice.gov.uk/legal-aid/areas-of-work/crime/duty-solicitor-rotas accessed on 13/11/2013))
[471] Ashworth A, 'Legal Aid, Human Rights and Criminal Justice' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 64
[472] Legal Action Group, *A Strategy for Justice: Publicly Funded Legal Services in the 1990s* (Legal Action Group 1992)
[473] Goriely T, 'Revisiting the Debate over Criminal Legal Aid Delivery Models: Viewing International Experience from a British Perspective' (1998) 5(1) *International Journal of the Legal Profession* 7.

1986/87, spending on summary criminal legal aid accounted for a quarter of all legal aid costs and four fifths of defendants appearing on criminal charges in magistrates' courts were now represented.[474] Expansion of legally aided representation during this period is somewhat incongruent with conventional accounts of the roll back of state funded services as Conservative neoliberal polices became dominant. However, there are several factors that may provide at least partial explanations for this trend.

Firstly, rising crime rates had contributed to the crisis of the welfare state, which would suggest that there was more court business and one might expect a greater number of advocates to be appearing before the Benches. Secondly, the legitimacy of state-led prosecutions was under public scrutiny in the face of several notorious miscarriages of justice.[475] This contributed to the professionalisation of the police under the Police and Criminal Evidence Act 1984 and the creation of an independent CPS, which bolstered demands for defence representation under equality of arms arguments. Furthermore, in the wake of tough police action in relation to inner city riots and industrial action that occurred during this period, lawyers' ability to hold state-led forces to account could play a role in legitimising institutional power. These factors, alongside the rise of individualisation in political philosophy, provide evidence that politics has the ability to interrupt trajectories of neoliberalism[476] as the state must respond to immediate crises of legitimacy.

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[474] Legal Action Group, *A Strategy for Justice: Publicly Funded Legal Services in the 1990s* (Legal Action Group 1992)

[475] See, by way of example, *R- v- Anne Maguire, Patrick Joseph Maguire, William John Smyth, Vincent Maguire, Patrick Joseph Paul Maguire, Patrick O'Neill and Patrick Conlon* (1991) 94 Crim. App. R. 133

[476] Daly is of the view that politically motivated incidents can disrupt the strict order of political philosophy (Daly G, 'Radical(ly) Political Economy. Luhmann, Postmarxism and Globalisation' (2004) 11(1) *Review of International Political Economy* 1) while Middleton described how particular expressions of subordination and social dislocation can be used to challenge universal understandings of neoliberalism (Middleton M, 'Becoming War-machines: Neoliberalism, Critical Politics, and Singularities of Struggle' (PhD, University of Utah 2011)).

Furthermore, Young and Wall suggest that these changes occurred because, "once it was recognised that defence lawyers actually facilitated speedier court proceedings (often by negotiating a guilty plea), grants of legal aid were made much more freely."[477] Goriely notes that there were attempts to routinise court procedures at the same time, which is, as discussed in chapter two, facilitated by greater levels of defence advocates who then play an important role in providing legitimacy to state policy initiatives.[478] Goriely describes this period as "an explosion of magistrates' court legal aid…a fivefold increase in real terms."[479] This phase of legal aid development is therefore significant in its complexity. The state faced several public setbacks to its appearance of legitimacy and fairness, and lawyers had the potential to redress any perceived imbalance while also increasing the efficiency of court proceedings. Thus lawyers fulfilled a dual function for the government even though neoliberal Conservative politics was becoming increasingly sceptical about the behaviour of public service professionals and ever more interested in cost control in what was perceived as the wasteful public sector. This again highlights the complex nature of neoliberal politics when actually applied to state funded institutions.

By the mid-1980s, however, "the growth in the numbers prosecuted…levelled off, yet the numbers receiving legally-aided representation continued to rise."[480] This growth led the government to introduce various initiatives and reviews to reduce

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[477] Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (Eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 4. Goriely agrees with this view (Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996))

[478] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)

[479] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 45

[480] Bridges L, 'The Reform of Criminal Legal Aid' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 281

legal aid expenditure,[481] driven by neoliberalism's more familiar preference for managerialism, distrust of professional behaviour and concerns about efficiency. Until 1988, the Law Society had been responsible for the administration of legal aid. However, the Thatcher government took the view that the duties of the Law Society as representative of solicitors conflicted with their responsibility for payment of lawyers' fees and created the Legal Aid Board ('LAB'), which was a non-departmental public body.[482] This again provides evidence of a shift in attitude towards public service professionals as criminal defence advocates came to be seen as obstructive and in need of external supervision. These developments paved the way for greater regulation as demands for greater efficiency were made by subsequent governments, as detailed in chapter two. As Marshall noted, there had previously been a tendency to try to protect individuals from institutions but

> "success in this endeavour depends greatly on the intervention of the professional, or the expert, between the bureaucratic machine and the individual client…The bureaucrat tends to assign cases to appropriate categories…this has a depersonalising effect on the relationship. The professional, by contrast, claims the right to judge each case on its own merits and then to prescribe or recommend, what is, in his opinion, the best treatment for it, within the limits of the service".[483]

We can thus identify the problematic approach of politics to lawyers – their presence appears to increase efficiency but governments remain of the view that they are, at least to an extent, self–serving professionals. This resulted in increased

[481] Hynes S and Robins J, *The Justice Gap. Whatever happened to legal aid?* (Legal Action Group 2009)
[482] Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005)
[483] Marshall T, *Social Policy in the Twentieth Century* (Hutchinson and Co (Publishers) Ltd 1975); 13

regulation of the profession via franchising and contracting measures discussed below.

Hynes and Robins view the creation of the LAB as the beginning of a period during which the government was increasingly unconcerned about policies which related to publicly funded representation,[484] but were instead concerned about efficiency. The Legal Action Group noted that "no less than half the initial membership of the board came from business, while the role of the Law Society was reduced to putting forward the names of two solicitors."[485] This is consistent with the Thatcher government's scepticism about the efficiency of state funded institutions, and the efficacy of those working within them, alongside a more marketised, managerialist approach to funding in public services. There was however a significant rise in legal aid costs in summary criminal proceedings[486] and, in 1992, government spending on legal aid passed the billion pound mark, with the cost of criminal legal aid in the magistrates' courts and court duty solicitor costs being £218m net.[487] At this time, public discussion focused largely on expenditure versus the remuneration of legal aid lawyers.[488] The government's cost reduction strategy at this time was to reintroduce the system of payment by fixed fee in the

[484] Hynes S and Robins J, *The Justice Gap. Whatever happened to legal aid?* (Legal Action Group 2009)
[485]Legal Action Group, *A Strategy for Justice: Publicly Funded Legal Services in the 1990s* (Legal Action Group 1992); 11
[486] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).
[487] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996). Young and Wall report that in the decade to 1993-1994, "legal aid expenditure on criminal matters rose by 300 per cent to £519m." (Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 17). Wood notes however that the application refusal rate rose by 8.7 per cent between 1991 and 1993 (Wood A, 'Administrative Justice within the Legal Aid Board: Reviews by Caseworkers and Area Committees of Refusals of Criminal Legal Aid Applications' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).
[488] Legal Action Group, *A strategy for justice: publicly funded legal services in the 1990s* (Legal Action Group 1992).

magistrates' courts,[489] which proved to be the catalyst for many lawyers refusing to undertake duty solicitor work.[490]

This phase marked the beginning of a new stage of neoliberalism in which greater control was sought over state funded institutions. This trend was encouraged by New Labour's desire to increase efficiency in the criminal justice system via measures that increasingly restricted lawyers' professional decision making by juxtaposing business needs and practices. Such demands did however also indirectly increase defendant marginalisation as lawyers were required to balance business and professional needs – a dilemma that now appears constant in the process of summary criminal justice, as was evidenced by comments made in my interviews with defence solicitors. This trend can be set in the context of New Labour's enthusiasm for managerialism in criminal justice.

<u>New Labour's approach to legal aid; Marketisation and efficiency</u>

Both Cape and Moorhead and Hynes and Robins identified an increase in summary criminal legal aid claims in the late 1990s.[491] New Labour regarded this as economically inefficient, and decided that the number of firms providing legal aid in criminal cases should be limited by a franchising system.[492] From that point, firms

[489] As Gray, Fenn and Rickman note, "there is a lower and a higher standard fee, with cases involving more work than is covered by the higher standard fee being paid on a fee-per-item basis…these encompass a much larger percentage of magistrates' court work than in the Crown court" (Gray A, Fenn P and Rickman N, 'Controlling Lawyer's Costs through Standard Fees: An Economic Analysis' in Young, R. and Wall, D (eds), *Access to Criminal Justice. Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 193). See also Hynes S and Robins J, *The Justice Gap. Whatever Happened to Legal Aid?* (Legal Action Group 2009).

[490] Legal Action Group, *A Strategy for Justice: Publicly Funded Legal Services in the 1990s* (Legal Action Group 1992).

[491] Cape, E and Moorhead, R, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre, 2005); Hynes S and Robins J, *The Justice Gap. Whatever Happened to Legal Aid?* (Legal Action Group 2009); 112

[492] Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005). Legal Action Group, *A Strategy for Justice: Publicly Funded Legal Services in the 1990s* (Legal Action Group 1992); 146. The wish to impose a franchise scheme can be traced to the 1980s, when "politicians were beginning

who wished to provide publicly funded advice in criminal proceedings would have to hold a contract for those services issued by the LAB.[493]

However, New Labour's Lord Chancellor, Lord Falconer felt that the LAB failed to sufficiently regulate legal aid expenditure[494] which meant "the administrative overheads of funding a large number of firms – many of which did only a small amount of criminal legal aid work each year - were placing an unnecessary financial burden on the Board."[495] In 1999, the LAB was replaced by the Legal Services Commission ('LSC') under the Access to Justice Act 1999. The LSC was charged with developing and maintaining criminal legal aid funds under the Criminal Defence Service ('CDS'). The launch of CDS led to an approximate 15 per cent drop in the number of firms providing legal advice in criminal proceedings, [496] which resulted from the fact that those firms who only conducted a very small amount of criminal defence work were unable to meet the practice management contracting criteria. Those criteria evidenced a desire for greater regulation of lawyer behaviour. From 2001, only firms that demonstrated competence in criminal proceedings to the satisfaction of the LSC would be awarded contracts to conduct publicly funded criminal defence work.[497]

Solicitors had protested against the introduction of CDS, but were offered their first pay rise in eight years and assurances that the payment scheme for police

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to 're-invent government' by contracting out services to private suppliers. Soon 'contracting' became elevated to the status of political doctrine." (Goriely T, 'Revisiting the Debate Over Criminal Legal Aid Delivery Models: Viewing International Experience from a British Perspective' (1998) 5(1) *International Journal of the Legal Profession* 7; 8)

[493] Hynes, S and Robins, J *The Justice Gap. Whatever happened to legal aid?* (Legal Action Group 2009)

[494] Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005)

[495] Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005); 9

[496] Hynes S and Robins J, *The Justice Gap. Whatever happened to legal aid?* (Legal Action Group 2009)

[497] Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005)

station work would remain the same as incentives to sign the new contracts.[498] This also serves to demonstrate that the competitive nature of private practice can be used to government advantage to control cost. Ultimately firms needed to agree to sign contracts to remain in business and the fragmented, competitive nature of criminal defence services provides the government with a significant advantage in restraining cost. [499]

Such problems are compounded if one accepts Hynes and Robins suggestion that "In the LSC period of control, they [the LSC] have generally moved closer to the government and been less keen to assert their independence."[500] As franchising regimes were introduced, managerial influences took greater control over advocates, because the contracts devised by the LSC required lawyers to adopt specific working practices which the LSC (and not necessarily the firm) regarded as appropriate.[501] This represented a challenge to the lawyer/client relationship.[502] Wall notes that, "franchising, quality control mechanisms ….are employment conditions which

[498] Hynes S and Robins J, *The Justice Gap. Whatever Happened to Legal Aid?* (Legal Action Group 2009)
[499] Amidst government concerns that lawyers were obstructive, four publicly state funded public defender offices were created, but proved to be less efficient and cost the government more than firms operating in private practice (Bridges, L. Cape, E. Fenn, P. Mitchell, A. Moorhead, R and Sherr, A. 'Evaluation of the Public Defender Service in England and Wales' (2007) <http://www.legalservices.gov.uk/docs/pds/Public_Defenders_Report_PDFVersion6.pdf> accessed on 05 February 2012). While the offices that were created remain operative, there does not, as far as I am aware, exist any plans to expand that method of criminal defence service provision.
[500] Hynes S and Robins J, *The Justice Gap. Whatever Happened to Legal Aid?* (Legal Action Group 2009); 29
[501] For example, the contract makes provisions about when defendants will qualify for representation by a duty solicitor, determines when claims for payment can be made and determines what tests shall be applied by lawyers when considering whether a defendant/suspect qualifies for representation (Legal Services Commission. 'Standard Crime Contract 2010' (2012) <http://www.legalservices.gov.uk/docs/cds_main/Specification_2012_Part_B_Apr_2012_-_1_Apr_12.pdf> accessed on 28 September 2012.)
[502] Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds*), Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 23. See also Sommerlad H, 'Criminal Legal Aid Reforms and the Restructuring of Legal Professionalism' in Young, R. and Wall, D (eds), *Access to Criminal Legal Aid: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).

provide a mechanism of governance and define a new type of legal professional"[503] who has to work with "the competing rationalities that arise from the conflicting professional agendas of the groups involved in the process."[504] The result is that firms can take one of three stances; classical (a continuous service with intense lawyer involvement), managerial (routinised processes and reliance on unqualified staff) or political (opposition to managerialism and client-focused).[505] Workgroup cultures that favour co-operation and routinisation are likely to result in managerial approaches to representation. Newman's recent study found that defence lawyers tend to adopt a factory-like approach to case progression[506] in order to cope with government initiatives, thereby inadvertently increasing marginalisation experienced by defendants. As he further notes in his recent book, the idea of professional control is impugned by relinquishing responsibility to government.[507] The payment regime set out in the contract and the government's desire to improve efficiency were likely to lead to conveyor-belt type procedures and de-skilling[508] with significant reliance on unqualified support staff[509] as firms struggled to remain profitable in the face of demands for efficiency.

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[503] Wall D, 'Keyholders to Criminal Justice? Solicitors and Applications for Criminal Legal Aid' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 115

[504] Wall D, 'Keyholders to Criminal Justice? Solicitors and Applications for Criminal Legal Aid' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 115

[505] McConville M, Hodgson J, Bridges L and Pavlovic, A, *Standing Accused. The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford University Press, 1994). See also Sommerlad H, 'Criminal Legal Aid Reforms and the Restructuring of Legal Professionalism' in Young, R. and Wall, D (eds), *Access to Criminal Legal Aid: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).

[506] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).

[507] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).

[508] Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).

[509] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996). Wall further noted that solicitor's firms were increasingly reliant on support staff to complete applications for legal aid, and found that they tended to be less thoroughly completed and more likely to be rejected (Wall

Despite New Labour's desire "to regulate the cost and delivery of public services through market competition,"[510] between 1997 and 2005 spending on criminal legal aid increased by 37 per cent[511] but, notably, "increases in the costs of CDS work (magistrates' court, police station and free-standing advice and assistance) broadly kept pace with GDP."[512] Over the same period, the costs of running the criminal justice system (in terms of police, prison service, probation service and CPS) had increased by 46 per cent as a result of New Labour's objectives to deal with repeat offending and anti-social behaviour and to bring more offenders to justice.[513] According to the Legal Action Group, however, the government did not recognise the degree of pressure placed on criminal legal aid as a result of frequent changes to the law and the administration of justice and instead placed the blame of rising costs on lawyers.[514] Roger Smith, the then head of Justice, suggests that, as a result of misplaced attention to the source of rising costs, the government gave "insufficient attention to the reasons why the state should provide access to justice."[515] Both David Blunkett and Jack Straw, in their terms as Home Secretary, had blamed increased costs on defendants and

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D, 'Keyholders to Criminal Justice? Solicitors and Applications for Criminal Legal Aid' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)).

[510] Hynes S and Robins J, *The Justice Gap. Whatever happened to legal aid?* (Legal Action Group 2009); 35

[511] Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005)

[512] Cape, E and Moorhead, R, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre, 2005); 5

[513]Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005). As Hynes and Robins note, "the crime spend was about to take off…as a result of New Labour's promise to be 'tough on crime and tough on the cases of crime'" (Hynes S and Robins J, *The Justice Gap. Whatever Happened to Legal Aid?* (Legal Action Group 2009); 108).

[514] Hynes S and Robins J, *The Justice Gap. Whatever Happened to Legal Aid?* (Legal Action Group 2009); 4. As Hynes and Robins note, "in 1996/97, 42 per cent of legal aid spending in the crown court…was on just 1,000 (one per cent) of the cases" (Hynes S and Robins J, *The Justice Gap. Whatever Happened to Legal Aid?* (Legal Action Group 2009); 110)).

[515] Smith, R *Proposals for the Reform of Legal Aid in England and Wales. Response* (Justice, February, 2011); 3

"their unscrupulous lawyers playing the system. Ministers developed an almost pathological refusal to accept that New Labour's relentless law-making could contribute to pressures to process high numbers of guilty pleas on the courts when brought to book in increasing numbers."[516]

It seems therefore that increasing distrust of public service professionals and concerns with efficiency led to greater focus on case progression measures, which are less concerned with defendants' rights than due process provisions. As such, principles relating to access to justice become invisible in the context of political debate about efficiency, consumerism and individual responsibility, thereby contributing to processes of defendant marginalisation. This provides an example of the inadvertent nature of marginalisation (as highlighted in chapter one) which results, at least partially, from the way in which neoliberalism is responsive to crises and politics rather than an unbending, monolithic doctrine.

Against this background, the New Labour government sought to take measures that would stabilise, if not reduce, legal aid expenditure. In 2005, Lord Falconer extolled the virtues of legal aid in terms of protection for defendants,[517] while simultaneously providing incentives for concluding cases swiftly, thereby demonstrating commitment to the Treasury[518] and further illustrating the tension that exists between due process and cost control. At the same time, it was recognised that practitioners need to be paid fairly for the work that is undertaken because "legal aid…makes a vital contribution to the effective operation of our fair and

[516] Hynes S and Robins J, *The Justice Gap. Whatever Happened to Legal Aid?* (Legal Action Group 2009); 115
[517] Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005)
[518] Hynes and Robins describe the financial incentives as "inappropriate" because they resulted from lawyers being accused of maximising costs (Hynes S and Robins J, *The Justice Gap. Whatever happened to legal aid*? (Legal Action Group 2009); 109)

effective criminal justice system."[519] However, Falconer, in line with New Labour's preference for marketisation of public services, was of the view that legal aid remuneration rates should be determined by the operation of market practices rather than by central government.[520]

Lord Falconer instigated a review of legal aid to be performed by Lord Carter.[521] Carter's view was that the procurement of criminal legal aid was inefficient.[522] He went on to state: "we had to break the hold of the criminal practitioners and force them to restructure so we could get more control over the costs of provision",[523] highlighting the government's desire to regulate professional behaviour that was viewed as inefficient. Carter viewed legal aid provision in criminal proceedings as a market which should be "driven by competition based on quality, capacity and price."[524] Following his review, Carter recommended fixing fees for block contracted police station work, reform of Crown and magistrates' court fees and a system of Best Value Tendering for high cost cases.[525]

Carter's review was not well received by either professionals or the House of Commons Constitutional Affairs Committee[526] and the LSC's reaction (a failure to implement most of the recommendations) betrayed its "half-hearted faith in market

[519]Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005); 21
[520] Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005)
[521] Carter, P *Lord Carter's Review of Legal Aid Procurement - Legal Aid: A Market-based Approach to Reform* (2006)
[522] Department of Constitutional Affairs 'Procurement of Criminal Defence Services: Market-based reform' (2006) http://www.legalaidprocurementreview.org.uk/docs/leaflet_pcapp.pdf accessed on 24 February 2012
[523] Hynes S and Robins J, *The Justice Gap. Whatever Happened to Legal Aid?* (Legal Action Group 2009); 53
[524] Leech, S. 'Solicitors 'Deserting' Legal Aid' (2006) www.http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/6115514.stm accessed on 20 February 2012.
[525] Hynes S and Robins J, *The Justice Gap. Whatever happened to legal aid?* (Legal Action Group 2009); 55
[526] Hynes S and Robins J, *The Justice Gap. Whatever happened to legal aid?* (Legal Action Group 2009).

forces."[527] Solicitors had protested that the Criminal Defence Service contracts which followed Carter's report would result in advice deserts but the majority of firms reluctantly agreed to sign the new agreements.[528] Carter's main recommendation was to introduce a scheme of Best Value Tendering ('BVT') which would involve firms bidding to perform certain services in certain areas.[529] The BVT proposals proved to be extremely controversial and were repeatedly postponed.[530] The Legal Action Group argue that Carter's recommendations were based on

> "an overly simplistic belief in 'the market' being able to sort out the problem. But there was a failure to understand what 'the problem' was, that the publicly funded legal sector has evolved in a complex and haphazard fashion, and is one that will not withstand shocks."[531]

Nevertheless, the government announced proposals for significant, rapid change in April 2013, which initially included a revised form of BVT referred to as Price Competitive Tendering.[532] Those proposals are further considered below.

Economist Peter Grindley was asked by the Law Society to assess the likely impact of the Carter proposals,[533] and the issues he identified resonate with current concerns. Grindley's analysis noted that the reforms would require major

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[527] Hynes S and Robins J, *The Justice Gap. Whatever happened to legal aid?* (Legal Action Group 2009); 126
[528] Rozenberg J, 'New Deal Unlawful, Say Solicitors' *The Telegraph* (29 March 2007).
[529] Carter, P *Lord Carter's Review of Legal Aid Procurement - Legal Aid: A Market-based Approach to Reform* (2006)
[530] Baksi, C. 'Ken Clarke Postpones Legal Aid Reforms and Tendering' (2011) <http://www.lawgazette.co.uk/news/ken-clarke-postpones-legal-aid-reforms-and-tendering> accessed on 14 August 2012. Goriely notes that competitive tendering has been shown to be detrimental to the quality of representation as lawyers become motivated to perform too little work (Goriely T, 'Revisiting the Debate Over Criminal Legal Aid Delivery Models: Viewing International Experience from a British Perspective' (1998) 5(1) *International Journal of the Legal Profession* 7.)
[531] Hynes S and Robins J, *The Justice Gap. Whatever Happened to Legal Aid?* (Legal Action Group 2009); 57
[532] Ministry of Justice, *Transforming Legal Aid: Delivering a More Credible and Efficient System* (Ministry of Justice CP14/2013, 2013)
[533] Grindley, P *Legal Aid Reforms Proposed by the Carter Report - Analysis and Commentary* (LECG Corporation, 2006)

reorganisation of firms providing legally aided advice and representation, "making it unclear …whether there will be enough capacity to provide services."[534] His analysis found that, as the most stable aspect of legal aid expenditure, "magistrates' court costs have fallen by 0.1 per cent per year and per case by 0.5 per cent. After allowing for inflation these each represent net decreases in real per case costs."[535] These findings demonstrate the fragility of legally aided advice and assistance, which could suffer long-term problems with sustainability if radical reform is introduced.

The Coalition government's proposals; Austerity

In 2010, the Ministry of Justice asserted that, while the introduction of fixed fees and means testing had stabilised legal aid expenditure, the way that services were delivered needed to be restructured in order to be sustainable.[536] In the same year, Kemp found that 82 per cent of defendants in her sample of magistrates' court appearances were represented by a solicitor, and nearly all of them were publicly funded[537] which suggests that the majority of defendants were still able to access state funded legal assistance. The Ministry of Justice indicated that it wanted to create a system which

> "can deliver continuing access to justice at the right quality…maintains a sustainable and stable market…enables the Government and the taxpayer to

[534] Grindley, P *Legal Aid Reforms Proposed by the Carter Report - Analysis and Commentary* (LECG Corporation, 2006); 3
[535] Grindley, P *Legal Aid Reforms Proposed by the Carter Report - Analysis and Commentary* (LECG Corporation, 2006); 4
[536] Ministry of Justice, *Restructuring the Delivery of Criminal Defence Services* (Ministry of Justice, 2010)
[537] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011

secure greater value for money…is as simple and consistent as possible…is flexible and continues to offer individuals a choice of legal representative."[538]

The Ministry of Justice stated that the government's "first priority is to reduce the burden of debt by reducing public spending…Legal aid must therefore make a substantial contribution to the required savings",[539] and that it was trying to ensure that the legal aid system ran as efficiently as possible. The LSC was replaced by the Legal Aid Agency, which has been specifically brought under the remit of the Ministry of Justice[540] and has sought even greater control over legal aid expenditure. If efficiency becomes the only way in which the state is able to justify spending on publicly funded criminal defence services, lawyers' behaviour forms part of the political discourse and this becomes more acute as greater pressure is placed on government spending targets. There is however a constant contradiction in the government's desire to have an efficient process, to which appropriate legal advice is key, and its desire to restrict access to legal aid.

As the LAG noted, "a proper solution requires consideration of whether so many cases need to brought before the court in the first place, and whether magistrates need such extensive powers of imprisonment."[541] This is unlikely to occur while, as Young and Wall argue, "the state spends far more on the police and Crown Prosecution Service than it does on legal aid…It is, in short, because the Government lacks a genuine commitment to equal access to justice that the scope of legal aid

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[538] Ministry of Justice, *Restructuring the Delivery of Criminal Defence Services* (Ministry of Justice, 2010); 10

[539] Ministry of Justice, *Legal Aid Reform: Legal Aid Remuneration (Criminal). Impact Assessment* (Ministry of Justice, 2010); 14

[540] Baksi C, 'MoJ Ushers in Coates to Head Legal Aid Agency' (2013) (4 March) Law Society Gazette 2.

[541] Legal Action Group, *A Strategy for Justice: Publicly Funded Legal Services in the 1990s* (Legal Action Group 1992); 116. At the same time, however, solicitors bemoan the introduction and increased use of diversionary measures (discussed in subsequent chapters) which, although there are real concerns about their appropriateness, also reduced the amount of work available.

remains so restrictive".[542] Legal aid has become more restricted since that statement was written as governments have sought to bring more cases to 'justice'. This comment demonstrates how the pendulum which represents governments' approaches to publicly funded representation has swung back in favour of cost control and efficiency and away from due process and individual rights.

Additionally, this period of government saw the appointment of the first non-lawyer Lord Chancellor, Chris Grayling, demonstrating further a commitment to market, rather than traditional legal, principles. Grayling made clear his distrust of lawyers and his time as Lord Chancellor saw the introduction of further measures designed to regulate lawyer behaviour, such as a (self-assessed) quality assurance scheme[543] and a requirement for all publicly contracted criminal defence firms to obtain a quality practice accreditation.[544] Notably, those accreditation schemes relate largely to how the firm operates as opposed to the quality of advice given and provide an example of government commitment to management of criminal defence services rather than the quality of access to justice. These issues provide additional evidence of the way in which neoliberal politics adapts to crisis in that the Coalition government's professed need to promote austerity measures encouraged the executive to adopt policies that placed even greater reliance on market-based practices rather than traditional legal values.

[542] Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 6
[543] See 'Quality Assurance Scheme for Advocates' <http://www.qasa.org.uk/> accessed on 29 December 2014.
[544] See 'Specialist Quality Mark' (2014) <http://www.sqm.uk.com/> accessed on 29 December 2014.

The latest legislation to alter the terms of publicly funded representation is the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO').[545] So far as criminal legal aid is concerned, Section 17(2) re-states the Widgery criteria to be considered when determining the interests of justice test (subject to a power of amendment conferred on the Lord Chancellor) and Section 21 allows regulations to be made in relation to means testing. The Coalition government expressed a desire, through LASPO, to reduce criminal legal aid expenditure by eight per cent between 2009/10 and 2014/15.[546] In fact, the amendments are reducing criminal legal aid fees by a stated 17.5 per cent over two years, along with reduced police station fixed fees.[547] This led Justice to accuse the government of focussing too much on inputs (funds) rather than outputs (justice).[548] While the Ministry of Justice asserted that since the inception of the legal aid scheme it "has expanded beyond its original intentions,"[549] Smith argued that its scope was drafted widely on purpose.[550] The government's primary concern was therefore how to restrain legal aid expenditure. It argued that it was legitimate to do so on the basis that the system of publicly funded representation had grown beyond its core aims, but the government did not

[545] The provisions of LASPO have had a profound effect on civil legal aid provision and the provisions relating to criminal legal aid were less far reaching. The controversial proposal to introduce means testing for police station matters was abandoned (Baksi C, 'Means-testing Plan Abandoned' (2012) (2 February) Law Society Gazette 2).
[546] Baksi C, 'Labour Would 'Rebalance' Justice System' (2012)(3 May) Law Society Gazette 3
[547] Ministry of Justice. 'Transforming Legal Aid - Next Steps: Government Response'(2014) <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps> accessed on 14 April 2014). The need to make cuts to this extent is questioned by lawyers and economists, who note a general decline in legal aid expenditure due to a number of factors, such as the widespread use of out of court disposals (Gazette Newsdesk, 'Research Bolsters Case Against Cuts' (2014)(13 January) Law Society Gazette 1)
[548] Smith, R 'Legal Aid, Sentencing and Punishment of Offenders Bill.' Second Reading Debate. Briefing on Legal Aid Provisions' (Justice, 2011)
[549] Ministry of Justice, *Legal Aid Reform: Scope Changes. Impact Assessment* (Ministry of Justice, 2010)
[550] Smith, R *Proposals for the Reform of Legal Aid in England and Wales. Response* (Justice. February 2011)

articulate what those aims were. In this way, the government was able to justify restricting access to legal aid while also maintaining the appearance of legitimacy.

Although the introduction of BVT was repeatedly postponed because the Ministry of Justice was "persuaded that the scheme proposed was unlikely to lead to the efficient, re-structured legal services market envisaged by Lord Carter,"[551] it has stated that the department remains committed to a scheme which would see contracts with larger scope being offered to a smaller number of firms, and thus proposes a more rigorous form of tendering.[552] This was indeed the model proposed in 2013, and a similar model is now being implemented in the face of staunch criticism, albeit without a price competition element. Under this scheme, firms are required to bid for separate contracts to perform 'own' and duty solicitor work, there will be a limited number of contracts offered per county, and there will be fee cuts and requirements to provide wider area coverage.[553] The High Court initially declared the consultation process unlawful but the government, after a further brief period of consultation, continued its position in relation to legal aid contracts.[554] In December 2014, the process was made the subject of a stay by the High Court pending further judicial review[555] but it is now being implemented.

Further cuts in the legal aid budget and implementation of the new contracting scheme will reduce the number of criminal defence firms. This would have a

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[551] Ministry of Justice, *Restructuring the Delivery of Criminal Defence Services* (Ministry of Justice, 2010); 3
[552] Ministry of Justice, *Restructuring the Delivery of Criminal Defence Services* (Ministry of Justice, 2010)
[553] Ministry of Justice. 'Transforming Legal Aid - Next Steps: Government Response' (2014) <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps> accessed on 14 April 2014.
[554] *The Queen on the application of London Criminal Courts Solicitors Association and Criminal Law Solicitors Association -v -The Lord Chancellor* [2014] EWHC 3020 (Admin)
[555] The Law Society. 'Legal Aid Crime Duty Contracts Process to be Suspended ' (2014) <http://www.lawsociety.org.uk/news/press-releases/legal-aid-crime-duty-contracts-process-to-be-suspended/> accessed on 29 December 2014.

negative effect on client choice,[556] which is an important check to encourage a good level of service through competition.[557] The Ministry of Justice acknowledges that firms are already asserting that criminal legal aid work is unsustainable and note that "we might therefore expect that suppliers would start to leave the market in significant number. We cannot predict how quickly this might happen, or the impact on the provision of services."[558] The effects of ongoing changes remain to be seen.

Clearly the economic crisis requires the government to appropriately manage the resources available to fund public services, but those decisions must not be made on the basis of "flawed assumptions"[559] about the necessity and operation of publicly funded representation. The Legal Aid Practitioners Group argues that the government fails to recognise that "good legal advice actually saves the state money."[560] It seems that the Criminal Law Solicitors Association may be correct when it argues that "the Government is looking to find ever quicker and cheaper ways of convicting citizens rather than maintaining a just system".[561] Such observations highlight governmental preference for efficiency over due process.

The Coalition government appears therefore to have continued the move away from due process, welfarist principles of legal aid provision in favour of contracting legal aid via managerial techniques, which was justified by a distrust of lawyer

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[556] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011
[557] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011
[558] Ministry of Justice, *Restructuring the Delivery of Criminal Defence Services* (Ministry of Justice, 2010); 4
[559] Storer, C *Legal Aid Practitioners Group Response to the Ministry of Justice Consultation: Proposals for the Reform of Legal Aid in England and Wales* (Legal Aid Practitioners Group, 2011); 4
[560] Storer, C *Legal Aid Practitioners Group Response to the Ministry of Justice Consultation: Proposals for the Reform of Legal Aid in England and Wales* (Legal Aid Practitioners Group, 2011); 6
[561] Criminal Law Solicitors Association, 'Response to the Ministry of Justice Consultation paper " The Award of Costs from Central Funds"; 14

behaviour and austerity drives. While I have referred to particular points at which neoliberal approaches to legal aid have exhibited a distrust of lawyer behaviour, this topic merits detailed examination in its own right.

Changes to legal aid and lawyer behaviour

Traditionally, the professional paradigm of legal practice embodied a privileged position of civic morality based on access to justice and "universalistic notions of service".[562] However, Newman observes that, in UK governments after the 1960s, "in contrast to the previous sympathetic professional portrayal, there emerged a more judgemental one".[563] This, coupled with the rise of consumerist culture from the 1970s, transformed 'citizens' into customers and challenged the meaning of 'service'.[564] As a result the "delivery of 'justice' is recast as a disaggregated assortment of 'skills' and 'services'".[565] Sommerlad and Wall's study attributes lawyers' need to 'cut corners' to the rise of consumerist culture,[566] which resonates with comments made by the participants in my research.

Young notes that the government became "determined to resist the arguments for any further colonisation of the magistrates' courts by publicly-funded lawyers".[567] As a result, the government introduced fixed fees in magistrates' court

[562] Sommerlad H, 'Criminal Legal Aid Reforms and the Restructuring of Legal Professionalism' in Young, R. and Wall, D (eds), *Access to Criminal Legal Aid: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 293
[563] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013); 13
[564] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013); 87
[565] Sommerlad H, 'Criminal Legal Aid Reforms and the Restructuring of Legal Professionalism' in Young, R. and Wall, D (eds), *Access to Criminal Legal Aid: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 23
[566] Sommerlad, H and Wall, D *Legally Aided Clients and their Solicitors* (The Law Society Research Study 34, 1999)
[567] Young R, 'Will Widgery do? Court Clerks, Discretion and the Determination of Legal Aid Applications' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 140

proceedings but this did not produce the expected degree of cost control.[568] Bridges did however find that magistrates' court costs in relation to Representation Orders were stable between 1993 and 2001.[569] At the same time, lawyers were accused of extending the time that cases took to be dealt with in order to cope with low annual increases in remuneration rates.[570] Lord Bingham stated, "soaring costs have provoked an unprecedented level of debate about the merits and demerits of existing arrangements and the form which future arrangements should take."[571]

According to Goriely, contemporary "government policy towards legal aid appeared to be driven solely by the exigency of cost control."[572] Thus, in the mid-1990s, the supplier induced demand theory became popular in policy circles, not least in relation to criminal legal aid provision.[573] The theory suggests that lawyers construct the need for legal services by providing unnecessary services,[574] and thereby aim to achieve a particular target income each year.[575] Bridges[576] and Goriely[577] note however that the supplier induced demand hypothesis is unproven,

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[568] Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).
[569] Cape, E and Moorhead, R, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre, 2005)
[570] Cape, E and Moorhead, R, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre, 2005)
[571] Young R and Wall D, *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); v
[572] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (ed), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 51
[573] Goriely notes that this theory "was first put into the political arena by a right-wing think tank…they argued that professionals behave as economically rational individuals by seeking to maximise their income." (Goriely T, 'Revisiting the Debate Over Criminal Legal Aid Delivery Models: Viewing International Experience from a British Perspective' (1998) 5(1) *International Journal of the Legal Profession* 7; 14)
[574] Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds*), Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).
[575] Cape, E and Moorhead, R, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre, 2005)
[576] Bridges L, 'The Reform of Criminal Legal Aid' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)
[577] Goriely T, 'Revisiting the Debate Over Criminal Legal Aid Delivery Models: Viewing International Experience from a British Perspective' (1998) 5(1) *International Journal of the Legal Profession* 7

while Tata and Stephen note that there "has been relatively little published direct empirical examination of the effects of standard fees for summary work."[578] Theories of this nature are consistent with the above-mentioned change in attitude towards public service professionals since the 1960s. As Le Grand notes, during this period neoliberal principles expressed concern about the inefficient, wasteful nature of public service institutions as those working within the apparatus of the welfare state "are no longer assumed to be...public spirited altruists (knights)...instead they are all considered to be in one way or another self-interested (knaves)."[579]

Gray, Fenn and Rickman's important research, conducted between 1988 and 1994, suggested that solicitors reacted to fee changes by reducing the amount of work they did on cases that would clearly not exceed the threshold for a lower standard fee.[580] They also found that firms were splitting case fees where there was more than one charge alleged so that two claims could be made.[581] However, the evidence did not support the contention that solicitors would increase core costs to ensure that cases went beyond the standard fee categories.[582] Stephen, Fazio and Tata found that following the reintroduction of standard fees, solicitors were putting

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[578] Tata, C and Stephen, F. ''Swings and Roundabouts': Do Changes to the Structure of Legal Aid Remuneration Make a Real Difference to Criminal Case Management and Case Outcomes?'http://staff.law.strath.ac.uk/staff/cyrus_tata/public/Swingsper cent20andper cent20Roundaboutsper cent20Draft106.pdf accessed on 10 April 2012; 2. See also Tata, C and Stephen, F. 'The Impact of Fixed Payments: the effect on case management, case trajectories, and 'quality' in criminal defence work' http://strathprints.strath.ac.uk/5420/2/impact_of_fixed_payments_Tata_and_Stephen.pdf accessed on 10 April 2012.

[579] Le Grand J, 'Knights, Knaves or Pawns? Human Behaviour and Social Policy' (1997) 26(2) *Journal of Social Policy* 149; 149

[580] Gray, A, Fenn P and Rickman, N 'An Empirical Analysis of Standard Fees in Magistrates' Court Criminal Cases' (LCD Research Series, 1999).

[581] See also Goriely T, 'Revisiting the debate over criminal legal aid delivery models: viewing international experience from a British perspective' (1998) 5(1) *International Journal of the Legal Profession* 7.

[582] Gray, A, Fenn P and Rickman, N 'An Empirical Analysis of Standard Fees in Magistrates' Court Criminal Cases' (LCD Research Series, 1999). Cape and Moorhead note however that as the research only covered the first year of the fixed fee payment scheme, the finding could be attributed to the "bedding down" of the system, and are therefore sceptical about the claims made (Cape, E and Moorhead, R, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre, 2005); 12)

less effort into conducting cases and were reducing "expenditure on those activities which are incorporated in the core payment of the standard fee and increasing activities which are outside the core costs and are separately compensated."[583] This behaviour allowed lawyers to increase the volume of cases taken, thereby demonstrating economically rational behaviour. [584]

Young and Wall describe the supplier induced demand theory as an "overly-simplistic model of human behaviour, in which actions are driven only by self-interest, and which pays no regard to the social and institutional context shaping and constraining case-related decisions."[585] Instead, Cape and Moorhead identify several non-supplier based factors which contribute to rising costs; increased case complexity, increased case length, heavy reliance on counsel, non-standard fee cases, changes in defence practice (such as more frequent requests for advance disclosure since the 1990s), prosecutorial decisions and generous approaches to the merits test.[586] Newman, while critical of lawyer behaviour, also notes increased complexity in summary criminal proceedings, justifying greater levels of representation.[587] As is discussed in chapter five, this appears to have increased the legalisation of proceedings.

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[583] Stephen, F. Fazio, G and Tata C, 'Incentives, Criminal Defence Lawyers and Plea Bargaining' (2008) 28(3) *International Review of Law and Economics* 212; 213

[584]Stephen, F. Fazio, G and Tata C, 'Incentives, Criminal Defence Lawyers and Plea Bargaining' (2008) 28(3) *International Review of Law and Economics* 212; 213. See also Tata, C and Stephen, F. 'The Impact of Fixed Payments: The Effect on Case Management, Case Trajectories, and 'Quality' in Criminal Defence Work' <http://strathprints.strath.ac.uk/5420/2/impact_of_fixed_payments_Tata_and_Stephen.pdf> accessed on 10 April 2012.

[585] Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 18. Cape and Moorhead go further, stating that the model suggests that a large number of lawyers would be prepared to act in a quasi-fraudulent manner to secure income. (Cape, E and Moorhead, R, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre, 2005))

[586] Cape, E and Moorhead, R*, Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre, 2005)

[587] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).

Cape and Moorhead note that "a significant layer of difficulty is added to the criminal justice field by the level and frequency of reform, which means that the ability to isolate particular causes of cost increases is limited."[588] However, they later report that a cost increase resulting from the duty solicitor at court scheme may have been supplier-led as solicitors chose "the most cost-efficient mix of representation order and 'duty solicitor of choice' claims."[589] Despite this, profit costs only rose in line with RPI and at a lower rate than GDP until the introduction of the contracting scheme (described below), after which there was an initial increase in costs which then levelled out, contrary to the supplier induced demand hypothesis.[590]

Both lawyers and the Legal Services Research Centre have raised concerns that frequent changes to legal aid are causing solicitors to leave the profession;[591] concerns about attracting qualifying solicitors; and concerns about the quality of work[592] provided when there is no incentive to spend a significant amount of time on individual cases. Tata and Stephen found that solicitors believed remuneration

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[588] Cape, E and Moorhead, R, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre, 2005); 3

[589] Cape, E and Moorhead, R, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre, 2005); 39

[590] Cape, E and Moorhead, R, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre, 2005)

[591] See, for example, Leech, S. 'Solicitors 'deserting' legal aid' (2006) <www.http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/6115514.stm> accessed on 20 February 2012.

[592] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011. Similar comments about remuneration and low status had been noted by McConville *et al* (McConville M, Hodgson J, Bridges L and Pavlovic, A *Standing Accused. The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford University Press 1994)) and Grindley (Grindley, P *Legal Aid Reforms Proposed by the Carter Report - Analysis and Commentary* (LECG Corporation, 2006)). It is however important to note that, even in the 1970s, there were concerns that the provision of a lawyer would not necessarily protect defendants from unfair treatment (Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge, 1976), Carlen P, *Magistrates' Justice* (Martin Robertson 1976), McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981))

changes meant that they were spending less time on face to face contact with clients, and that this caused defence work to be less effective.[593] This approach is coupled with an institutional desire for efficiency which forces defendants to enter pleas at the first hearing regardless of whether or not legal aid has been granted.[594] This means that solicitors are pressurised into dealing with cases in routinised ways,[595] which is facilitated by the professional networks already used to conduct cases at speed, as set out in chapter two. McConville *et al*. found that such problems existed in the early 1990s,[596] and they are likely to have worsened given that further drives for efficiency and cost cutting have occurred since that time. These problems were evident in my research, as is discussed in the following chapters.

Concerns about quality of representation become acute when one considers that clients tend to assume a passive role in the lawyer-client relationship,[597] as a result of the fact that most defendants have "relatively weak social, educational and economic resources."[598] Such passivity is encouraged by workgroup networks that

[593]Tata, C and Stephen, F. ''Swings and Roundabouts': Do Changes to the Structure of Legal Aid Remuneration Make a Real Difference to Criminal Case Management and Case Outcomes?' <http://staff.law.strath.ac.uk/staff/cyrus_tata/public/Swingsper cent20andper cent20Roundaboutsper cent20Draft106.pdf> accessed on 10 April 2012. See also Tata, C and Stephen, F. 'The Impact of Fixed Payments: The Effect on Case Management, Case Trajectories, and 'Quality' in Criminal Defence Work' <http://strathprints.strath.ac.uk/5420/2/impact_of_fixed_payments_Tata_and_Stephen.pdf> accessed on 10 April 2012.

[594] Riddle H, 'The Stop Delaying Justice! Initiative' (2012) (19 January) Law Society Gazette.

[595] Wall D, 'Keyholders to Criminal Justice? Solicitors and Applications for Criminal Legal Aid' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)

[596] McConville M, Hodgson J, Bridges L and Pavlovic A, and others, *Standing Accused. The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford University Press 1994).

[597] Tata, C. Goriely, T. Duff, P. Henry, A and Sherr, A. 'Does Mode of Delivery Make a Difference to Criminal Case Outcomes and Clients' Satisfaction? The Public Defence Solicitor Experiment' (2004) (Feb) *Criminal Law Review* 120.

[598] Tata, C and Stephen, F. 'The Impact of Fixed Payments: The Effect on Case Management, Case Trajectories, and 'Quality' in Criminal Defence Work' <http://strathprints.strath.ac.uk/5420/2/impact_of_fixed_payments_Tata_and_Stephen.pdf> accessed on 10 April 2012; 12

exacerbate the marginalisation of defendants. Tata and Stephen further, and significantly, note:

> "By flatly denying that financial arrangements influence the overall quality of defence work, the profession places itself in a bind which government can easily exploit. Policy officials know that the profession will not ever concede publicly that there may have been a decline in the effectiveness of defence work."[599]

As discussed above, in line with the neoliberal preference for market-based approaches to public services, there has been a move to market-based efficiency. The criminal justice system is not however a rational market.[600] In this context, the National Audit Office noted in 2009 that the former Legal Services Commission was unable to understand its supplier base,[601] which left suppliers feeling "alienated"[602] and "fragmented and disillusioned."[603] Steele and Seargent further note that "the need for legal advice is an imprecise concept, making it difficult to quantify the number of potential users and their level of need."[604] The LAA however operates in a monopsonistic[605] way which enables it to try and control the market via price setting

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[599] Tata, C and Stephen, F. 'The Impact of Fixed Payments: The Effect on Case Management, Case Trajectories, and 'Quality' in Criminal Defence Work' <http://strathprints.strath.ac.uk/5420/2/impact_of_fixed_payments_Tata_and_Stephen.pdf> accessed on 10 April 2012; 21. In fact, the participants in my research did appear to acknowledge this.

[600] Edwards A, 'Will Defendants Survive Changes to Criminal Legal Aid?' (2011) 86 *Criminal Justice Matters.*

[601] National Audit Office 'C&AG Report on Accounts: Community Legal Service Fund and Criminal Defence Service accounts 2008-09' http://www.nao.org.uk/publications/0809/lsc_accounts.aspx accessed on 24 February 2012.

[602] Hynes S and Robins J, *The Justice Gap. Whatever happened to legal aid?* (Legal Action Group 2009); 1

[603] Law Society. 'Access to Justice Review' (2010) <http://www.lawsociety.org.uk/new/documents/2010/access-to-justice-review.pdf> accessed on 15 August 2012; 3

[604] Steele J and Seargent J, *Access to Legal Services. The Contribution of Alternative Approaches* (Policy Studies Institute 1999); 67

[605] This situation arises when there is a single buyer of services (the Legal Aid Agency) and many suppliers, which enables the buyer to have a significant degree of control over the market (Hynes S and Robins J, *The Justice Gap. Whatever Happened to Legal Aid?* (Legal Action Group 2009)).

and work volume control.[606] This means that "the interests of defendants have rarely been uppermost in the minds of those who, at a macro and micro level, have been responsible for taking decisions on legal aid."[607] As Grindley notes, there "can never be a fully free market when the government remains the sole procurer of services, where the client is likely to be ill-informed about the quality of the service and is not paying directly."[608]

It is clear that neoliberal polices focused on managerialism and efficiency have made governments sceptical about the propriety of lawyer behaviour. Paradoxically, the government also recognised that the presence of lawyers in magistrates' courts facilitates the efficient administration of criminal justice. The government therefore remains, to an extent, reliant on lawyers' presence in summary criminal proceedings to achieve its aim of efficient case progression. This paradox is also manifest in the processes of obtaining legally aided representation, which serve indirectly to marginalise defendants further.

Legal aid, bureaucracy and marginalisation

While applications for legal aid are written as if they are completed by defendants, it is common for applications to be filled in by solicitors[609] who were adept at completing such applications in ways which would try to second guess

[606] Hynes S and Robins J, *The Justice Gap. Whatever happened to legal aid?* (Legal Action Group 2009).
[607] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 52
[608] Grindley, P *Legal Aid Reforms Proposed by the Carter Report - Analysis and Commentary* (LECG Corporation, 2006); 9
[609] Wilcox, A. and Young, R *Understanding the Interests of Justice. A Study of Discretion in the Determination of Applications for Representation Orders in Magistrates' Courts. Report to the Legal Services Commission* (Centre for Criminology, University of Oxford, 2005)

magistrates' decisions.[610] Wall found that "only a handful of the 5,500 applications for criminal legal aid studied by Wall and Wood, and the 1,201 examined by Young *et al*, were completed by clients themselves."[611] Indeed, the Administrative Court has noted that the application process for legal aid in criminal proceedings is, for defendants and solicitors alike, "unnecessarily complex and non-user friendly."[612] This indicates the way in which bureaucratic procedures can increase the marginalisation of defendants.

Applications for legal aid were, until the beginning of the twenty-first century, completed and determined immediately by a magistrates' court legal adviser. So far as the decision-making process was concerned, Justice commented in 1971 that "we have little doubt that the single most important element in decisions about representation is the approach of the clerk of the court to the unrepresented defendant."[613] Similarly, Young noted that clerks were given broad discretion when determining whether to grant legal aid,[614] and he suggests that ensuring court efficiency influenced the frequent decisions to allow the application.[615] High grant

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[610] Wall D, 'Keyholders to Criminal Justice? Solicitors and Applications for Criminal Legal Aid' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)

[611] Wall D, 'Keyholders to Criminal Justice? Solicitors and Applications for Criminal Legal Aid' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 117.

[612] *Jakub Stopyra –and- District Court of Lublin, Poland, Stopyra –and- The Regional Court of Ostoleka, Poland, Debreceni –and- Hajdu-Bihar County Court, Hungary* [2012] EWHC 1787 (Admin); para. 39

[613] Justice, *The Unrepresented Defendant in Magistrates' Courts* (British Section of the International Cmssn of Jurists, 1971); 41

[614] Young R, 'Will Widgery do? Court Clerks, Discretion and the Determination of Legal Aid Applications' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996). See also Young R, 'The Merits of Legal Aid in the Magistrates' Courts' (1993) (May) *Criminal Law Review* 336.

[615] Young found that clerks were prepared to admit to 'sometimes' being influenced by a desire for courtroom efficiency (Young R, 'Will Widgery do? Court Clerks, Discretion and the Determination of Legal Aid Applications' in Young, R. and Wall, D (Eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)). Bridges similarly notes that "courts have their own bureaucratic interest in ensuring high levels of legal representation as this assists in the administrative processing of their own case-loads" (Bridges L, 'The Reform of Criminal Legal Aid' in Young, R. and Wall, D

rates relieved the clerk of some of the duties that must be exercised towards unrepresented defendants and allowed for more out of court negotiation between the prosecution and defence, thereby saving court time.[616] Thus the presence of lawyers, as members of the professional network, assisted the smooth operation of the courtroom workgroup, but government distrust of professional discretion in public services may have been fuelled by high legal aid grant rates.

The government's concerns about the rising cost of criminal defence services led to the removal of the clerks' powers to grant legal aid and the reintroduction of means testing, firstly in the magistrates' court and later in Crown court proceedings.[617] Lawyers argued that the Legal Services Commission failed to properly pilot and evaluate the re-introduction of means testing in the magistrates' courts, which resulted in delay and uncertainty in terms of knowing if and when legal aid had been granted.[618] That delay and uncertainty contributed to the marginalisation of defendants who were unable to play an active role in the process.

In addition, Wilcox and Young note that, as a consequence of efficiency drives in summary proceedings, there is often insufficient time to allow legal aid applications to be processed between arrest, charge and first court appearance.[619]

(eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 282)

[616] Young R, 'Will Widgery do? Court Clerks, Discretion and the Determination of Legal Aid Applications' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996). As is noted by the British Columbia Civil Liberties Association, "unrepresented accused consume significant additional time and resources…Indeed, the efficient functioning of our criminal justice system depends on informal plea discussions that regularly go on between Crown and defence." Tilley, K and Eby, D *Justice Denied. The Causes of BC's Criminal Justice System Crisis* (BC Civil Liberties Association, 2012); 21, 22. These issues are discussed in both the preceding and the data analysis chapters.

[617] Provisions which allowed the reintroduction of means testing were made via the Criminal Defence Service Act 2006, which amended the Access to Justice Act 1999.

[618] Merriam, J. Shaw, R and Morgan, R 'Criminal Law Solicitor's Association letter to the LSC' (2009).

[619] Wilcox, A. and Young, R *Understanding the Interests of Justice. A Study of Discretion in the Determination of Applications for Representation Orders in Magistrates' Courts. Report to the Legal Services Commission* (Centre for Criminology, University of Oxford, 2005)

Applications for legal aid are now submitted to the Legal Aid Agency administration centres,[620] along with numerous documents,[621] and processed thereafter. The former LSC came under serious criticism for delay in processing applications, which left people unrepresented in serious cases.[622] As District judge Evans commented, "the LSC might be protecting its budget (but the administrative costs of processing and then rejecting these applications are not inconsequential) but more importantly it is doing so to the obvious detriment of other budgets."[623] These issues demonstrate how the desire to manage legal aid expenditure has inadvertently exacerbated the marginalisation of defendants from the process of summary criminal justice by causing greater delay and uncertainty.

Solicitors interviewed by Kemp argued "that the administrative requirements of the means test could be too onerous for some people and this could have the unintended consequences of restricting access for eligible applicants, particularly those who are vulnerable."[624] Kemp further found that those who are self-employed particularly struggled to obtain legal aid due to the burdensome requirements about

[620] Applications made in Kent are sent to the Legal Aid Agency team in Birmingham.
[621] Wage slips, previous convictions, charge sheets, and bank statements and, for self-employed applicants, full tax returns and accounts.
[622] Baksi, C and Hyde, J, 'LSC Debt Collection Tactics Slammed' (2011) (16 March) Law Society Gazette 1. The administration centres have also been criticised for delay in processing applications (Baksi C, 'Djanogly Urged to Ease Legal Aid Backlog' (2011) (23 June) Law Society Gazette 3). See *Jakub Stopyra –and- District Court of Lublin, Poland, Stopyra –and- The Regional Court of Ostoleka, Poland, Debreceni –and- Hajdu-Bihar County Court, Hungary* [2012] EWHC 1787 (Admin).
[623] *Jakub Stopyra –and- District Court of Lublin, Poland, Stopyra –and- The Regional Court of Ostoleka, Poland, Debreceni –and- Hajdu-Bihar County Court, Hungary* [2012] EWHC 1787 (Admin); para 5. The system by which legal aid applications are processed has not, in practice changed since the establishment of the Legal Aid Agency. Furthermore, the Supreme Court has recognised that the triage service provided by the duty solicitor is often insufficient (*Lukazewski v The District Court in Torun, Poland* [2012] UKSC 20).
[624] Mental illness, learning difficulty and language barriers seemed to be particular problems (Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011; 6)

the provision of evidence in support of an application for funding.[625] As will be seen below, this finding was supported by comments made within my primary research. There is also concern that the funding thresholds for criminal legal aid are set too high, representing a "gulf between the reality of the new test and the image of it presented by speakers during parliamentary debates."[626] The Criminal Law Solicitors Association note that "75 per cent of the working population…are not financially eligible for Legal Aid in the Magistrates' Court."[627]

Furthermore, the transfer of the decision-making process from the court to the administrative branch of summary proceedings contradicts Rushcliffe's original vision of how legal aid should be administered, and is subject to little performance monitoring or supervision.[628] This is of particular concern because

> "Administrative staff are not as well placed as the court-based legal advisers to assess when a case is likely to involve legal complexity or result in a custodial outcome."[629]

Moreover, such administrative staff do not operate in the courtroom on a daily basis, which means that they do not form part of the ordinary courtroom workgroup and are less likely to be concerned about maintaining co-operative relationships than court clerks, who are likely to regard co-operation as beneficial to the court process. Administrative decision-making is also likely to increase marginalisation

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[625] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011
[626] Kenway, P 'Means-testing in the Magistrates Court: Is This Really What Parliament Intended?' (New Policy Institute, 2006); 2
[627] Criminal Law Solicitors Association, 'Response to the Ministry of Justice Consultation paper "The Award of Costs from Central Funds"; 7
[628] Young R and Wilcox A, 'The Merits of Legal Aid in the Magistrates' Courts Revisited' (2007) (February) *Criminal Law Review* 109.
[629] Young R and Wilcox A, 'The Merits of Legal Aid in the Magistrates' Courts Revisited' (2007)(February) *Criminal Law Review* 109; 117

experienced by defendants as legal aid becomes harder to obtain while the complexity of proceedings increases.

Despite the reintroduction of means testing in 2008, Kemp notes that by 2010 "no research has examined the impact of the change on defendants accessing legal representation"[630] in magistrates' courts. Justice was concerned that the re-introduction of means testing may "provide a perverse incentive for innocent defendants to plead guilty to avoid the financial cost of a trial."[631] Lawyers in Kent described the system as discriminatory, unfair and unworkable.[632] Lawyer led campaign groups felt that the reintroduction of means testing placed considerable burdens on defence solicitors, who "were expected to bear the cost of administering the scheme" in assisting applicants to complete the forms, gather evidence of means and liaise between the legal aid body and the client.[633] This demonstrates that in fact governments remain, to an extent, reliant on lawyers to ensure the system continues to operate and thereby provides at least a veneer of legitimacy. These issues are examined further in chapter six.

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[630] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010)accessed 12 December 2011; 16

[631] Justice, 'Crown Court Means Testing - JUSTICE response ' <http://www.justice.org.uk/resources.php/198/crown-court-means-testing-justice-response> accessed on 10 December 2011; 2.

[632] Baksi, C 'Abolish 'Unfair' Means Testing, say Criminal Lawyers' (2012) <www.lawgazette.co.uk/news/abolish-unfair-means-testing-say-criminal-lawyers> accessed on 11 October 2012. Kemp notes however that the re-introduction of means testing in the magistrates' court delivered "annual savings of £35 million during the first two years of operation." (Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011; 69)

[633] Hynes S and Robins J, *The Justice Gap. Whatever happened to legal aid?* (Legal Action Group 2009); 118 Indeed, Lord Justice Burnton stated that no one could fail to be aware of "the very serious financial pressures that cuts in legal aid have caused barristers and solicitors alike." (Baksi C, 'Committal Fee Change Lawful' (2012)(5 April) Law Society Gazette 2)

Conclusion

The present system of publicly funded representation developed throughout the last half of the twentieth century as initial concerns about the appearance of legitimacy and, later, welfarist approaches to government increased access to justice. As liberal welfarism became concerned to promote individual rights, due process in the criminal justice system and the provision of publicly funded representation became increasingly important. Further, political crises in the early years of neoliberal government meant that legal aid was promoted to legitimise state processes and enhance individualisation.

Subsequently, neoliberal governments adopted management-oriented approaches as a result of a need to save money by reducing welfare expenditure, particularly after New Labour came to power. The preference for managerialism and distrust of public service professionals led governments to be concerned that lawyers were simply exploiting the system and so further measures were introduced to incentivise efficient working practices and cut costs. These measures have undermined access to justice, reduced the quality of that access which does exist and caused providers to feel resentment towards funding processes. These problems appear to have indirectly increased the marginalisation experienced by defendants. It is therefore possible to see how neoliberal governments' attitudes to publicly funded representation have resulted in a complex and fragile system from which defendants are increasingly marginalised.

This, and the preceding chapters have demonstrated the complex nature of neoliberalism in summary criminal proceedings. I now turn to an empirical interrogation of those issues.

Chapter 4: Efficiency and Marginalisation in Summary Criminal Proceedings

Introduction

The desire to increase efficiency in magistrates' courts was discussed in detail in chapters one and two. In this chapter, I will consider some of the issues that arose from the primary research in relation to demands for efficiency and how such demands have affected access to justice in terms of the ability of the defendant to participate effectively in the proceedings.

As previously described, the demand for efficiency reflects the decline in welfare approaches to criminal justice[634] and affects the way that prosecutors make decisions about how the case should proceed, the way that magistrates and clerks manage the throughput of cases as they enter the courtroom and the defence advocates' role, which is to represent the clients' wishes about how a case progresses within the boundaries of the law. The effect could either facilitate or hinder access to justice for defendants, or the effects could be positive in some ways but negative in others. Ashworth and Redmayne have noted that policies which dictate procedures designed to implement government objectives "do not necessarily determine treatment since the working practices of officials are what suspects and defendants actually experience. These practices may be more or less faithful to the rules."[635]

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[634] Newburn, T and Sparks, R, 'Criminal Justice and Political Cultures' in Newburn, T and Sparks, R (ed), *Criminal Justice and Political Cultures* (Willan Publishing 2004). As such, even though "a major role of the state is as guarantor of the rights of all those involved," (Zander M, *Cases and Materials on the English Legal System* (Oxford University Press 2007); 50) criminal justice policies "seem to make a virtue of avoiding or minimising human rights protections" (Zander M, *Cases and Materials on the English Legal System* (Oxford University Press 2007); 57)

[635] Ashworth, A and Redmayne, M, *The Criminal Process* (3rd edn, Oxford University Press 2005); 8

I have identified several ways in which efficiency drives appear to have manifested themselves in summary criminal proceedings.[636] The most significant appear to be a continued desire to process cases quickly and to reduce the number of court hearings per case, moves towards standardisation and an apparent increase in the use of district judges. I will discuss each of these issues in turn, and consider whether they appear to enable the defendant's effective participation in the proceedings. Given that I have not interviewed defendants themselves, I intend to extract from the observations and interviews areas in which advocates feel their work has been affected and then consider the potential effect on the ability of defendants to participate in the proceedings.

I suggest that external demands for efficiency disturbed the workgroups in the courtroom. Governments imposed policies designed to alter the conduct of court business, which has always operated with high degrees of co-operation among professional personnel. High degrees of co-operation tend to marginalise defendants from active participation in the proceedings.[637] While the introduction of measures designed to improve efficiency caused disruption to the way that cases proceed, the culture of the workgroup appears to have adapted to accommodate the demands of initiatives such as CJ: SSS, which could further marginalise defendants. As work patterns are standardised in order to process cases as quickly as possible, the individual circumstances of defendants become less relevant.[638] I will therefore

[636] It is however appropriate to note here that "there is no officially published measure of criminal justice productivity in England and Wales" (E. Solomon, C. Eades, R. Garside and M. Rutherford, *Ten Years of Criminal Justice under Labour: An Independent Audit* (Centre for Crime and Justice Studies , 2007); 10)
[637] Carlen P, *Magistrates' Justice* (Martin Robertson 1976). See also Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203
[638] Howard, G and Freilich, J, 'Durkheim's Comparative Model and Criminal Justice Theory' in Duffee, D and Maguire, E (ed), *Criminal Justice Theory: Explaining the Nature and Behaviour of Criminal Justice* (Routledge 2007).

consider how and why external pressures can affect the behaviour of the courtroom workgroup.

The findings generally support the idea that the criminal justice process has become increasingly subject to managerialist techniques of case progression, and highlight how some initiatives have affected summary criminal proceedings. I conclude by noting a surprising degree of cohesion and stability among court actors in east Kent even though there is also evidence to support the notion that different courtroom workgroups actors prioritise and approach different goals in distinct ways.[639] However, one element of the research also suggests that, when they feel that their hand is inappropriately forced, defence advocates will prefer solidarity with their clients to solidarity with their workgroup. I found that increased demands for efficiency may have further marginalised defendants, but defence advocates will ultimately, albeit rarely, attempt to uphold defendants' rights. In order to examine the reasons for this, I first consider court workgroup behaviour in general.

How efficiency drives affect culture

As is noted in chapter two, the courtroom operates as a field [640] in which professionals compromise in order to achieve particular ends. As such, workgroups are likely to modify their behaviour to absorb sporadic attempts at reform.[641] This is likely to affect the way that defendants experience the proceedings given that they tend to assume a passive role in the lawyer/client relationship.[642] Despite evidence

[639] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203
[640] Bourdieu P, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 (July) *The Hastings Law Journal* 805; 816
[641] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203
[642] McConville M and others, *Standing Accused. The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford University Press 1994).

of socio-legal studies (discussed in chapter two) which confirmed that advocates acted in co-operative ways, governments remained concerned that defence lawyers were simply "obstructive, self-seeking service providers"[643] and were explicit about their desire to increase co-operation in the criminal justice system via various initiatives. I agree with Young's suggestion that the courtroom workgroup adapts to formal changes of law or policy and dilutes them in order to maintain the status quo,[644] but there appears to be little actual resistance to such changes.

When one of the primary aims of an initiative is to promote co-operation, it may mean that the interests of people beyond the immediate workgroup are minimised. If so, defendants' ability to participate in the proceedings may be reduced. Defence advocates tended to express the opinion that co-operation among advocates is important in order to maintain credibility with the court and CPS, and therefore be in a stronger position to negotiate.[645] Similarly, Newman found that lawyers regarded good relationships with prosecutors as beneficial to clients.[646] Questions then arise as to whether defendants wish to negotiate, whether the negotiations are in the defendants' interests and what other interests are being protected. This is likely to vary on a case by case basis and calls into question whether the use of negotiated outcomes assists speed and, if so, prioritises a desire for rapid case conclusion over defendant participation. Interviewee A acknowledged the difficulty of this position, saying that the defence advocates' role is not really to facilitate the proceedings yet there seems to be a lot of scope for discussion to find

[643] Faulkner D, 'Prospects for Progress in Penal Reform' (2007) 7(2) *Criminology and Criminal Justice* 135; 136
[644] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203
[645] See, for example, interview K.
[646] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013)

the best outcome even though "crime is not something that you can mediate."[647] Thus it seems that, in accordance with Carlen's[648] and, more recently, Young's[649] findings, the existence of professional compromise appears to remain a significant feature of summary criminal justice.

Despite the fact that both shared and differing goals exist among the workgroup – see chapter two – all parties do however have an interest in maintaining co-operative relationships[650] and dealing with cases expeditiously. It seems that relationships may become strained only at the occasional point at which shared and contrasting goals conflict. So, while defence advocates are prepared to co-operate with efficiency drives as long as they serve the purpose of maintaining co-operative relationships and dealing with cases expeditiously, when their particular goals are, they feel, unreasonably challenged they will employ specific legal provisions in order to place actor specific goals first – such as reliance on the burden and standard of proof in order to obtain full disclosure.[651] As such, the ultimate source of power lies in recourse to legal provisions which form the basis of the criminal justice system, as is discussed below. Those provisions may be invoked, among other reasons, to protect client interests, which also serves a business interest in maintaining a good reputation.

The comments made by my interviewees may illustrate that, when push comes to shove, due process is the most important expressive goal to defence solicitors at the cost of the instrumental goal of speed. This suggests a desire to

[647] Interview A; 8
[648] Carlen P, *Magistrates' Justice* (Martin Robertson 1976).
[649] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203
[650] See, for example, interview K
[651] See, for example, interview E

favour defendants' interests over workgroup interests, at least in theory. The need to maintain the self-conception of legal professionals[652] as service providers may also mean that advocates will behave in certain ways to maintain a particular image.[653] In other words, as Young says, the effort used to preserve established work techniques may indicate that they are highly valued.[654] This demonstrates the importance of particular goals in the maintenance of workgroup culture - even within the field itself. However, it is also reasonable to conclude, based on both my observations and experience, that those cases in which reliance is placed on strict legal provisions are comparatively small in number. Thus, the evidence suggests a high degree of acceptance and co-operation among advocates, while a refusal to co-operate is exercised only in extreme cases. This may be demonstrative of Young's opinion that interviews are more likely to uncover expressive as opposed to instrumental goals.[655] Notably, however, my interviewees discussed the importance of both expressive and instrumental goals, in that they acknowledged a need for efficiency and co-operation among court personnel, as well as a desire to favour solidarity with clients over the court when necessary. Thus, interviewees appeared to be alive to a number of issues, some of which did not necessarily reflect well on their behaviour.

All of the prosecutors interviewed[656] felt that there is a good deal of co-operation between defence advocates, the court and prosecutors. This appears to confirm that advocates tend to avoid antagonistic forms of behaviour. However,

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[652] Bourdieu P, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 (July) *The Hastings Law Journal* 805

[653] On this point, see, for example, Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013) and Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203

[654] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203; 220

[655] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203

[656] Interviews H, J, L, M, N, P, Q

there was a tendency to think that co-operation among advocates has always been good,[657] and that in fact the requirements of CJ: SSS antagonised those relationships because advocates felt that they were being unduly pressurised into premature decision making which challenged their professional standing in the workgroup and undermined co-operative relationships. Prosecutors experienced pressure from the court while pressure came from both the court and prosecutors for defence advocates. In order to combat those difficulties, advocates acknowledged that they had "probably fallen into, not deliberately, but accidentally, some sort of compromised way of working".[658] This supports Newburn and Sparks's view that policy is continuously negotiated by practitioners, which means "there are considerable variations in the ways that national policies are appropriated…for local use."[659]

It is important to note, at this juncture, the factor of local variation. Interviewees who had practised in London noted that there was less co-operation in the City as a result of the fact that advocates, as well as being arranged in an adversarial relationship, are less familiar with each other.[660] Most criminal defence firms in east Kent are relatively small; the largest employ approximately 8 advocates. This, along with the reasonably small geographical area in which they practise, may mean that advocates rarely exercise antagonistic behaviour as firms

[657] This is evidenced by Carlen P, *Magistrates' Justice* (Martin Robertson 1976) and Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976).
[658] Interview M; 8
[659] Newburn, T and Sparks, R, 'Criminal Justice and Political Cultures' in Newburn, T and Sparks, R (ed), *Criminal Justice and Political Cultures* (Willan Publishing 2004); 210
[660] See, for example, interviewees A and I.

compete with each other for clients and are keen to avoid being marginalised from local court culture.[661]

The socially situated knowledge of summary criminal proceedings appears to be based on a high degree of co-operation among advocates, and always has been.[662] External disruption, such as the introduction of policy designed to increase productivity, to those predictable patterns causes a degree of tension until the new material has been absorbed and, where the group feels it appropriate, adapted. Interviewee J, a prosecutor, was of the view that there had never been any problem with co-operation and then "the Criminal Procedure Rules came in and seemed to be ordering people to do this and do that and get down to the issues in the case but I think we pretty much got that anyway".[663] This interviewee described an initial period of disruption to stable work patterns followed by acceptance and adaptation. All of the above supports Young's view that external influences are likely to result in an initial period of uncertainty, followed by acceptance of the requirement to make changes.[664] This results in the establishment of amended norms for processing cases.[665] It is in the process of adaptation that marginalisation of defendants may arise or be exacerbated as workgroup patterns are renegotiated. As advocates adapt to and accommodate change via compromise, the interests of defendants are at risk of becoming side-lined because that renegotiation is conducted in the context of ensuring that networks remain stable and experience as little disruption as possible.

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[661] McEvoy K, 'What Did the Lawyers Do During the 'War'? Neutrality, Conflict and the Culture of Quietism' (2011) 74(3) *The Modern Law Review* 350.
[662] Carlen P, *Magistrates' Justice* (Martin Robertson 1976)
[663] Interview J; 11
[664] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203
[665] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 Common *Law World Review* 203

This means that marginalisation and othering occurs as a by-product to the need to be efficient as opposed to being an explicit aim of the workgroup.

Speed and reducing hearings

In 2008, Home Office Minister Jack Straw told the Magistrates' Association that CJ: SSS had produced significant benefits in terms of reducing the number of hearings per case and reducing paperwork.[666] In chapter six I discuss how the participants in my research felt that the magistrates' courts in east Kent are reluctant to adjourn proceedings in order for problems with obtaining publicly funded representation to be resolved, which means that defence advocates often conduct cases despite uncertainty about remuneration. While defence advocates bemoaned that situation, nearly half expressed the view that magistrates appeared to have no choice but to refuse applications to adjourn proceedings as a result of guidance contained in the provisions of CJ: SSS and Stop Delaying Justice![667] It seems that advocates expressed sympathy with the court, even though their own interests suffered and the interests of their clients were put at risk, which they attempted to absorb by continuing to provide a service. As will be seen below, advocates acknowledged that the adequacy of the service provided might be affected by this problem because, as Rayner notes, "the defence's role is to evaluate each case as lawyers…whereas the court's priority is to dispose of cases quickly – and the two approaches are incompatible."[668]

[666]Straw, J. 'Magistrates' Association AGM' (2008) <www.justice.gov.uk/news/sp181108.htm> accessed on 19 July 2009**.** It should however be noted that E. Solomon, C. Eades, R. Garside and M. Rutherford, *Ten Years of Criminal Justice under Labour: An Independent Audit* (Centre for Crime and Justice Studies , 2007) recorded "there has not been a significant step change in outcomes. Claims of success have been overstated and at times have been misleading" (13)

[667] Interviews A, B, C, D, E, G and O

[668] Rayner J, 'Duty Calls' (2009)(1 October) Law Society Gazette; 11

Furthermore, advocates acknowledged that, in conducting cases in this way, they reinforced the court's desire to process cases as quickly as possible. It seems therefore that advocates accepted that their continued co-operation enabled efficiency drives to succeed, even though they later expressed the view that premature decision-making reduced the quality of representation. Advocates appeared to justify their lack of resistance on the basis that the court had no choice but to refuse applications to adjourn proceedings. Clearly, however, advocates could have refused to represent clients unless they were sure of payment, which would have caused significant disruption to the courtroom and its level of efficiency. By way of example, Interviewees A and D specifically noted that when means tested legal aid was initially reintroduced, it was relatively easy to secure an adjournment in order to resolve problems with publicly funded representation. Subsequently the courts were given guidance that they had to make progress in cases regardless of whether or not legal aid is in place and "some magistrates simply do what the clerk tells them and too many clerks simply say 'we're following the rules, you can't have an adjournment, there should be no adjournments simply because of legal aid problems.'"[669]

Interviewee O also commented that after the introduction of CJ: SSS magistrates "had to lose their sympathies...They just had to straight away say 'I'm sorry we have to deal with this whether or not you've got legal aid.'"[670] Two of the seven prosecutors interviewed also noted that the magistrates' courts were less likely to grant adjournments for legal aid to be resolved after CJ: SSS was introduced.

[669] Interview B; 2
[670] Interview O; 2

Interviewee H expressed similar sentiments to the defence advocates who were interviewed in saying that the court used to be sympathetic but

> "unfortunately the current Criminal Procedure Rules have made the court be less sympathetic because the encouragement now is for the courts to make progress and therefore, despite them possibly being sympathetic, they feel compelled to make progress and therefore require the defence to press on".[671]

There may be many reasons for advocates' failure to disrupt the system by refusing to act, including loyalty to the workgroup, loyalty to clients (by causing as little disruption as possible) and a desire to maintain their reputation by being seen to assist the court. The result is that defence solicitors assumed the problem of securing funding for representation but defendants still required advice at an early stage in the proceedings.[672] It seems however that defence solicitors, for a variety of both altruistic and selfish reasons, have actually done little to resist that process because they continue to provide advice and assistance despite being unsure of payment, and those actions facilitate the volume processing of cases, which tends to limit discretion, as is discussed below. Solicitors displayed some awareness of this in accepting that they have acquiesced in the changes.[673]

Advocates described the court as having no choice but to refuse to allow cases to be adjourned, and thereby displayed reluctance to criticise the workgroup itself. Interviewees tended to blame problems on the externally introduced policy rather than workgroup members. Interviewee C expressed the opinion that those who design initiatives such as CJ: SSS do not understand the causes of delay in

[671] Interview H; 2
[672] Interview D.
[673] See, for example, interviews C and K.

magistrates' court proceedings, saying that such initiatives are imposed "in the flawed belief that delay in the court is caused by defence solicitors...most delay in my experience is caused by the CPS not being held to account for their time limits."[674] As Ashworth and Redmayne previously noted, courtroom workgroups tend to take the view that externally imposed change reflected a lack of understanding by those who are not part of the workgroup. [675]

Further, interviewee F (a defence solicitor) was of the view that while CJ: SSS did encourage co-operation, it also imposed unrealistic timetables on defence advocates who are unlikely to have access to case papers before the first hearing date.[676] This is evidence which supports Frost's view that reform in the criminal justice system is usually done "dragging the defence along in its trail, rather than consulting in any meaningful way."[677] This seemed to cause tension between the parties because "you are expected to assimilate gigantic amounts of information in a very short period of time and then make decisions for which you can be criticised at a later date".[678] Defence solicitors expressed some bitterness about being required to make decisions about cases at an early stage in the proceedings while the CPS and police had more time to prepare their files. Interviewee B commented that the defence side is forced into making decisions immediately which may not be in the client's best interests whereas the CPS and police have had time to consider the case while the accused was on bail pending the court appearance. Interviewee E further

[674] Interview C; 6
[675] Ashworth, A and Redmayne, M, *The Criminal Process* (3rd edn, Oxford University Press 2005).
[676] The findings of research conducted for my LLM thesis confirmed that advocates rarely received case papers in advance of the first hearing, and that case papers received were often deficient. This is contrary to the requirements of CJ: SSS as designed (Welsh L, 'Implementing Criminal Justice, Simple, Speedy, Summary in East Kent: Justice and Unintended Change in a Neoliberal Context' (2010))
[677] Frost T, 'A Simple Solution' (2007) (27 September) Law Society Gazette; 1
[678] Interview F; 9

commented "CJ: SSS was a brilliant idea…then people started to realise that speeding it up…at certain points didn't necessarily mean the case would finish any quicker…and sometimes speeding it up at the beginning actually makes it take longer".[679] Several interviewees[680] commented that the relevant papers are often unavailable at the first hearing which leads defence solicitors to advise their clients to plead not guilty but later, when the relevant evidence has been received and reviewed, approach the prosecutor with a view to negotiating pleas. This increased the number of ineffective trial bookings along with increasing delay and uncertainty for both defendants and victims.

It must also be noted however that defence advocates have an interest in processing cases at speed because fixed fees encourage the swift and easy disposal of cases; adjournments eat into the profit margin. There are other benefits to processing cases quickly for the defence, including reducing uncertainty and stress, particularly for defendants who are detained in custody.[681] The idea that advocates favour speed in case management was supported by both my and Newman's findings that lawyers aimed to work through their cases as quickly as they could, which Newman argues led to the dehumanisation of clients.[682] This means that a relationship of co-operation and negotiation among advocates is useful to both business interests – volume processing maximises profits – but also to the courtroom workgroup in terms of expediency. It seems however to undermine the interests of defendants in favour of efficiency because, in a desire for speed, complex or unusual issues may be avoided or remain unnoticed. This illustrates the tension

[679] Interview E; 5
[680] Interviewees B, F, G, and J
[681] Ashworth, A and Redmayne, M, *The Criminal Process* (3rd edn, Oxford University Press 2005).
[682] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).

that can be generated by the existence of competing goals (efficiency versus client needs) among defence advocates. Government demands for greater efficiency increase tension between those goals.

Further, interviewee B felt "CJ: SSS has led to a dilution of the quality of the work that we do. We're forced to make decisions far too soon and I think it leads to problems."[683] However, it should be noted that it was not just defence solicitors who raised concerns about being forced to make decisions without the necessary documentation. Prosecuting interviewee J was of the view that CJ: SSS did not work because "you never really get everything you need for the first hearing...for that reason it failed miserably...I think you get a trial date quicker but you get a lot more cracked trials[684] in my experience."[685] Similarly, prosecutor interviewee M also noted that forcing the entry of a plea tended to mean that defendants entered not guilty pleas, which had a knock on effect for case management and trial listings.[686] Half of the defence solicitors[687] and three of the prosecutors[688] who were interviewed were of the view that this situation forces people into premature decision making which might not be in the client's best long term interests, as well as leading to more trial listings that are ineffective. The advocates' views are supported by the courts' statistics in 2008 which indicated that the number of cracked trials had increased.[689] Thus advocates did appear to be aware of a problem for defendants but conflict appeared to exist between accommodating the court's desire

[683] Interview B; 5
[684]Trials 'crack' when a guilty plea is entered on the day of trial.
[685] Interview J; 10
[686] Interviewee M was also of the view that trials are now taking longer to be listed by the court due to the closure of courthouses in the area.
[687] Interviews A, B, D, E, F and G
[688] Interviews J, L and M
[689] Her Majesty's Court Service, CJ: SSS Kent Project Defence Questions (2008).

to make progress in cases, maintaining good relationships in the workgroup and the defence advocate's duty to act in the client's best interests (which involves considering both the credit he or she may receive for entering an early guilty plea and considering the strength of the evidence served by the prosecutor).

Half of the advocates interviewed felt that pleas are forced at a time when the appropriate evidence is not available. One prosecutor said

> "We are trying to deal with case management quicker. Ultimately, whether this is improving cases or not… I personally, I don't think it is improved. I think there is some benefit in stepping back allowing for enquiries to be made for perhaps a more informed decision to be made".[690]

Interviewee D also expressed the opinion that the Stop Delaying Justice initiative has meant that "people have sometimes been rushed into entering pleas that perhaps with a bit more time and consideration you'll get a different result."[691] Interviewee G expressed similar sentiments:

> "they force it through and that is just again pointless. Just so they can say they've got a plea. Well great but that plea could change in three weeks time when I get that CCTV….They'll say 'your client knows if he did it'. 'Well my client says he didn't do it. Shall we just walk out of court and dispense with you lot? Because that's what, if you're saying that's how much trust you put in my client's word, well let him go, drop the charges because he said he didn't do it'".[692]

[690] Interview L; 8
[691] Interview D; 4
[692] Interview G; 12. See also interview A; 6

In addition, half of the defence solicitors and half of the prosecutors interviewed felt that the court's insistence on making progress at an early stage in cases leads to problems as the case moves through the court. There appear to be two problems. The first problem is a rise in the number of unrepresented defendants which reduces the speed at which cases can be conducted, even though this problem has been limited by defence advocates continuing to provide representation despite uncertainty over payment. Interviewee E commented upon this, stating that while the courts are being told to avoid adjourning cases for legal aid to be resolved, "all they're doing is building up longer proceedings for the court, taking up more time because people are unrepresented".[693] Several interviewees felt that cases involving unrepresented defendants take longer to be processed. Such delay appears to result from the inability of unrepresented defendants to understand the nuances of courtroom behaviour, which confirms that the defendant is at a disadvantage as an 'outsider' in the proceedings.

The second problem raised by participants in my research related to the way in which a desire to process cases at speed restricts the ability of advocates to conduct cases in the way they might wish. Three of the defence solicitors interviewed[694] felt that the court applies a desire to conclude cases at speed with too much rigidity, because the efficiency drive legitimised the view that defendants know whether or not they are guilty of a crime regardless of the need for legal advice,[695] even though defendants should not be pressurised by the system.[696] The idea that defendants know if they are guilty is contrary to the idea that defendants are often bewildered

[693] Interview E; 2
[694] Interviewees A, F and K
[695] See, for example, interviews D, F, G and K
[696] Morgan, R. 'Summary Justice. Fast - but Fair?' <www.crimeandjustice.org.uk/summaryjusticefastbutfair.html> accessed on 20 August 2009.

by the process itself, let alone the legal provisions behind it, and tend to assume a passive role in court.[697] Further, as Interviewee F noted, a client

> "may well know whether he did it or not but that's not really what the criminal procedure's about is it? Otherwise they would just get people into the dock and say 'hello, what have you done?' That's not the way it works. You've got to know and understand the case against your client... and unless they're going to suddenly change the way in which the court operates to become an inquisitorial system there is no reason for the defence to change that as being their starting point."[698]

The entry of a not guilty plea in such circumstances appeared to be one of the few ways in which defence solicitors resisted demands for efficiency. They exercised a right to rely on legal provisions - the burden and standard of proof - when they felt their client was being forced into an unfavourable situation. Interestingly, interviewees repeatedly used the words 'force' or 'push' when discussing this trend, as if the provisions represented a symbolic attack on due process. Interviewee E echoed those sentiments in explaining that advocates do not like to be told that a plea must be entered and generally react by telling the client to plead not guilty and require the attendance of all of the witnesses at the trial because the regime forces

> "you into a position from where you take the safest line for your client...whereas if they gave you a little bit of time to engage with your client, get some proper instructions, look at the paperwork...you may be pleading guilty or you may be

[697] See, for example, Carlen P, *Magistrates' Justice* (Martin Robertson 1976) or McConville M and others, *Standing Accused. The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford University Press 1994).
[698] Interview F; 10

saying 'alright it is a trial but these are the issues, it's only going to take two hours and we only need one witness.'"[699]

Therefore, when forced into what they regard as premature decision making, defence advocates may be less likely to behave in a co-operative way and encourage defendants to enter not guilty pleas.

As Carlen[700] and Young[701] have noted, the smooth operation of summary criminal courts is dependent to a large extent on the ability of defence advocates to influence or control clients for the majority of the time. Thus, when they feel sufficiently threatened, the advocates will reject their usual conciliatory behaviour in favour of strict legal provisions, which in turn disrupts the proceedings. It is unclear when, and what causes, advocates to feel sufficiently threatened to behave in that way. The behaviour does however suggest that, while working in congruence with instrumental goals of efficiency and co-operation most of time, the expressive nature of justice via due process is in fact considered to be the most valuable goal; a kind of 'trump card'. As Carlen noted, a willingness to disrupt proceedings via strict adherence to legal principles places the challenger in a very powerful position.[702] For example, interviewee O, when speaking about being questioned over witness requirements said:

"if you think as a defence lawyer that you need a witness then why should you be questioned about…why you should have your witness? You want the witness, you're a professional and you should be treated as one who is competent to make that decision for yourself… It has changed the way they work – the

[699] Interview E; 7
[700] Carlen P, *Magistrates' Justice* (Martin Robertson 1976).
[701] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203
[702] Carlen P, *Magistrates' Justice* (Martin Robertson 1976).

magistrates and even the DJs because they do that very proactively even these days, they say 'well why do you want this person?' You know and the truth is actually can they actually stop you if you put your foot down? They can't so it's wasting the next five, 10 minutes arguing about something that they can't actually stop you if you say 'actually as a defence lawyer, I do want this witness'."[703]

These comments also illustrate the change in attitude towards professional judgement as detailed in chapter three – the court is required to check that advocates are not relying on technical points or being obstructive rather than accepting professional judgement.

Unfortunately, interviewees did not explain what it was about these cases that made them take a less co-operative approach to case management. It could be that they were cases in which they had a genuine belief in their client's innocence, that they felt affronted about the way the case was brought in that it challenged due process principles, that there were concerns about either missing or inappropriately obtained evidence or simply that they felt their, or their client's, position was being unreasonably undermined. There could, of course, be several of these issues at work in any one case. Newman[704] and Young[705] may take the view that this forms part of a pretence performed by advocates in an attempt to persuade clients that they are acting in their best interests. However, it should be noted that the entry of a not guilty plea is not necessarily in the advocates' interests. It means that more work is required, which may affect the profitability of the case and the advocate may be seen

[703] Interview O; 10
[704] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[705] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203

as difficult and therefore undermine his/her reputation and workgroup stability. The consequences of entering a not guilty plea in these circumstances mean that it is unlikely to simply be about putting on a show. Thus it seems that defence solicitors are aware that efficiency drives seem to undermine due process provisions designed to protect defendants via the adversarial process. They also verbalised a willingness to protect clients' rights by reliance on strict legal provisions when they felt it necessary in the face of bureaucratic demands.

However, as a result of the need to balance their own competing interests of reputation, business interests and workgroup cohesion, advocates may only be prepared to exercise such rights in extreme situations. Newman also found that the lawyers he interviewed spoke of being forced into situations that are not in anyone's best interests, but the preference is for speed over justice.[706] Notably in 2008, Kent Criminal Justice Board reported that the number of guilty pleas entered had increased,[707] and HMCTS repeated that fact in 2010.[708] This suggests that defendants' interests and ability to participate may have been subordinated to demands for efficient case processing. Newman documents that solicitors he interviewed verbalised due process, client-centred concerns but acted in a way which is inconsistent with client needs[709] and showed no remorse about doing so. Interviewee A's above quote, coupled with recognition by advocates that they have effectively 'toed the party line' potentially sets Newman's research in a slightly different context. Here, advocates appeared to distinguish how they would like to be able to act while also referring to constraints placed upon them by, among other

[706] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[707] Kent Criminal Justice Board. 'Staff News – CJ: SSS Update' (2008) <www.cjsonline.gov.uk/kent> accessed on 8 July 2009.
[708] Her Majesty's Court Service, SE Kent Performance Report. February 2010 (2010).
[709] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).

things such as funding, the court's desire for efficiency above all else. In this way, they demonstrated some insight into their behaviour.

One way in which both defending and prosecuting advocates have sought to relieve the pressure placed upon them by a bureaucratic demand for efficiency in the face of cost cutting measures is via plea negotiations. In support of the prominence given to managerial imperatives, Newman found that the firms in his study all exhibited a factory like approach to case processing, with one lawyer stating that business needs get in the way of idealism[710] and, as a method of case disposal, plea negotiations can be seen as mutually beneficial, as discussed in chapter two. It is however important to note that client retention (the source of income) is also reliant on reputation and, consequently, defence solicitors must, when negotiating pleas, balance the client's wishes and interests with the workgroup desire for efficiency. Interviewee J (a prosecutor) spoke particularly favourably about plea negotiations, saying "At the end of the day it's all statistics driven for the court and the CPS. At the end of the day you just want to get a guilty plea, a good result on the file."[711] Both prosecutors and defence advocates were in favour of plea negotiations. One prosecutor expressed the view

> "If a defendant is willing to plead guilty to some offences and it's quite clear that the other offences that are left aren't going to affect his sentence at all then clearly a plea negotiation with the defence is going to be useful".[712]

While all advocates who spoke about plea negotiations appreciated the opportunity to foreshorten the proceedings, defence advocates also mentioned that

[710] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[711] Interview J; 15
[712] Interview J; 15

plea negotiations could be beneficial to clients in terms of resolving the issues as soon as possible and limiting the nature or number of charges.[713] Interviewee J went further in indicating that plea negotiations tick the right boxes for the CPS while issues for the victims seem to be undermined because "statistics seem to be the important thing."[714] This provides a further example of how workgroup behaviour has been disturbed by external pressure that calls for increased speed in case disposal, and how advocates have altered their behaviour in line with that disruption; by taking a particularly favourable approach to plea negotiations. Defence advocates expressed the view that plea negotiations may actually be helpful to defendants and therefore appeared to feel justified in using them. However, as Mulcahy[715] notes, they also fulfil a desire for swift case resolution which may favour bureaucratic procedures over adversarial due process aims. The favouring of bureaucratic processes over adversarial principles may also be evidenced by procedures which standardise cases.

Standardisation

Howard and Freilich are of the view that advocates, when dealing with large caseloads, increase efficiency via “a stale application of generalised procedures.”[716] I have taken generalised procedures to mean those that encourage particular routines, reduce discretion and are applied to cases regardless of the particular

[713] See, for example, interview I
[714] Interview J; 13
[715] Mulcahy A, 'The Justifications of `Justice': Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts' (1994) 34(4) *British Journal of Criminology* 411.
[716] Howard, G and Freilich, J, 'Durkheim's Comparative Model and Criminal Justice Theory' in Duffee, D and Maguire, E (ed), *Criminal Justice Theory: Explaining the Nature and Behaviour of Criminal Justice* (Routledge 2007); 61

features of each case. Further, and of particular relevance to local context, familiarity and co-operation among a workgroup is also likely to lead to routinised practices.[717]

Advocates who were interviewed[718] expressed the opinion that, as an example of rigidity and in a desire to process cases expeditiously, too many issues are reduced to 'yes' or 'no' answers on standardised forms. For example, interviewee K said "everyone's got to fill in a form; everyone's got to tick a box to be audited and assessed to why you did that."[719] The same interviewee went on to describe CJ: SSS as faceless bureaucracy which removed personal discretion at all levels and was "unnecessary other than to sort of crank up the speed machine."[720] Newman also notes that, by focusing on a need to be efficient and meet targets, clients are often offered standardised services.[721] One of his interviewees commented "There's no time for access to justice…the client loses out in the need to get through the list".[722] The standardisation that follows "entails that both action and speed are utilised to undermine individual identity."[723]

I suggest that the forms used in criminal proceedings are evidence of the desire for standard procedures that result from a hope to conduct cases as expeditiously as possible. For example, Interviewee O also expressed the view that "it's purely tick boxes at the moment...it's just so bureaucratic."[724] This provides an example of how speedy case progression dehumanises defendants, whose cases are all managed

[717] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203
[718] Interviews B, E, F, K and H
[719] Interview K; 3
[720] Interview K; 8
[721] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[722] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013); 96
[723] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013); 98
[724] Interview O; 2-3

subject to the same procedures even though they are likely to involve different issues and defendants are likely to have different priorities.

At least 16 types[725] of form are now regularly referred to (either implicitly or explicitly) in magistrates' court in east Kent. Across 183 cases observed, there were a total of 220 references to forms, but only 49 of those references were explicit.[726] This demonstrates that forms operate to regulate the behaviour of the workgroup, without necessarily directly involving the person who is actually subject to the proceedings. My observations suggest that the most frequent explicit references to forms involve case management forms. Case management forms are used when a defendant pleads not guilty. The advocates are required to record the matters that are in dispute and evidential requirements and then fix a trial date accordingly. The use of case management forms is further discussed in chapter five, because they also represent one way that law has come to be expressed in magistrates' court proceedings.

While nearly all prosecutors interviewed[727] felt that case management is useful to focus the issues in the case, only three defence advocates[728] expressed a similar view. Defence advocates seemed to be more likely to express the view that case management removes discretion and becomes routine.[729] For example, interviewee K said

[725] Police bail notices, MG5 (police prepared case summary), MG10 (prosecution witness availability), Court bail notice, case management forms, sentencing reasons forms, trial reasons forms, means forms, cracked and ineffective trial forms, interpreter's timesheets, legal aid applications, form certifying committal procedures, TIC schedules, special measures applications, bad character and hearsay applications.
[726] I have taken implicit references to mean when it is clear that a form will be used but it is not actually referred to during proceedings.
[727] Interviews H, J, Q, L, M, N
[728] Interviews D, R, S
[729] Interviews B, E, F and K

"I always taunted them that they often forget that there's a 'J' in there and what does that stand for and you know, they're so obsessed with this bureaucratic machine and moving it on...It [CJ: SSS] made the thing less case sensitive and it was very much a one size fits all mentality"[730]

These comments support Brenneis'[731] view that the way that the forms are produced provides "frameworks for guided response,"[732] making it possible to detect a move towards standardised procedures. Demands for standardised procedures can be associated with the need to process cases quickly. As interviewee G noted "the system really is being forced through…for the sake of expediency as opposed to justice."[733] Packer's crime control model[734] associates volume processing with effective case disposal at whatever cost but it is possible to link increased reliance on, and reference to, forms with Bottoms and McClean's liberal bureaucratic model,[735] which requires procedures that ensure justice is seen to be done - it is recorded on the form - but also requires volume processing so that the system does not become overburdened. Such practices result in standardisation, and, generally, "standardisation produces new legal regimes through routinisation of work and professional roles."[736] Standardisation of routines seems to increase by the professionalisation of legal proceedings. A further example of this process is provided by the increased use of district judges to preside over summary criminal cases.

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[730] Interview K; 8
[731] Brenneis D, 'Reforming Promise' in Riles, A (ed), *Documents. Artefacts of Modern Knowledge* (University of Michigan Press 2006)
[732] Brenneis D, 'Reforming Promise' in Riles, A (ed), *Documents. Artefacts of Modern Knowledge* (University of Michigan Press 2006); 49
[733] Interview G; 2.
[734] Packer H, *The Limits of Criminal Sanction* (Oxford University Press 1968)
[735] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976)
[736] Riles A, *Collateral Knowledge. Legal Reasoning in the Global Financial Markets* (University of Chicago Press 2011); 58

District judges

Interviewees were almost unanimously agreed that the presence of a district judge increases the speed at which proceedings are conducted. All seven prosecutors[737] and eight of the defence solicitors[738] interviewed asserted that the district judge is much more efficient than lay magistrates. As Young notes "Judges are the linchpins of courtroom workgroups, with formal responsibility for making decisions that affect the processing and outcome of cases, and for governing the conduct of the other members of the workgroup in court."[739] The position is slightly different when lay benches sit because the decisions made are filtered via the court clerk, who also plays a greater role in governing courtroom behaviour in such circumstances. The court clerk plays a greater role in courtroom workgroup behaviour than district judges because they remain present in court while magistrates retire whereas district judges are more removed from the activities of other courtroom users.

Interviewee Q asserted "district judges are way more efficient. I think they get through more work. I find magistrates retiring so laborious, it's just so tedious."[740] Similarly, interviewee N was of the view that the district judge "is a lot swifter. He's less indecisive. He makes decisions and goes with it. He will get through a list in half the time."[741] The majority of defence solicitors were of the same opinion, with interviewee R going so far as to say "if they want to save money, get rid of magistrates and employ district judges." My observations also suggested that the

[737] Interviews H, J, Q, L, M, N and P
[738] Interviews B, C, F, I, K, O, R, S
[739] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203; 207
[740] Interview Q; 13
[741] Interview N; 10

district judge appeared to conduct proceedings with greater speed, perhaps because he rarely retired to make decisions – presumably at least partially influenced by the fact that he does not have to seek the agreement of his colleagues in decision making. Another influence may be the fact that he does not often have to pause to seek legal advice from the court clerk, who assumes a much more administrative role in the proceedings by performing tasks such as fixing hearing dates and completing forms such as Bail Notices. The speed with which district judges conduct proceedings has long been documented by, among others, Zander[742] and Morgan and Russell.[743]

Interviewees tended to attribute the expediency with which proceedings were conducted to the ability of the district judge to direct the proceedings to the issues that he (all of the district judges who then sat in east Kent were male) feels are important,[744] and the fact that the district judge is legally qualified.[745] The case management hearings that I observed provide an interesting case in point. If magistrates were presiding over a case management hearing, the court clerk tended to go through the case management form methodically with the advocates, confirming each part that had been completed but with little challenge to the issues raised. Conversely, the district judge did not go through the case management form openly, but only discussed issues contained thereon when he wished to challenge an advocate about points raised.

[742] Zander M, *Cases and Materials on the English Legal System* (Oxford University Press 2007).
[743] Morgan, R and Russell, N. 'The Judiciary in the Magistrates' Courts' (2000) <library.npia.police.uk/docs/homisc/occ-judiciary.pdf> accessed on 08 February 2012.
[744] Interviews B, H, J, K, L, S, P
[745] Interviews I and R

The findings of my research thus confirm the findings of earlier studies, such as that by Darbyshire,[746] that district judges are seen to be more efficient by court personnel. It seems therefore that if the government wishes to increase the speed at which cases are processed, the presence of a district judge may achieve that aim. There are some indications that the government does see the use of district judges as beneficial to the criminal justice process as, despite a decline in the number of prosecutions over the last four years, lay magistrates are increasingly being replaced by district judges.[747] Advocates spoke very favourably about this trend. For example, interviewee R said

> "Appearing before magistrates is like appearing before an inept jury without proper guidance whereas appearing before a DJ is how it should be. Preparing for somebody who understands and knows how to apply the law in correct factual circumstances".[748]

Interviewee K also said "they're much more robust, much more direct but also are professional lawyers and are therefore not going to say or do anything to leave them exposed to a complaint or an appeal."[749] Similarly, prosecutor interviewee N was also of the view that the decisions made by the local district judge seem "much more sensible and they're more consistent with the law."[750]

Advocates seemed to favour district judges not only for their expediency but also because they felt the district judge is more likely to make a legally correct decision, which would be in the interests of defendants. It also seems that district

[746] Darbyshire P, 'For the New Lord Chancellor - Some Causes for Concern About Magistrates' (1997) (Dec) *Criminal Law Review* 861.
[747] Hall, K. 'Lay Magistrate Numbers Continue to Fall' (2014) <www.lawgazette.co.uk/practice/lay-magistrate-numbers-continue-to-fall/503938> accessed on 15 January 2014.
[748] Interview R; 10
[749] Interview K;14
[750] Interview N; 10

judges are more efficient than lay benches and this suggests that advocates are not, in principle, resistant to increasing efficiency. It also suggests that there would be little resistance to the replacement of lay benches by district judges if it were proposed, even at the potential cost of the symbolic democracy of a lay Bench. Further, the presence of a district judge may mean that defendants are likely to be treated in ways more consistent with the law, but the addition of another lawyer in the proceedings may exacerbate defendants' inability to engage in the process because the law is more likely to be referred to in fleeting terms. This issue is discussed further in the following chapter.

Conclusion

It is clear from this, and preceding chapters, that there has been an increased focus on the perceived need for efficiency in magistrates' courts over the last two decades. This seems to have had the effect of undermining the position that "historically…the state's process of…prosecution…was conducted according to a set of rules that led to a fair trial."[751] Advocates' responses to polices designed to meet demands for efficiency demonstrate how the courtroom itself is a site of struggle among actors. Once a point of equilibrium is reached, it has the potential to become unbalanced by external influences (such as efficiency drives) which create new struggles.

However, professionals are likely to "employ a set of established procedures for the resolution of any conflicts."[752] Given that summary criminal courts have always relied on a good degree of co-operation among actors in order to process

[751] Faulkner D, 'Prospects for Progress in Penal Reform' (2007) 7(2) *Criminology and Criminal Justice* 135; 139

[752] Bourdieu P, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 (July) *The Hastings Law Journal* 805; 819

cases smoothly, it is unsurprising that the established procedures resorted to by the workgroup consist largely of adaptation via compromise rather than aggressive forms of non co-operation. Maintaining and adapting relationships of compromise appears to exacerbate marginalisation experienced by defendants. In this case, there is some evidence that actors will resort to strict legal provisions to exercise power in the event of conflict, but only when they feel that attempts at compromise fail (such as refusals to adjourn) or that there is a power imbalance (such as the CPS having more time to prepare). In the majority of instances, conflict may be resolved via compromise learnt by way of "professional tools developed in response to...practice"[753] However, advocates did resort to pure legal theory[754] (in this case the burden and standard of proof) at extreme sites of conflict and when expert knowledge of the roles of professional participants failed.[755]

The evidence may demonstrate that, while the adversarial nature of the proceedings is largely eroded by high degrees of co-operation, defence advocates will ultimately (albeit in extreme circumstances) demonstrate loyalty to their clients above all else. This issue may arise because, in Young's view,

> "Judges and prosecutors value high disposition rates in order to transmit an aura of accomplishment...The position of defence lawyers is less clear cut. While delay might help them to win a case...most clients bring with them only modest fees... At the same time their institutional and market position requires them to maintain a reputation for effective representation...the defence may see justice

[753] Bourdieu P, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 (July) *The Hastings Law Journal* 805; 824
[754] Bourdieu P, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 (July) *The Hastings Law Journal* 805; 824
[755] Bourdieu P, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 (July) *The Hastings Law Journal* 805; 831

as putting the prosecution to proof, or securing a lenient sentence, whereas the prosecution may see it reflected in high conviction rates."[756]

It seems that recent concerns with efficiency in summary proceedings have been a possible site of struggle within the courtroom as workgroups grapple with their competing agendas. However, all parties seem to favour efficiency as a goal in itself for instrumental reasons. This, combined with a culture of co-operation among the parties, seems to have led advocates to acquiesce to the demands of policies designed to increase efficiency, both in terms of its existence and intensity. This occurs despite the fact that those initiatives appear to further undermine both due process rights and the traditionally adversarial nature of the proceedings. The marginalisation of defendants therefore appears to have been exacerbated by a culture of co-operation which has allowed efficiency drives to be successful in further promoting the volume processing of case management. That process has been assisted by the standardisation of case management, which has encouraged implicit reference to legal principles among professional court users.

[756] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203; 209

Chapter 5: The Legalisation of Summary Criminal Justice

Introduction

This chapter sets out the findings of my observation and interview data in relation to one particular and unexpected issue that arose during the course of the research. While magistrates' courts have traditionally been regarded as courts which rely more on common sense than on complex legal provisions, I suggest that summary criminal justice has in fact become increasingly legalised. I further suggest that a non-participant observer would find it difficult to identify the legalisation of summary justice because the provisions and procedures which are most frequently utilised are referred to in implicit terms by a specialist group of actors within the proceedings; those who are legally trained.

I will provide examples of the ways in which legal and procedural issues manifest themselves in summary criminal proceedings as they became apparent during periods of observation. I will connect these observations to issues that arose during the course of interviews which helped to provide both explanatory factors and insights into how practitioners view the use of law in magistrates' courts. These insights will be set within the context of literature that considers how magistrates' courts operate. I will then consider the political context in which legalisation has taken place, specifically since New Labour assumed a form of neoliberal political agenda in 1997. Finally I will consider the effects of legalisation in summary criminal proceedings.

Law-less courts?

Socio-legal scholars have regarded magistrates' courts as venues in which proceedings are processed quickly, with minimal due process protections, and give the impression that those advocates who refer to points of law are dismissed as inexperienced and/or time wasting.[757] This theme appears to persist in summary criminal proceedings, as, according to Darbyshire, lawyers who raise so-called spurious legal issues are still regarded as a threat[758] to what Carlen described as the uncomfortable compromise which typifies the relationships that exist between members of the court workgroup.[759] As a result, one gains the impression that points of law are seldom referred to or, alternatively, that when legal issues are raised, they are treated as an inconvenience; as something which delays the volume processing of cases.[760]

Notably, when Carlen,[761] McBarnet[762] and Bottoms and McClean[763] conducted their studies, defendants tended to appear without the assistance of a solicitor and the police (rather than qualified lawyers) were the prosecutors. The CPS took over state led prosecutions in 1986 and, by 1986/87, four-fifths of defendants appearing in magistrates' courts were legally represented.[764] Kemp noted that 82 per cent of defendants in her magistrates' court sample were legally represented, nearly all via

[757] Carlen P, *Magistrates' Justice* (Martin Robertson 1976); Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976); McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981).
[758] Darbyshire P, *Sitting in Judgement: The Working Lives of Judges* (Oxford: Hart 2011).
[759] Carlen P, *Magistrates' Justice* (Martin Robertson 1976)
[760] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981).
[761] Carlen P, *Magistrates' Justice* (Martin Robertson 1976)
[762] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981).
[763] Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976)
[764] Legal Action Group, *A Strategy for Justice: Publicly Funded Legal Services in the 1990s* (Legal Action Group 1992).

public funding.[765] Despite increased levels of representation, as recently as 2011, Darbyshire reported that district judges took the view that legal argument should not be raised in magistrates' courts, because the magistrates' court is the place of common sense, describing it as a "law free zone".[766] This resonates with Carlen's view that advocates who were prepared to contest the proceedings by raising legal issues were in a strong position to challenge the usual process of case management.[767]

Darbyshire does however acknowledge that the fact that legal argument is unusual does not mean that the law is not applied in summary proceedings, but rather that it is applied in routinised ways, and she referred to the fact that the district judge who commented that summary criminal justice is 'law free' also carried with him a file containing case law.[768] She does not, however, develop this further or provide examples or reasons why law is only referred to in mundane ways, aside from brief mention of lawyers' desire to send legally complex cases to the Crown courts. My findings suggest that legal issues in fact arise frequently in summary criminal proceedings, albeit in routine ways. One finding which demonstrates how frequently legal issues arise in summary criminal proceedings, and that their use has become routine, is that more than half of all advocates who were interviewed felt that proceedings involving unrepresented defendants take longer to conduct *because* the legal provisions involved need to be explained. Predictably, the majority of defence advocates indicated that they attempt to explain

[765] Kemp, V 'Transforming Legal Aid: Access to Criminal Defence Services' <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011
[766] Darbyshire P, *Sitting in Judgement: The Working Lives of Judges* (Hart 2011); 171
[767] Carlen P, *Magistrates' Justice* (Martin Robertson 1976)
[768] Darbyshire P, *Sitting in Judgement: The Working Lives of Judges* (Hart 2011)

the law and procedure to clients before going into court. One defence advocate commented that such explanations are "a major part of the job…and it's a part of the job that saves a lot of time".[769] Thus, in the same way that professional practices become standardised via routinisation in order to cope with managerial demands for increased efficiency, the use of law also becomes routinised to assist speedy case progression.

Therefore, while it may be correct to say that detailed or complex legal argument arises infrequently, it is a step too far to describe magistrates' courts as 'law free'. Although the routine use of legal provisions may mean that "there is little room for argument",[770] it does not mean that references to particular legal provisions are insignificant. As Interviewee F explained:

> "I can entirely understand where that criticism comes from because sometimes you do sort of think to yourself, 'oh people are just freewheeling here', but I think in reality a lot of the day to day slog of criminal litigation is so well known to all the parties in the court that you don't stand up and say 'let's have a look at the Bail Act' or something like that, but no, it's not law free zones" [771]

If the law referred to is assumed to be a mundane part of legal practice in summary criminal proceedings, its implicit use is likely to mean that it is less detectable to non-lawyers. The implication of this customary, and often implicit use of law, is that it at least perpetuates, if not exacerbates, practices which exclude defendants from active participation in the proceedings. I therefore agree with McBarnet when she says that the view of the lower court as one which does not rely

[769] Interview G; 19
[770] Darbyshire P, *Sitting in Judgement: The Working Lives of Judges* (Hart 2011); 171
[771] Interview F; 15. Indeed, Darbyshire reported the dismay expressed by one district judge that more people were attempting to raise legal arguments in magistrates' courts. (Darbyshire P, *Sitting in Judgement: The Working Lives of Judges* (Hart 2011))

on much law or require much legal expertise is inaccurate because empirical evidence demonstrates that it is "permeated by legalistic and professional consciousness".[772] Indeed, the classification of cases as straightforward and/or uncontested is itself based on legal construction.

At this stage it is important to acknowledge my role as participant-observer. By far the greatest advantage that the practitioner-researcher/participant-observer role gave me was my location in the same epistemic community as the research subjects. As Bryman notes, it is often "the special uses of words and slang that are important to penetrate that culture."[773] As a result of my previous training and experience, I was familiar with the meaning and significance of particular phrases used by court personnel. This enabled me to identify and analyse how law is used in summary proceedings. As such, I suggest that points of law arise in magistrates' courts much more frequently, and in more significant ways, than has previously been estimated.

Given that this type of legalisation is largely identifiable only by reference to implicit use of legal provisions, the researcher's understanding of those provisions is of significant importance. A non-legally trained observer may not be able to identify such implicit references and may thereby remain as marginalised from the proceedings as defendants. It is clear that the researcher's location in the field is extremely important, and while it may carry risks of over-identification with research subjects, these findings demonstrate how immersion in the research field can highlight hitherto underestimated issues.

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[772] McBarnet D, 'Two Tiers of Justice' in Lacey, N (ed), *A Reader on Criminal Justice* (Oxford Readings in Socio-Legal Studies, Oxford University Press 1994);198

[773] Bryman A, *Social Research Methods* (Oxford University Press 2012); 465

I intend to demonstrate this by reference to three instances in which advocates appear to make implicit references to law with relative frequency. Such references appear to be common when defendants are being sentenced, when bail is being considered and during the course of case management.

Evidence of legalisation

My observations suggest that there are frequent references to particular points of law during the course of summary proceedings in both implied and explicit terms. These practices manifest in the ways that advocates support the representations that they make to the court. Furthermore, the majority of both prosecutors and defence advocates interviewed indicated that they do refer to points of law in the magistrates' court on a relatively frequent basis, and acknowledged that they would tend to refer to the principles stated in authorities rather than the actual case or statute that is relevant to their case.[774] This supports the findings of my observations that legal issues tend to be referred to in implicit terms but still employ the use of specialist language. An example of this is provided by one prosecutor who stated:

> "So, for example, when a suspended sentence is to be triggered I would say 'you should do that unless it is unjust to do so' and I know that's the wording in the statute. I couldn't tell you actually now what that statute was but do you know what I mean? So yeah, I am trying to be technically accurate".[775]

While some interviewees did express the view that points of law rarely arise in magistrates' courts, they also talked about changes to evidential provisions (see below) and sentencing guidelines as if they are part of routine rather than specialist

[774] 10 of the 12 defence solicitors and five of the seven prosecutors interviewed stated that they tend to refer to the principles rather than the authorities, particularly in front of a lay Bench.
[775] Interview Q; 12

legal provisions. By way of example, one advocate stated that it would be easy to go through the magistrates' court without the law as long as the person concerned understood the "admin and the tactics and the procedure".[776] There was also a tendency for interviewees to suggest that legal issues are more likely to arise at trial, which is logical in the sense that a trial involves contested points. However, with reference to my observation findings discussed below, these comments betray the way that specialist issues become part of professional routines and ingrained in the workgroup culture. On the other hand, some interviewees seemed to be almost offended at the suggestion that magistrates' courts are law free zones.[777] Interviewee B described the assertion that magistrates' courts are law free zones as "rubbish".[778] One of the reasons that interviewees gave for the implicit use of legal provisions was a perception that it is appropriate to avoid bombarding a lay Bench with complex provisions because magistrates simply want to hear about the principles rather than the authorities.[779] Interviewee G said "of course there's law, it's not a law free zone but it's a legalese free zone."[780]

The best evidence of references to legal provisions tends to arise when a particular outcome is sought such as a particular sentence or release on bail. My observations suggest that points of law are most likely to be referred to during the course of sentencing proceedings. Furthermore, the provisions of the Bail Act 1976 are often implicitly referred to, while both implied and explicit reference to the

[776] Interview C; 8. Interviewee I also talked about bad character and hearsay provisions while also stating that law is used relatively infrequently.
[777] For example, interviewee E said, referring to law' "I don't see how you can do the job without it really" (Interview E; 11).
[778] Interview B; 11
[779] See, for example, interviews D, G and K.
[780] Interview G; 22. Interviewee R described law as being the trade so failing to use the law would be like a surgeon failing to use his tools.

construction of charges and required evidence are also relatively common in the course of case management. I will therefore turn to particular ways in which legal issues arise in the course of such proceedings.

- Sentencing

So far as sentencing proceedings are concerned, points of law seem to manifest via reference to sentencing guidelines. My observations suggest that sentencing hearings involve frequent implicit reference to sentencing guidelines. This finding was supported by the interview data in which interviewees indicated that they tended to refer to principles contained in sentencing guidelines during the course of mitigation. Some interviewees, such as interviewees J, K, L and O, specifically highlighted the increased need to refer to sentencing case law and guidelines. The sentencing guidelines represent an example of measures designed to combat inconsistent decision making practices.[781] The Sentencing Council states:

> "It is important to ensure that courts across England and Wales are consistent in their approach to sentencing. Sentencing guidelines, which set out a decision-making process for all judges and magistrates to follow, play an essential role in this".[782]

The sentencing guidelines are based on statute, case law and policy documents, and are based on particular legal provisions according to rules of precedent. Thus, while the guidelines are not strictly points of law, they represent a distillation of legal opinion about what factors are important in determining the severity of

[781] Darbyshire P, 'An Essay on the Importance and Neglect of the Magistracy ' (1997) (September) *Criminal Law Review* 627; Davies M, 'A New Training Initiative for the Lay Magistracy in England and Wales – A Further Step Towards Professionalisation?' (2005) 12(1) *International Journal of the Legal Profession* 93.
[782] Sentencing Council. 'What Are Guidelines?' (2012) <http://sentencingcouncil.judiciary.gov.uk/sentencing/what-are-guidelines.htm> accessed on 21 February 2013.

offences. According to the Coroners and Justice Act 2009, the use of sentencing guidelines is mandatory unless it is not in the interests of justice to follow a particular guideline. Therefore, in order to determine the most appropriate sentence in any case, a working knowledge of the guidelines is advantageous – either to highlight specific aggravating and/or mitigating features or to argue that it would not be in the interests of justice to apply a particular guideline. Of 37 references observed to the sentencing guidelines,[783] nearly half were made implicitly – for example, stating that a theft was opportunistic or an assault was provoked, which are matters specifically recorded as mitigating features.[784]

Sentencing guidelines in their present form did not exist until 2003, when the Sentencing Guidelines Council was created by the provisions of the Criminal Justice Act 2003.[785] As that agency notes, "Guidelines are a relatively new innovation in sentencing so there aren't guidelines for every offence yet, and where they don't exist, judges look at previous similar cases for guidance on appropriate sentencing levels".[786] As such, the sentencing guidelines represent a coordinated effort to ensure greater consistency and thereby appear to introduce a greater degree of specialised legal knowledge into summary proceedings than has previously been noted. The desire for consistency is also congruent with neoliberalism's preference for management techniques which encourage efficiency via routine case management systems, as discussed in the preceding chapter.

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[783] There were 70 hearings in which sentencing could have been considered.
[784] Sentencing Guidelines Council. 'Magistrates' Court Sentencing Guidelines' (2012) <http://sentencingcouncil.judiciary.gov.uk/docs/MCSG_Update9_October_2012.pdf> accessed on 09 February 2013.
[785] The Sentencing Guidelines Council became the Sentencing Council in 2010.
[786] Sentencing Council. 'What Are Guidelines?' (2012) <http://sentencingcouncil.judiciary.gov.uk/sentencing/what-are-guidelines.htm> accessed on 21 February 2013.

- Bail

In terms of issues relating to bail, the fact of being placed on bail (with or without conditions) allows any criminal court to prosecute an individual who fails to attend court while subject to bail under s.6 Bail Act 1976. Therefore, every time a defendant is released on bail, at whatever stage in proceedings, he or she is effectively put on notice that there will be further charges if s/he fails to attend court as directed. The provisions of the Bail Act 1976 state that bail may be refused or bail with conditions may be imposed to ensure attendance at court, to ensure the defendant does not commit an offence while on bail or to ensure that the course of justice is not obstructed. Those exceptions to the right to (unconditional) bail appear to be referred to in implicit terms when prosecutors make applications to remand defendants into custody and when defence advocates apply for bail to be granted with conditions, because any conditions that are suggested are designed to meet concerns about the statutory exceptions to the right to bail. Examples include suggesting a condition to report to the local police at designated times to ensure a defendant does not abscond, or a condition not to enter retail premises to limit the risk of further offending in a shoplifting case.

Furthermore, provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which came into force in December 2012 now state that the prosecutor can only apply for a remand into custody if there is a realistic prospect of a custodial sentence on conviction.[787] Not only does this suggest that knowledge of sentencing guidelines is advantageous, but also my observations suggest that it is

[787] There are certain limited exceptions to these provisions, such as where the allegation involves domestic violence.

now not uncommon to hear prosecutors stating that there is or is not a realistic prospect of a custodial sentence when addressing the court about a defendant's remand status. This is an implicit reference to particular legal provisions, the significance of which may not be understood by a non-lawyer. It should also be noted that particular provisions state that the decision to grant bail based on the fact that a custodial sentence is not a realistic sentencing option does not affect the power of the sentencing court to ultimately impose a custodial sentence.[788] Again, these are matters that appear to post-date earlier socio-legal studies of magistrates' courts proceedings, and are particular legal provisions, of which knowledge is advantageous in framing submissions to the magistrates. The tacit use of legal provisions is consequently significant in summary proceedings, and could result in misunderstanding to the untrained ear. The implicit use of those terms highlights, and perhaps more recently exacerbates, the paradox of summary justice in that it requires knowledge of procedural propriety but denies access to that knowledge by the unstated and unexplained use of legal provisions. Carlen identified a similar issue in relation to the use of jargon and signalling between advocates in magistrates' courts[789] but increased reference to legal provisions via procedures designed to encourage efficient case progression and via new legislation appears to have intensified this problem.

- <u>Case management</u>

A third type of hearing in which increased implicit reference to particular points of law appears to be made is during the course of summary case management. Case management hearings have evolved from Narey's suggestion that pre-trial review

[788] Legal Aid, Sentencing and Punishment of Offenders Act 2012
[789] Carlen P, *Magistrates' Justice* (Martin Robertson 1976).

hearings may alleviate the volume of ineffective trial listings that occurred in magistrates' courts.[790] Subsequently, in his review of the criminal justice system, Auld expressed concern about the number of pre-trial reviews that occurred, and believed that the parties should take a more co-operative approach to case management.[791] Later, CJ: SSS (which sought to reduce perceived delay in summary proceedings) proposed the abandonment of pre-trial reviews in favour of more proactive case management outside the court.[792] However, case management hearings remain in place in east Kent.

The forms used in case management have both administrative and legal roles in magistrates' court processes. They require the parties to state the matters that are in dispute, the witness requirements (and reasons why witnesses are required), any further evidence to be served and any legal argument that is envisaged. As such, they require the parties to narrow the contested issues at trial so that court time can be used in the most efficient manner. The forms are also used to prevent the Crown being 'ambushed' at trial, which has the effect of focusing the Crown prosecutor's time and resources only on those matters that are disputed.[793]

Case management forms are part of the executive's desire to increase efficiency under the Cr.PR and therefore have an administrative function. Case management forms do also, however, have a role in potential legal argument about how evidential burdens are discharged and whether it would be just for trials to proceed. The form requires a defence advocate - the wording of the form assumes

[790] Narey, M *Review of Delay in the Criminal Justice System* (Home Office , 1997)
[791] Auld, R. 'Review of the Criminal Courts of England and Wales: Executive Summary' (2001) <http://www.criminal-courts-review.org.uk/auldconts.htm> accessed on 05 October 2008.
[792] Office for Criminal Justice Reform, *Delivering Simple Speedy Summary Justice. An Evaluation of Magistrates Court Tests* (2007)
[793] See comments made in *DPP –v- Chorley Justices and Andrew Forrest* [2006] EWHC 1795; *Malcolm-v-DPP* (2007) EWHC 363 (Admin)

that the defendant has received advice - to indicate that a defendant has been advised that a trial can proceed in his or her absence if the defendant fails to attend court as directed,[794] which is relevant to whether proceedings should continue in the absence of a defendant and whether a charge of failing to attend Court as directed can be laid.

Furthermore, the answers provided on case management forms about the issues in the case can be used as evidence during the course of a trial as implied admissions to particular elements constituting an offence, such as presence at the scene.[795] The majority of interviewees, particularly defence advocates, appeared to be acutely aware of the fact that what is recorded on the case management form could be referred to at subsequent hearings, and indicated that this led them to consider completion of the form very carefully. About half of defence advocates and half of prosecutors interviewed felt that legal knowledge is necessary to complete a case management form appropriately.

The completion of case management forms represents an important convergence of law and bureaucratic measures designed to ensure consistency and efficiency, and provides an example of standardisation as questions are reduced to a series of tick box answers with limited space to explain the issues.[796] There is a specific section of the case management form which asks whether the parties can agree a basis of plea or plea to an alternative charge. As discussed in the previous

[794] See *R (on the application of Drinkwater) –v- Solihull Magistrates' Court* [2012] EWHC 765 (Admin), *R –v- Jones* [2002] UKHL 5 for indications about when it would be appropriate to proceed in the absence of a defendant.
[795] This practice is discouraged following the judgement given in *R –v- Newell* [2012] EWCA Crim 650 but I have observed prosecutors putting the content of case management forms to defendants in cross examination.
[796] Examples of this include a yes/no answer as to whether the defendant has been advised about provisions which allow a reduction in sentence for entering an early guilty plea (incorporated in the Criminal Justice Act 2003)

chapter, the interview data indicated that both prosecutors and defence advocates view plea negotiations as useful. Thus the form becomes a way of demonstrating that the parties are acting in an efficient, co-operative manner, as well as a document which, in order to be completed appropriately, requires knowledge of both the nature of the charge and the evidential burdens which the Crown must satisfy to prove its case.

Explanatory factors

The three examples provided above suggest that points of law arise more frequently in summary proceedings than has previously been observed. This seems to result from the increased legalisation of summary proceedings in a number of ways including a welter of legislation relating to the criminal justice process (see below). Greater complexity resulting from such legislation justifies an increase in levels of legal representation, and that representation has been increasingly professionalised. New Labour created more new criminal offences than preceding governments,[797] many of which are designed to avoid proceedings being transferred to the Crown court as part of the government's desire for magistrates to retain jurisdiction in cases in the name of efficiency.[798]

- Diversion

As is detailed in preceding chapters, neoliberalism's embrace of management techniques has focused governments' efficiency drives on the use of performance

[797] Baillie A, 'Can England and Wales Afford Both Justice and the Ministry of Justice?' (Open Lecture Series, University of Kent 7 December 2011); Ashworth A and Zedner L, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) (2) *Criminal Law and Philosophy* 21.
[798] Darbyshire P, 'Strengthening the Argument in Favour of the Defendant's Right to Elect' (1997) (Dec) *Criminal Law Review* 911.

management techniques and statistics.[799] This has resulted in the enactment of legislation which allows a number of low level, uncontested offences to be diverted from the criminal court process via the use of fixed penalty notices and conditional cautions,[800] meaning that the cases which do come before the court are more likely to be complex or contested in some way.

Most interviewees (both prosecuting and defending) felt that the introduction of fixed penalty notices and conditional cautions, along with the increased use of simple cautions, has resulted in a significant reduction in the volume of cases being dealt with in magistrates' courts. The by-product of this, as noted by one defence solicitor, is that mid or low level offending is not being dealt with in the magistrates' courts.[801] Nine of the 12 defence solicitors interviewed believed that diversion was increasingly being used, and six of those interviewees were concerned that diversion was being used inappropriately for serious (and sometimes indictable only) offending. Interviewee B felt that diversions were being used for serious offences while Interviewee E used the example of diversion for an offence of unlawful sexual intercourse with a minor, G of diversion for rape and O of diversion for arson and for robbery. Interviewees C and I both said that numerous cautions were being given rather than a single caution following which any offenders would be sent to court for the commission of further offences. The same concerns were only expressed by two of the five prosecutors (of seven interviewed) who felt that the police were using more diversionary measures. [802]

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[799] Jones C, 'Auditing Criminal Justice' (1993) 33 *British Journal of Criminology* 187.
[800] Morgan R, 'Austerity, Subsidiarity and Parsimony: Offending Behaviour and Criminalisation' in Silvestri, A. (ed) *Lessons for the Coalition: An End of Term Report on New Labour and Criminal Justice* (Centre for Crime and Justice Studies 2010).
[801] Interview D
[802] Interviews N and P

Thus it seems that there is a tendency for police to avoid instigating formal proceedings even in serious matters. Francis provides recent evidence of Kent Police misrecording crime in order to meet targets.[803] The point remains however that, as uncontested cases are increasingly likely to be dealt with by way of diversion, it seems that only more complex or contested cases will be put before the court. This means that legal issues are more likely to arise in those cases that are put before the Bench.

Alongside the increased use of out of court diversionary measures, there has been a desire for magistrates' courts to retain cases rather than send them to the Crown court since the late 1990s.[804] So, while Darbyshire asserts that lawyers who wish to raise legal argument will, where possible, try to have the case dealt with in the Crown court,[805] there are bureaucratic measures which seek to deter committal to the Crown court - not least the removal of committal fees and reduced guilty plea fees in the Crown court for advocates.[806] This desire has resulted from the government's hope to accelerate the processing of criminal cases as magistrates' courts tend to deal with cases more quickly than Crown courts. Sanders,[807] and Ashworth and Zedner,[808] note that a significant number of new offences created in the last two or three decades are strict liability matters, which are usually confined

[803] Francis, P. 'Police officers face pressure to hit targets which stops them doing job, internal report reveals' (2013) <http://www.kentonline.co.uk/kentonline/news/thin-blue-line-stretched-by-4424/> accessed on 4 September 2013.
[804] Darbyshire P, 'Strengthening the Argument in Favour of the Defendant's Right to Elect' (1997) (Dec) *Criminal Law Review* 911.
[805] Darbyshire P, *Sitting in Judgement: The Working Lives of Judges* (Oxford: Hart 2011).
[806] Legal Services Commission. 'Summary of the changes to be implemented on October 3rd 2011' (2011) <http://www.legalservices.gov.uk/docs/main/October_changes_summaryv5.pdf> accessed on 15 August 2012.
[807] Sanders A, 'What was New Labour thinking? New Labour's approach to criminal justice' in Silvestri, A. (ed), *Lessons for the Coalition: An End of Term Report on New Labour and Criminal Justice* (Centre for Crime and Justice Studies 2010).
[808] Ashworth A and Zedner L, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) (2) *Criminal Law and Philosophy* 21.

to summary only proceedings and are easier to prove than those offences requiring *mens rea*. Six of the 19 interviewees were of the view that more cases are being dealt with in magistrates' courts rather than being sent to the Crown court. Three of those six interviewees attributed this change to charging policy within the CPS, with one prosecutor saying that, if the prosecutor is of the view that magistrates' sentencing powers could be considered sufficient:

> "we were being instructed that, erm…to be very careful when, erm, even at pre-charge stage, if it's the case that clearly the person isn't going to receive more than six months in prison…then don't bother charging the either way offence…don't give them the opportunity to elect Crown court trial"[809]

The same prosecutor also attributed the drop in cases being sent to the Crown court to more rigorous case review at committal stage.[810] Another prosecutor similarly mentioned changes to CPS charging policy in order to explain that more serious cases are staying in magistrates' courts, but also mentioned changes to solicitor's fees as an explanatory factor – the intimation being that there is no longer a financial incentive for lawyers to send cases to the Crown court.[811]

In addition, the introduction of district judges (magistrates' courts), who do appear to be more efficient than a lay Bench in the eyes of interviewees, may also mean that advocates are more confident about dealing with legal points in the magistrates' courts rather than sending cases to the Crown court.[812] Interviewees

[809] Interview J; 12
[810] Alternative reasons offered for avoiding committals to the Crown court included the presence of a district judge who is regarded as more competent to deal with complex cases and as more fair than lay Benches, the introduction of contributions towards legal aid in the Crown court and changes to legal remuneration rates.
[811] Interview P. Similar sentiments regarding changes to solicitor's fees were expressed by two further prosecutors – Q and M.
[812] See, for example, Interview R

were certainly more complimentary about the way that district judges deal with legal issues when compared to lay Benches, as discussed in chapter four.

- Case complexity

In relation to those offences that remain in the summary criminal courts, case complexity has increased.[813] In addition to the foregoing factors, this may result from a flurry of legislation. Robert Marshall-Andrews QC, MP described the government as suffering from "legislative hyperactivity syndrome in respect of criminal justice matters"[814] when discussing the disproportionate number of statutes relating to criminal justice passed between 1997 and 2007. Approximately half of the defence advocates and half of the prosecutors interviewed cited the Criminal Justice Act 2003 and Criminal Procedure Rules as responsible for increased evidential and case complexity.

The Criminal Justice Act 2003 introduced significant amendments to the rules in relation to evidence of previous convictions[815] and hearsay.[816] Both were previously subject to common law provisions but the statute introduced complex guidelines and an application process in relation to the admission of both types of evidence, which encouraged the Crown to apply to admit these types of evidence much more frequently than prior to the introduction of the Criminal Justice Act 2003. For example, one defence advocate described evidential changes in the following way: "that's changed immeasurably. Bad character, obvious example.

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[813] Cape, E and Moorhead, R, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work.*(Legal Services Research Centre, 2005)
[814] Marshall-Andrews QC, R. <http://www.publications.parliament.uk/pa/cm200708/cmhansard/cm071107/deb/text/71107-0009.htm> accessed on 03/09/13.
[815] Section 101 Criminal Justice Act 2003
[816] Section 114 Criminal Justice Act 2003

Hearsay, another clear example".[817] Another advocate described proceedings as "pretty, sort of, straightforward"[818] before the enactment of the Criminal Justice Act 2003.

Additional legislation introduced, which has often been poorly drafted (evidenced by the number of appeals),[819] has not only created a number of summary-only offences but has also complicated sentencing proceedings. For example, since the 1997 election of New Labour, several mandatory minimum sentences have been introduced under the Powers of Criminal Courts (Sentencing) Act 2000 alongside the introduction of extended sentences for 'dangerous' offenders (replaced by indeterminate life sentences under Legal Aid, Sentencing and Punishment of Offenders Act 2012) as well as amendments to provisions relating to suspended sentence orders contained in the Criminal Justice Act 2003. This may explain interviewees' opinions that sentencing provisions and guidelines are of increasing importance.

Prosecutors appear equally perturbed by the complexity introduced by increased statutory intervention in summary criminal proceedings. Interviewee J expressed the opinion that, since the introduction of the Criminal Justice Act 2003, "it's all got a hell of a lot more complicated,"[820] which means that cases probably take longer to prepare for trial. Another prosecutor asserted that the same statute

[817] Interview F; 17
[818] Interview I; 11
[819] Baillie A, 'Can England and Wales Afford Both Justice and the Ministry of Justice?' (Open Lecture Series, University of Kent. 7 December 2011).
[820] Interview J; 22

"is a hideous Act with its, I forget how many sections and schedules it has, but it's a, it was a badly thought through piece of legislation... it is getting more complicated because of the way Parliament produces its Acts"[821]

Baillie provides examples in which the higher courts have similarly lamented the complexity of recent statutory provisions,[822] specifically in the cases of *R –v- Bradley*,[823] *R –v- Lang and others*[824] and *R (on the application of the DPP) –v- South East Surrey Youth Court (Ghanbari, interested party).*[825] In the last case, Rose LJ considered the amendments made by the PCC(S)A in relation to those classified as dangerous offenders and stated

"Yet again, the courts are faced with a sample of the deeply confusing provisions of the Criminal Justice Act 2003, and the satellite statutory instruments to which it is giving stuttering birth… we find little comfort or assistance in the historic canons of construction for determining the will of Parliament which were fashioned…at a time when elegance and clarity of thought and language were to be found in legislation as a matter of course rather than exception".

While statutory provisions have become more complex, other measures to which interviewees attributed increased complexity included policies designed to regulate proceedings, such as the Criminal Procedure Rules. These, along with the removal of low level, uncontested offending from magistrates' courts via diversionary processes were designed to increase efficiency in the criminal justice

821 Interview H; 13
822 Baillie A, 'Can England and Wales Afford Both Justice and the Ministry of Justice?' (Open Lecture Series, University of Kent. 7 December 2011).
823 [2005] EWCA Crim 20
824 [2005] EWCA Crim 2864
825 [2005] EWHC 2929

process,[826] but also appear to have encouraged reference to points of law. This has exacerbated the marginalisation of defendants and highlighted their role as dummy players in the proceedings.

The procedures introduced by the Cr.PR were also established to encourage co-operative case management practices,[827] amid courts' fears that defence advocates were ambushing prosecutors with legal argument at trial.[828] Furthermore, the routine provision of case papers has enabled cases to be analysed in greater detail at an early stage in proceedings.[829] However, as noted above, the practices which were introduced by those initiatives require specialist knowledge of legal and administrative provisions in order to engage with the process. Thus increased complexity has justified greater levels of representation, as is noted in preceding chapters. Increased levels of defence representation, along with the creation of the CPS, means that there are more participants who are more likely to refer to legal issues during the course of proceedings. The observations suggested that references to points of law were much more likely to be made when defendants were represented. Twenty-eight per cent of cases involving unrepresented defendants referred to points of law, whereas 73 per cent of cases involving represented defendants included references to points of law. Increased levels of representation justified by more complex and voluminous legislation is likely to have increased pre-existing co-operative working practices as well as references to points of law, both of which are likely to have exacerbated the marginalisation of defendants.

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[826] Auld, R. 'Review of the Criminal Courts of England and Wales: Executive Summary' (2001) <http://www.criminal-courts-review.org.uk/auldconts.htm> accessed on 05 October 2008.
[827] See for example Cr.PR 1.1 and 1.2 (Ministry of Justice. 'Criminal Procedure Rules' (2011) <http://www.justice.gov.uk/courts/procedure-rules/criminal> accessed on 1 June 2012.)
[828] See, for example, *DPP –v- Chorley Justices and Andrew Forrest* [2006] EWHC 1795
[829] Cape, E and Moorhead, R, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work.* (Legal Services Research Centre, 2005)

The relationship between legalisation, efficiency and professionalisation appears to be complex. Ironically, it seems that, via processes of case management, measures designed to speed up the process of summary justice may have also encouraged more references to points of law. Given that most defendants are legally represented, it is arguable that those references to points of law would be less likely to arise if defendants were unrepresented, but the proceedings are likely to be slower as references to legal provisions need to be explained. This supports evidence which suggests that lawyers actually increase efficiency by negotiating pleas[830] and co-operating with proceedings.[831] Indeed, as noted in the previous chapter, the majority of both defence advocates and prosecutors viewed plea negotiations as beneficial.

It would not be possible to negotiate pleas without disclosing case details, understanding the burden and standard of proof and understanding the weight of prosecution evidence. It is therefore possible that the desire for mutually beneficial but also efficient outcomes has increased implicit references to points of law. Again, efficient working practices actually seem to increase specialist practices in which legal knowledge is advantageous.

The legalisation of summary criminal justice therefore appears to have resulted from several factors. These include the professionalisation of representation, along with a proliferation of statutory provisions that have increased complexity alongside initiatives designed to increase efficiency in magistrates' courts via the use of

[830] Mulcahy A, 'The Justifications of `Justice': Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts' (1994) 34(4) *British Journal of Criminology* 411.
[831] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (ed), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).

standardised forms as well as diversion from Crown to magistrates' courts or away from court completely.

The relationship to neoliberalism

The legalisation of summary justice appears to have occurred at least partly as a by-product of increased demands for efficiency in summary justice. Such demands for efficiency have taken form in regulatory practices which are designed to control the trial process through case management which affects the behaviour of advocates, courts and defendants. In this sense, the criminal justice system has become subject to greater regulation since 1997. Regulatory techniques are manifest in evidential and procedural rules via the Criminal Procedure Rules (as amended), and in the use of forms which compel structured decision making. One example of such a form is the sentencing reasons form which requires magistrates to state which factors they considered in reaching their decision in accordance with sentencing guidelines. The case management form provides a further example of this trend in that it directs court users to formally record the issues and evidential requirements in a case.

The efficiency drive appears to result from neoliberal demands for the public sector to become more 'business-like'. As a result of the proliferation of managerialism, criminal justice services have become ever more anxious about meeting narrowly defined performance objectives.[832] The difficulty arises because managerialist principles incorporate commercial understandings of efficiency in which the 'lowest hanging fruit' becomes an easy target to demonstrate

[832] Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011).

effectiveness.[833] Diversion of offences and relaxation of evidential principles, coupled with more punitive sentencing provisions provide examples of legislation that encourage efficiency, target low hanging fruit and increase the legalisation of proceedings by ensuring that only complex, contested cases are put before the Bench.

It seems that initiatives designed to pursue a neoliberal drive for efficiency, such as increased co-operation between advocates, increased use of diversion and greater levels of case management, have inadvertently added to the legalisation of summary criminal proceedings. One factor, which does not immediately appear to be connected to a neoliberal agenda, is increased levels of representation and professionalisation. It is however arguable that professionalisation has enabled the government to introduce measures (such as case management) which unrepresented defendants would struggle to follow. Further, as detailed in chapter three, professionalisation in criminal courts signalled legitimacy in the early years of the Thatcher government. These issues, coupled with the strong professional network operating in the magistrates' court, exacerbates the marginalisation of defendants. It also contributes to the othering process because defendants are unable to play an effective role in the proceedings.

Conclusion

It seems that the frequency with which points of law arise in summary criminal proceedings has been either previously underestimated or those references which did occur were limited and there has been a change in the way courts refer to law. It

[833] Sanders A, 'Reconciling the Apparently Different Goals of Criminal Justice and Regulation: The 'Freedom' Perspective' in Smith, G. Seddon, T and Quirk, H (eds), *Regulation and Criminal Justice: Innovations in Policy and Research* (Cambridge University Press 2010); 52

appears most likely that increased levels of representation, alongside new legislation and procedural requirements have increased references to points of law in summary criminal proceedings. Earlier socio-legal studies of summary justice have drawn attention to marginalisation which is consequent to courtroom layout and signalling between personnel,[834] as well as issues regarding the efficacy of legal representation.[835] However, recent government interest in the criminal justice process has resulted in more legislation which creates new offences, amends criminal justice procedure or alters evidential provisions. This appears to add another dimension to the nature of marginalisation experienced by defendants.

Many of the references to recent legal provisions are made in implicit terms and thus the increased legalisation of summary criminal proceedings potentially exacerbates marginalisation experienced by defendants. Significantly, defendants may not understand the importance of particular issues that tend to be referred to in implicit ways. The specialist use of language appears to prevent access to effective participation. Levels of marginalisation do however potentially decrease when defendants are represented because lawyers indicate that they do attempt to explain law and procedure to clients before entering the courtroom. Such explanations also appear, according to the data, to enable cases to be processed more quickly. That is not to say that co-operation and language do not marginalise defendants from processes in the courtroom itself, particularly given the passivity of most defendants in court,[836] but is to say that defence advocates do have an important role to play.

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[834] Carlen P, *Magistrates' Justice* (Martin Robertson 1976).
[835] McBarnet D, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981); Bottoms, A and McClean, J, *Defendants in the Criminal Process* (Routledge 1976).
[836] Tata, C. Goriely, T. Duff, P. Henry, A and Sherr, A. 'Does Mode of Delivery Make a Difference to Criminal Case Outcomes and Clients' Satisfaction? The Public Defence Solicitor Experiment' (2004) (Feb) *Criminal Law Review* 120.

Furthermore, the documents required to progress cases appear to require specialist knowledge to be completed appropriately. This suggests that greater levels of representation are to be favoured. However, difficulties with obtaining publicly funded representation remain, as are discussed in the following chapter.

Chapter 6: The Effects of Changes to Legal Aid Provision in Summary Criminal Cases

Introduction

In this chapter I aim to show how the availability of, and procedure for obtaining, publicly funded representation in summary criminal proceedings constructs the relationship between defendants, their lawyers and the magistrates' courts in east Kent.

There have been important changes to the way in which representation in summary criminal proceedings is funded in the first two decades of the twenty-first century. The interests of justice test has remained largely unchanged since the criteria were introduced in 1966.[837] However, the administration of the test has shifted from court legal advisers to non-legally qualified court support staff amid the executive's concerns that court legal advisers were too often persuaded to grant legal aid so that they would be relieved of some of their duties towards unrepresented defendants.[838]

The removal of legal adviser discretion in granting legal aid was only one of a number of measures designed to reduce legal aid expenditure which were set out in chapter three. As has been noted above, means testing was reintroduced in applications for legally aided representation in criminal proceedings following concerns that its abolition had caused an increase in criminal legal aid

[837] Chapter three sets out the interests of justice criteria in full.
[838] Young R, 'Will Widgery do? Court Clerks, Discretion and the Determination of Legal Aid Applications' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)

expenditure.[839] This occurred despite its abolition in 2001 because the system had been too costly to administer.[840] Therefore, in order to obtain publicly funded representation in criminal proceedings, a defendant must pass both the merits (interests of justice) and means test.

This chapter explores the effects of those changes that appear to have had greatest impact on criminal cases in magistrates' courts according to the data obtained from observations and interviews with advocates. The patterns which seem to emerge are significant in providing some explanation of the challenges faced by defendants in summary criminal proceedings, and provide support for some findings in earlier studies.

I will highlight some of the issues that appear to have arisen in relation to publicly funded representation in summary criminal proceedings in recent years. I aim to consider the effect of changes to legal aid and suggest how these themes affect the relationships between defendants, lawyers and the magistrates' courts. The themes that arose during the course of the research were solicitors' risk taking behaviour relating to obtaining funding, remuneration rates affecting the service that defendants receive, issues surrounding defendants' ability to engage in the process of actually applying for legally aided representation and delay caused by the reintroduction of means testing. Before considering those themes, I will discuss the general pattern of representation that I identified.

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[839] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011

[840] Kenway, P 'Means-testing in the Magistrates' Court: Is This Really What Parliament Intended?'(New Policy Institute, 2006).

Levels and methods of representation

Levels of representation in summary criminal proceedings remain high. Of 183 cases observed during my fieldwork, only 40 defendants (22 per cent) appeared to be unrepresented, of whom 22 would have been entitled to representation under the duty solicitor or legal aid provisions.[841] Of the 143 defendants (78 per cent) who were represented, the method under which representation was being funded is summarised as follows:

Method	**Number of cases**
Representation Order (Legal Aid)	75
Pro Bono[842]	23
Duty Solicitor	23
Unclear	17
Privately fee paying	1
Costs reimbursed from central funds[843]	1
Appointed under statutory provisions[844]	3

[841] I was unable to ascertain why those defendants did not take up that entitlement.
[842] In 11 of these cases, the defence advocate appeared to be making the application for Legal Aid at the first hearing, while in a further 5 cases legal aid had been applied for but not yet granted. The remaining 8 cases are unaccounted for.
[843] A solicitor is able to make a claim for costs from central funds when a defendant is represented under a private fee paying agreement and the case is dismissed. In those circumstances, a solicitor can apply for the defendant's costs to be reimbursed by HMCTS.
[844] See s.38 Youth Justice and Criminal Evidence Act 1999 which allows the court to appoint a solicitor to cross examine certain witnesses if the court feels that it is in the interests of justice to do so – i.e. because it would be inappropriate for the defendant to cross examine the witness directly. Strictly speaking, the

My observations reflect a similar level of representation to that found by Kemp in 2010 (82 per cent) – a study also conducted after the reintroduction of means testing.[845] Prior to the reintroduction of means testing, Wilcox and Young assessed grants of applications for legal aid in summary proceedings to be in excess of 90 per cent.[846] While this does not necessarily reflect levels of representation prior to the reintroduction of means testing, I detected a general feeling during the course of the research that more defendants are appearing without legal representation. Six interviewees (A, E, F, I, M and S) specifically referred to a greater number of defendants appearing without representation since means testing was reintroduced. Several more generally asserted that proceedings take longer to conclude because things need to be explained to unrepresented defendants in greater detail – for example, interviewee J. During the course of a conversation observed between a barrister and legal adviser at one magistrates' court in late 2012, counsel observed that he thinks more people are appearing without representation since means testing was reintroduced. The legal adviser agreed with that observation and asserted that cases involving defendants appearing without representation take longer to be dealt with. Despite these comments, the proportion of unrepresented defendants remained relatively low. However, it seems that, although levels of

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role of court appointed advocates is limited to preparing cross examination points for trial, taking the defendant's instructions and performing the cross examination of particular witnesses during the course of the trial. Such advocates are not therefore obliged to attend preliminary administrative hearings (and are not allowed to claim payment for doing so), although there may be tactical advantages to doing so because the advocate will then be aware of any issues that have arisen, will be able to negotiate with the prosecutor, and will be able to gain the confidence of the defendant.

[845] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011

[846] Wilcox, A and Young, R *Understanding the Interests of Justice. A Study of Discretion in the Determination of Applications for Representation Orders in Magistrates' Courts. Report to the Legal Services Commission* (Centre for Criminology, University of Oxford, 2005)

representation remain high, lawyers are not necessarily confident about being remunerated for the service they provide.

Uncertainty for lawyers

During the course of both observation and interviews (particularly in the latter) it became apparent that solicitors were representing defendants at financial risk to their firm. I observed advocates completing their client's application for legal aid while in court and solicitors complaining about being required to conduct case management hearings when they were not in funds. During the course of observation, I was approached by one defence advocate (who was not interviewed) who told me that his firm makes an application for legal aid in every case, even if they know it will be refused, in order to make a claim for pre-order cover[847] (£49.70) or under the early cover scheme[848] (£75 plus VAT) and thereby receive some remuneration.

[847] "Pre-Order cover is available under the 2010 Standard Crime Contract and offers solicitors an additional safeguard. Where legal aid is refused on Interests of Justice grounds, regardless of whether the applicant passes or fails the means test, a claim can be made for a limited amount of work to an upper limit of £49.70 (national) or £52.55 (London). The conditions for Pre-Order Cover
- A qualified Solicitor who is a Designated Fee Earner or a Crime SQM supervisor must have determined that the case meets the Interests of Justice Test.
- Documented reasons for the determination are on file.
- Work done appealing against the refusal can be Pre-Order Cover providing the capped amount is not exceeded." Ministry of Justice. 'Pre-order cover Criteria' (2013) <http://www.justice.gov.uk/legal-aid/assess-your-clients-eligibility/crime-eligibility/payment-before-legal-aid-is-granted/pre-order-cover-criteria> accessed on 23 October 2013.

[848] Early Cover is available under the Standard Crime Contract. A fixed fee of £75 + VAT is available. The criteria for Early Cover are:
"- A properly completed legal aid application has been received by HMCTS by 9am on the sixth working day following the date of first instruction (provided that the date of first instruction is on or before the date of the first hearing); and
- the application has not been granted or refused by the start of the first hearing; and
- the first hearing moves the case forward and any adjournment is justified; and
- the application satisfies the Interests of Justice (IoJ) test but does not pass the means test." Ministry of Justice 'Early Cover Criteria' (2013)<http://www.justice.gov.uk/legal-aid/assess-your-clients-eligibility/crime-eligibility/payment-before-legal-aid-is-granted/early-cover-criteria> accessed on 23 October 2013

Similar sentiments emerged during the course of interviews, with interviewee S saying that work is conducted when remuneration is uncertain

> "All the time, all the time. I'd say if I was to go to court with six cases a day, roughly for example at least one of them would be a bit of a wing and a prayer job where you're hoping you would [be paid] and sometimes you should, I do submit legal aid knowing it's going to get refused on the interests of justice just to get the refusal fee, just to get something."[849]

Three of the seven prosecutors interviewed (Q, L and P) did not notice advocates working when they were unsure if they would be paid but all of the other 19 interviewees described this as a relatively common occurrence since the reintroduction of means testing. While defence solicitors predictably had the strongest views about this issue (see below), prosecutors also commented that they had a sense of defence solicitors doing work when they were unsure about payment a lot of the time[850] or every time they had conduct of a court list.[851]

Defence solicitors spoke of conducting cases when they were unsure of payment on a frequent basis. Several said that they worked in this way "all the time",[852] others described it as a daily occurrence[853] and several talked about attempting to secure payment via legal aid in terms of taking a risk[854] or a gamble.[855] Interviewee F explained that when there are problems with legal aid

> "These cases end up being dealt with *pro bono* by solicitors who, you know, have an ongoing, or have had an ongoing, relationship with the client and don't want

[849] Interview S; 4
[850] Interviews J and N
[851] Interviews M and N
[852] Interviews C, D, E and S
[853] Interviews F, G, R and S
[854] Interviews E and O
[855] Interviews D and R

to see people stuck high and dry. I don't think it happens for trials but I'm pretty sure it happens quite a lot for guilty pleas."[856]

This suggests that lawyers seek to mitigate defendants' marginalisation (by providing free representation) as a result of pre-existing relationships. The nature of that mitigation may however be limited by remuneration levels, as is discussed below. Potentially, in the future, when such relationships have not been established, more defendants will appear in court without representation.

It must also be recognised that there may be other reasons why solicitors represent defendants on a *pro bono* basis, including to maintain good working relationships with the court and prosecutors. As discussed in chapters two and four, a high degree of co-operation exists between court personnel, and that co-operation seems to be crucial to the smooth running of busy courts. Acting in a co-operative way also enables defence solicitors to maintain credibility and therefore remain a member of the exclusive group[857] of personnel who work in summary criminal courts. Furthermore, defence solicitors may be of the view that, by conducting a degree of *pro bono* work, they will maintain a good reputation with (potential) clients, as is alluded to below.

However, defence advocates recognised that, by taking risks in relation to the likelihood of payment, they are playing into the hands of a system that considers efficiency to be of extreme importance. For example, interviewee K said

"Magistrates were trained and said absence of legal aid is no reason to adjourn and again solicitors were not, I think a) because we are professional and care

[856] Interview F; 2
[857] Carlen P, *Magistrates' Justice* (Martin Robertson 1976); Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).

about our clients but b) because we're terrified someone else will come along and look after them and we'll lose our market share, solicitors have facilitated the courts. It's back to my first point that we've allowed it to happen and we shouldn't have done."[858]

One solicitor felt that the magistrates' courts in east Kent are aware of the willingness of advocates to take that risk and take advantage of that behaviour.[859] Thus, by failing to resist the difficulties they encounter, solicitors become complicit in their own subordination.[860]

However, even when publicly funded representation is in place, the way that fees are paid has the potential to affect the way that defendants experience the magistrates' court process. When legal aid is in place, most summary criminal cases are paid by way of fixed fee. The method and rate of payment may both explain solicitors' willingness to take risks about payment[861] and may affect the level of service received by defendants.

<u>The effect of fixed (or standard) fees</u>

Fixed fees had been scrapped in favour of payment by hourly rate in the 1960s because the government felt this was a fairer way of remunerating advocates,[862] but they were reintroduced in the mid-1990s because legal aid costs had risen by 300

[858] Interview K; 3. Interviewee C also said "You're expected to do it and we've all jumped into line and we do it" (Interview C; 3)
[859] Interview G
[860] Newman took the view that criminal defence solicitors do regard themselves as subordinate to other members of the legal profession, and that they attempt to justify poor service that they provide as a result of the attack on their egos (Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013)). Solicitors may be more tempted to provide a limited service if they are uncertain about receiving payment.
[861] As long as legal aid is eventually granted, payment at the same rate would be received as if legal aid had been in place at the outset and so little is actually lost
[862] Falconer, C. *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005).

per cent.[863] There exists, however, "relatively little published direct empirical examination of the effects of standard fees for summary work."[864] Kemp goes further and states that there has been no research (as at 2010) in England and Wales that has examined how fixed fees affect the decisions that criminal defence solicitors make about cases.[865] While my research findings are based on data from a relatively small interview and observation sample that has not been corroborated with file examination, the views expressed by solicitors about the effect of working under a fixed fee scheme seem to be surprisingly candid.

Seven of the 12 defence solicitors[866] interviewed expressed an opinion about the level of payment received under the fixed fee scheme. Most of those interviewees indicated that the fixed fee payment scheme was in principle acceptable – either because "on average it pans out" because the difficult cases are being subsidised by the straightforward ones,[867] or because the level is "about right when you can get legal aid."[868] Interviewee O said that the system is "not great but it's, I guess it's OK" because it is possible to break out of the fixed fee system and be paid per hour in lengthy or complicated cases.[869] All of these issues were considered by interviewee F, who summarised the situation as follows:

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[863] Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)
[864] Tata, C and Stephen, F. ''Swings and Roundabouts': Do Changes to the Structure of Legal Aid Remuneration Make a Real Difference to Criminal Case Management and Case Outcomes?' <http://staff.law.strath.ac.uk/staff/cyrus_tata/public/Swingsper cent20andper cent20Roundaboutsper cent20Draft106.pdf> accessed on 10 April 2012
[865] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011; 110
[866] Interviews A, C, F, K, O, R and S
[867] Interview A; 4.
[868] Interview S; 4
[869] Interview O; 5

"I think that the fee structure at the moment is not too bad. I think that the fees payable for guilty pleas, for summary only and either way offences are fine. I understand entirely the logic behind standard fees and I think that it's swings and roundabouts and, in any standard fee situation, there are going to be cases where you lose and there will be cases where you win. It's not ideal, obviously I'd prefer to be paid for everything I do, but that would also mean that there would be some cases where I would be putting in a bill for less than £50. So on a swings and roundabouts basis I think that fixed fees are fine. I think that it is a very good thing when you go outside standard fees you are paid for what you do and that that is looked at by the Legal Aid Agency and they will tax it down if they think you're billing stuff that you shouldn't be billing for because that incentivises two things. First of all it incentivises hard work on the client's behalf and secondly it means that you don't do unnecessary things. I think it's a perfectly sensible way of dealing with criminal legal aid funding. So I don't have very much complaint or really any complaints about the magistrates' court fee structure as I think that it's fine - certainly in the provinces."[870]

In contrast, interviewee C described the profession as "on its knees"[871] due to the fact that there has been no rise in the fees paid since the late 1990s and payment rates are too low. Both the Law Society and National Audit Office have criticised the low remuneration rate in publicly funded criminal defence representation.[872] Kemp also found that solicitors asserted that they "were not adequately paid for the

[870] Interview F; 5
[871] Interview C; 3. Interviewee I made a similar comment.
[872] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).

services they provided and they felt this would have a detrimental impact on the quality of service."[873] Interviewee K was similarly disparaging in saying:

> "Where one has legal aid it again, I mean one talks about the swings and roundabouts of legal aid but in my view it's neither fun nor fair so this analogy should be dropped… Fixed fees in the magistrates' and Crown court act, can act as a disincentive to do work thoroughly and properly and then there's the whole question of the rates of remuneration that have not increased for I forget however many years. The cuts that have been sustained, the abolition of committal fees and I can't think what else but numerous things have ceased to be an item for payment or rolled into the standard fees and so I think the whole system is underfunded and does not act as an incentive to more or less provide quality and good service. Whereas I was brought up for most of my career to say to clients 'if you pay me privately you'll get no better service than if you've got legal aid', that parted some time ago."[874]

Interviewee K was clearly of the view that the level of remuneration received under legal aid affects the service that defendants receive. However, raising defence advocate remuneration rates is politically difficult, as much media attention focuses on the very small percentage of advocates who earn considerable sums conducting legally aided work.[875] Most of the defence solicitors interviewed did generally acknowledge that payment via the fixed fee system provides an incentive to work less thoroughly on cases than if payment were made by the hour, including the

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[873] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011; 107

[874] Interview K; 6

[875] Hynes S, 'Social Welfare Law and Public Opinion' (LSRC International Research Conference 2012. Rights and Wrongs: Developments in Access to Justice. Oxford 12 September 2012).

advocate who agreed with the system in principle.[876] Interviewee I gave an example of a firm drawing up case plans which incorporated how much a case was worth and only working to that value.

Prosecutors made no similar comments, but largely confessed to knowing little about the way that defence advocates are paid. One prosecutor erroneously believed that defence solicitors are paid for every hearing and lawyers would therefore be pleased when cases are adjourned.[877]

Of those defence solicitors who did acknowledge that payment via fixed fee could mean that less time would be spent on case preparation than if hourly rates were paid, three were keen to say that the system did not affect the way that they personally work,[878] while also acknowledging that their resources are somewhat stretched. The remaining defence solicitors tended to acknowledge that fixed fees provide a disincentive to put in extra work on a case, but in general terms – such as by saying "it's human nature, you try and do as little as you can get away with and I think that's the big fault of the fixed fee system"[879] - rather than indicating that it affected their behaviour personally.

By way of example, interviewee A, noting that the initial contact with clients is focused on how to get paid, and that this taints the relationship, said:

> "You're inclined to get through things as quickly as possible. You're torn between doing something properly which is what you want to do and...Working for minimum wage. You think, what is the point in going through this in any detail when odds on it won't pan out that way, whereas before you would be

[876] Interviews A, B, C, D, E, F, G, I, K, O
[877] Interview Q
[878] Interviews C, E and I
[879] Interview B; 4

able to fine tooth comb as one ought to and that's the thing that I find most difficult just from what I do with files… It's not that people suddenly don't want to do their jobs properly, it's just that you can't and it's incremental and we probably don't even notice that sort of jaded approach is creeping in."[880]

Another interviewee spoke of the struggle between the professional obligations of the job as against trying to run a profitable business:

"When you've got fixed fees there is always going to be a time at which you start looking at your watch and you start thinking how much are we actually being paid to do this… And that mental calculation has got to be done by anybody who is running a business. And there comes a point where on a fixed fee structure you say 'sorry, enough's enough'. Well you don't say 'sorry enough's enough' but you are thinking enough's enough and you have to start looking at, you know, exactly what level of service you are providing… Yes, we're professionals and, yes, we are supposed to be providing a professional service but that doesn't mean that we aren't also having to run, try and run a profitable business and it's very difficult to do that if you don't have an eye on costs and the amount of time you are spending doing work for which you can't be paid."[881]

Interviewee D similarly commented that less staff have to do more work to balance the books, which places additional pressure on case preparation. This supports Newman's finding that lawyers were concerned to process cases as quickly as possible[882] because, in order "to sustain themselves, many lawyers insisted that they were forced to compromise their behaviour; discontinuous representation was

[880] Interview A; 4-5
[881] Interview F; 6-7
[882] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013); 78

a necessity to survive".[883] However, unlike Newman, who said "lawyers did not provide any discernible sense of regret at behaving in the manner they did",[884] my interviewees described themselves as 'torn'[885] between their duties to the client and business needs. They expressed insight into the difficulties this can cause defendants in that they described a temptation to 'cut corners'[886] or perform as little work as possible in order to maximise profit.[887]

These comments appear to specifically undermine the theory that lawyers provide services that are unnecessary in order to maximise income by claiming higher fees.[888] Instead, and in line with managerial demands for efficiency, lawyers seem to generally work to volume. Thus, the comments made by advocates in my sample do not support the supplier induced demand theory discussed in chapter three. Instead, advocates seem keen to conduct cases with maximum efficiency (or minimum effort) even at potential (recognised) harm to the client. This supports the findings of Gray, Fenn and Rickman which suggested that defence solicitors tended to reduce the amount of time spent on cases that would clearly not break out of the lower standard fee category.[889] In fact, the comments made by advocates entirely support the findings of Stephen, Fazio and Tata in Scotland, who noted that the introduction of fixed fees meant that solicitors put less effort into conducting cases

[883] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013); 86
[884] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013); 87
[885] See interview A in particular
[886] See, for example, interview B
[887] See, for example, interview G. In fact, Newman's own subjects did express similar concerns that "the client loses out in the need to get through the list" (Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013); 96)
[888] Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)
[889] Gray A, Fenn P and Rickman N, 'Controlling Lawyer's Costs through Standard Fees: An Economic Analysis' in Young, R. and Wall, D (eds), *Access to Criminal Justice. Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)

and reduced "expenditure on those activities which are incorporated in the core payment of the standard fee."[890]

It was apparent that advocates felt constrained by the business circumstances in which they found themselves, and that this caused some conflict with their professional duties. Young and Wall had earlier noted that the contracting scheme under which standard fees were introduced was likely to lead to conveyor-belt type case processing as firms struggled to remain profitable.[891] The contractual terms of the legal aid franchising system appear to place limits on lawyers' ability to make flexible, autonomous decisions,[892] because, as Sommerlad noted, "the development of a direct relationship with the state raised the possibility of managerial control over the legal aid sector."[893] It seems that Young and Wall were correct to predict that "if the only way of making a profit under legal aid is to offer hurried, standardised services, then access to justice must suffer"[894] as lawyers are pressurised into dealing with cases (rather than clients) in standardised ways.[895]

My research supports this prediction, as well as Wall's statement that the legal aid system "is characterised by the competing rationalities that arise from the

[890] Stephen F, Fazio G and Tata C, 'Incentives, Criminal Defence Lawyers and Plea Bargaining' (2008) 28(3) *International Review of Law and Economics* 212; 213
[891] Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)
[892] Sommerlad H, 'Criminal Legal Aid Reforms and the Restructuring of Legal Professionalism' in Young, R. and Wall, D (eds), *Access to Criminal Legal Aid: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).
[893] Sommerlad H, 'Criminal Legal Aid Reforms and the Restructuring of Legal Professionalism' in Young, R. and Wall, D (eds), *Access to Criminal Legal Aid: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 297
[894] Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 12
[895] Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)

conflicting professional agendas of the groups involved in the process".[896] The conflicts that can be seen in my research exist between the court's demands for efficiency and compliance with bureaucratic procedures, the advocate's duties to clients and the advocate's need to maintain a business. In response, firms demonstrated a tendency to adopt a managerial stance involving volume processing.[897]

However, advocates did express some discomfort with that position, suggesting that they would prefer to take a political stance (which involves a more robust, resistant approach to bureaucratic procedures in favour of client-centred approaches) [898] if the pressure of running a business were not present. This builds on Newman's recent findings.[899] He was of the view that lawyers expressed a client-centred approach but acted in a way that was almost dismissive of clients' needs.[900] My findings may provide some explanation for Newman's result, although it seems that my interviewees openly recognised the difficulties in representing clients in this way while Newman took the view that solicitors were in a form of denial about their behaviour.[901] Newman was of the view that lawyers actively embraced the working patterns encouraged by fixed fees, and that this was demonstrated by a "clear disregard for their clients".[902] It is clear however that Newman was hoping to find lawyers who remained committed to public service ideals of civic morality, and was

[896] Wall D, 'Keyholders to Criminal Justice? Solicitors and Applications for Criminal Legal Aid' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 115
[897] McConville M, Hodgson J, Bridges L and Pavlovic, A, *Standing Accused. The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford University Press, 1994))
[898] McConville M, Hodgson J, Bridges L and Pavlovic, A, *Standing Accused. The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford University Press, 1994))
[899] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[900] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[901] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[902] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013);87

obviously disappointed to find lawyers' professional obligations challenged by the business practices that they felt constrained them.[903]

Neither Newman's[904] nor my own research suggests however that lawyers did not do their best for clients in terms of their advocacy when they were actually in the courtroom, and I suggest that one must view their behaviour outside the courtroom in a somewhat different way – although I would not endorse the behaviour observed by Newman as best practice.[905] While I did observe the alienation of defendants in the courtroom via jargon, professional networking and courtroom layout, I did not observe defence advocates denigrating their clients in the way that Newman suggests occurs among colleagues outside the courtroom.[906] In contrast to Newman's study, defence advocates that I interviewed appeared to recognise that payment by fixed fee incentivises volume processing of cases over spending a significant degree of time examining the fine details of any given case. The implications of this are obvious – points may be missed meaning that relevant evidential or legal points may not be pursued.

This clearly has the potential to place defendants at significant risk of inadequate access to justice in the proceedings. However, the complexities of the legal aid system do not just affect the way that lawyers approach cases. As well as the possibility of defendants' exclusion from active participation in the process via

[903] Newman does not however conduct a thorough analysis of the potential for alternative models of practice, nor of behaviour in court or at the police station – arguably the most important parts of legally aided representation. Newman decries the level of client care outside the courtroom as clearly substandard and asserts that lawyers seemed to positively embrace their behaviour in order to maximise profit (Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013)). On the other hand, my interviewees seemed conscious of the crossroads at which they had been placed – the business or the client.

[904] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).

[905] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).

[906] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013). I conducted my observations inside the courtroom only.

poor service, the application process exacerbates the defendant's exclusion at an early stage in the proceedings. There appeared to be a tendency for interviewees to attribute the uncertainties involved in applying for legal aid to what are perceived as burdensome bureaucratic requirements (such as the need for self-employed applicants to provide business paperwork[907] or problems with the correct information being held by the Department of Work and Pensions).[908] Given that many defendants have somewhat chaotic lifestyles, they struggle to comply with administrative demands placed upon them as part of the legal aid application process.[909]

Defendants, lawyers and the legal aid application process

Most interviewees felt that specialist legal knowledge is necessary in order to appropriately complete an application for legal aid. This results from the need to understand whether or not a case will meet the interests of justice test.[910] Kemp also noted that the discretionary nature of the interests of justice test alongside the administrative requirements of the means test "have the potential to create

[907] Interview I, K and Q for example. Kemp also found defence solicitors expressing concern about the administrative burdens placed on self-employed defendants who attempt to apply for legal aid (Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011)

[908] Interview O highlighted this as a particular issue. When defendants are in receipt of Job Seeker's Allowance, Employment Support Allowance or Income Support they should be automatically entitled to legal aid, subject to the interests of justice test. Whether or not that entitlement exists is checked via records held by the Department of Work and Pensions. Interviewees in Kemp's study reported similar problems in accessing information held by the Department of Work and Pensions (Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011)

[909] Interviews C, E and I in particular

[910] Both the interests of justice test and the means test must be passed in order to secure legally aided representation. The interests of justice test allows the court to test whether the case is one in which a defendant requires specialist (i.e. legal) assistance to properly advance his or her case. The criteria are set out in chapter three.

obstacles to legal representation, particularly for vulnerable defendants".[911] Half of defence solicitors[912] and two of the seven prosecution advocates interviewed also felt that defendants struggle with the additional information that is required to satisfy the means test as well as the interests of justice test.[913] By way of example, interviewee F described the legal aid application as "virtually designed to irritate and be as difficult as possible to complete…Even intelligent, articulate people who have to fill in this form get it wrong".[914]

My findings therefore lend support to Wall's description of solicitors completing legal aid applications as mutually beneficial to both the client and the lawyer. He explains:

> "First, the legal aid certificate is an important source of income to the legal practitioner…Secondly, clients are not always aware of the importance of the application form and, in the solicitor's experience, tend to leave the application to the last minute or to forget about it altogether. Thirdly, the clients prefer to leave the application to the solicitor because of the complex legal knowledge and expertise required to complete it. Fourthly defendants are encouraged by the information pamphlets…to apply through a solicitor."[915]

As well as concerns about bureaucracy surrounding the procedure, defence solicitors felt that they had been misled about the degree to which they would need to assist in resolving problems with legal aid – stating that, when means testing was

[911] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011: 66

[912] Interviews A, D, F, O, R, S

[913] Interviews H and Q

[914] Interview F; 3

[915] Wall D, 'Keyholders to Criminal Justice? Solicitors and Applications for Criminal Legal Aid' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 117

initially reintroduced, they were told that any problems that arose would be resolved between the court and the applicant. Despite this, advocates felt that they are expected to liaise between the court and the applicant in order to assist the legal aid application process.[916] This supports Kemp's finding that lawyers felt the means test had added to the administrative burdens placed on them.[917] The Legal Services Commission (now replaced by the Legal Aid Agency) recognised, when means testing was reintroduced, that solicitors would probably be required to complete the means information required on a legal aid application on behalf of defendants.[918] Hynes and Robins had already noted that defence solicitors had been expected to assist defendants in completing forms, gathering evidence for the means test and liaising between the legal aid provider and the client.[919] This demonstrates how the executive has been able to transfer the cost of administering the legal aid system to lawyers, although this is not a new feature of the English and Welsh legal aid system.[920]

Defence solicitors appeared to be of the view that the procedure for obtaining legal aid was too bureaucratic and too onerous on defendants and that this delayed case progression. They generally appeared to be of the view that magistrates are unsympathetic to those problems (although they also tend to allow unrepresented defendants more leeway in court, as below) and that the court process forces them

[916] See, for example, interviews C and E
[917] Kemp, V *Transforming legal aid: Access to criminal defence services* http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf (2010) accessed 12 December 2011
[918] Legal Services Commission, 'Focus on CDS' (2004) 16 (December)
[919] Hynes S and Robins J, *The Justice Gap. Whatever Happened to Legal Aid?* (Legal Action Group 2009). One prosecutor similarly blamed the court process for delay and complexity in obtaining publicly funded representation – stating that the court does not seem to be able to sort out legal aid very quickly and the whole system seems like it could be greatly simplified (Interview L).
[920] For example, solicitors were expected to complete the administration of the earlier 'green form' scheme referred to in chapter three.

into action - partly because magistrates are aware that advocates are prepared to take the risk of non-payment in a proportion of cases. Interviewee F expressed concern that "there is sometimes a lack of understanding on the Bench, particularly the lay Bench, as to just how difficult it can be to get a client legal aid"[921] as a result of the bureaucracy surrounding the form.[922] These views were, to some extent, supported by prosecutors. It also seemed to be the case that advocates felt a sense of duty to both the court and to clients, but further felt that those duties were hindered by the difficulties that exist in applying for and obtaining legal aid.

Notably, however, interviewee S was of the view that, if the magistrates are told everything that has to be done in order to obtain legal aid, then they tend to be more sympathetic to requests for adjournments. This suggests that magistrates have little understanding of the procedure for applying for, and obtaining, publicly funded representation. It also suggests that, when the court is informed about the requirements of that procedure, magistrates demonstrate compassion towards both defendants and their solicitors who are attempting to obtain funding. Such demonstrations of compassion may indicate that magistrates, when told about the procedure for obtaining legal aid, also believe that it is onerous.

The data demonstrated that advocates believed that the reintroduction of means testing had a negative effect on defendants. While only two prosecutors expressed the opinion that defendants find it difficult to comply with the conditions required to obtain legally aided representation, four of the seven were of the view that defendants tend to have vulnerabilities which affect their ability to participate

[921] Interview F; 2
[922] Interviewee O also commented that the procedure for obtaining legal aid is very bureaucratic and obtaining the required proof of income from clients who are not particularly organised can be problematic.

effectively in the legal aid application process, or that their motivation is not sufficient to enable effective participation.[923] Interviewee H said that many defendants have not had a great education, while interviewee L stated that the majority of defendants either have learning difficulties or literacy problems. Interviewee J similarly expressed the opinion that a defendant might be able to complete a legal aid application "providing they can read and write in the first place of course…let's face it, a lot of them can't…I've looked at the form once and it didn't seem that easy to understand".[924] Newman found – as did I – defence solicitors expressing similar opinions about the level of defendants' ability to understand the process.[925] He however took the view that these opinions demonstrated an unhealthy lawyer/client relationship on the basis that it was part of the lawyer's desire to distinguish the client as belonging to "a different breed,"[926] a bad category of citizen. This fails to acknowledge that the private views expressed by defence solicitors about their clients may not reflect the way that they actually act in court – something which, as a non-lawyer, Newman acknowledges that he cannot assess.[927] It may also simply be a fact of the criminal justice system that many defendants do suffer educational, emotional and/or health difficulties. Similarly, while Newman criticises the way in which defence solicitors advise clients and act in court, as a non-lawyer he is not able to assess the appropriateness of the advice or behaviour in legal or evidential terms.

While prosecutors highlighted literacy or educational difficulties as a hindrance to defendants successfully applying for legal aid, defence solicitors noted additional

[923] Interview H, J, L, P
[924] Interview J; 5
[925] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[926] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013); 46
[927] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013)

factors that they felt had an impact on defendants' ability to participate effectively in the legal aid application process.[928] By way of example, interviewee C said "I understand that the clients make no effort whatsoever to get legal aid sorted but then my clients are drug addicts and vulnerable people so, you know, they don't live by normal every day rules",[929] which also highlights how procedures and culture 'others' defendants. Again, interviewees involved in Kemp's study made similar comments, which led her to conclude that "solicitors were also concerned that the bureaucratic requirements of the means test were too onerous when they were dealing with people who lead chaotic lifestyles, have severe mental illness, or have little or no English".[930]

An acute example of these issues was provided via observation at one court hearing. A defendant appeared before the court after breaching his bail conditions, which had been imposed at the Crown court. He was represented by the duty solicitor who explained that the defendant was not legally represented in the proceedings because he had failed the means test. He had failed the means test because he had been hospitalised numerous times as a result of mental health problems and could not therefore provide the necessary income information to the legal aid department. The Crown court judge was reportedly extremely concerned that the defendant was not legally represented and had adjourned the case a number of times to try and resolve the problems but the defendant remained without publicly funded representation, even though he would have passed both the means

[928] See interviews A, B, C, D, K,
[929] Interview C; 2
[930] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011; 71

and merits test.[931] This case illustrated how a defendant's inability to engage with the application process might cause delay in the proceedings and risk inadequate access to justice.

While this may be an extreme example, observations provided numerous examples of situations in which a defendant's case had been hindered because legal aid was not in place. This appeared to result in delay in the proceedings, which was also commented upon during the interviews.

Delay

As noted above, the administrative requirements of the legal aid application procedure, coupled with personal difficulties faced by many defendants, mean that it is difficult to know if or when legal aid will be granted. Defence solicitors also complained that it might take as long to try and resolve issues with legal aid as it would to actually prepare the case.[932] Three quarters of defence solicitors[933] and five of the seven prosecutors[934] interviewed felt that problems with obtaining legal aid cause delay in summary criminal proceedings.

Defence advocates raised concerns that delay in obtaining legal aid not only means that they cannot start preparing cases as early as they would wish to, but also that the inability to prepare properly means that defendants are sometimes forced into situations which are not necessarily beneficial to them.[935] For example, interviewee B expressed concern that it was difficult to know how far to take

[931] While this is perhaps an extreme example, it does not appear to be an isolated one. Baksi noted in 2011 that the LSC received criticism for delay in processing legal aid applications and leaving people without representation in serious cases (Baksi C, 'Djanogly urged to ease Legal Aid backlog' (2011)(23 June) Law Society Gazette 3)
[932] See, for example, interviews G and I
[933] Interviews A, B, C, D, E, I, K, O, R
[934] Interviews H, J, L, M, N
[935] See, for example, interviews A, B, C, E and O

instructions unless or until legal aid is in place and, as interviewee E noted, forcing defendants to enter a plea before the advocate is prepared forces solicitors to advise defendants to enter a not guilty plea, because the burden of proving the case remains with the prosecution.[936] One prosecutor noted that demanding efficiency when legal aid is not in place causes delay at later stages;

> "We are told that we should object to an adjournment just so that the defence can get legal aid but it got very difficult for people to sort out their legal aid… forcing a plea always forced a not guilty at an early stage which would have an impact on the case management hearings and on CJ: SSS". [937]

Interviewee H, another prosecutor, similarly commented that the reintroduction of means testing "delays the start of legal aid and therefore delays defence solicitors from taking proper instructions".[938] Interviewee C commented that the courts require decisions to be made about the conduct of cases at a time when advocates "don't necessarily have the opportunity to go through the papers as much as we would wish and subsequently, you know, we might get cross examined upon it".[939] Interviewee K expressed some criticism of this behaviour, as noted above, in stating "means testing delays the grant of legal aid and so solicitors continue to facilitate the system to run at speed by allowing cases to be progressed, representing people when they don't have legal aid."[940] The fact that this is noted by prosecutors and defence advocates suggests that it is not simply defence solicitors 'talking the talk' in

[936] As is, however, noted in chapter four, the entry of a not guilty plea in these circumstances does not occur very frequently.
[937] Interview M; 7.
[938] Interviewee H; 1
[939] Interview C; 8
[940] Interview K; 2. This was particularly noticeable in the course of observing cases that were due to be committed to the Crown Court. Payment for committal proceedings was abolished in 2012 (Baksi, C 'Solicitors to Work 'Unpaid' Until Committals Abolished in April 2012' (2011) (8 December) Law Society Gazette).

relation to due process as Newman suggests.[941] As is discussed in chapter four, forcing pleas at too early a stage in the proceedings is detrimental for all participants. The difficulty appears to result from a combination of delay in obtaining legal aid, the court's desire to improve efficiency in the proceedings (which means that applications for adjournments are less likely to be tolerated by the Bench) and advocates' desire to conform to usual co-operative workgroup behaviour.

Both defending and prosecuting[942] interviewees therefore expressed the view that, by refusing to adjourn cases when legal aid is not in place, cases ultimately take longer to be dealt with. This is because pleas are entered prematurely and because, according to the data, cases involving unrepresented defendants take longer to be processed – and, as a result of the reintroduction of means testing, there appear to be more unrepresented defendants appearing in magistrates' courts.[943] Kemp similarly found that the number of defendants appearing without legal representation had increased since the reintroduction of means testing.[944] This issue adds another dimension to the way in which the presence or otherwise of publicly funded representation constructs summary criminal proceedings. I therefore turn to consider some of the issues that arose during the course of observation and interviews in relation to unrepresented defendants.

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[941] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[942] See, for example interviews J and M
[943] See, for example, interviews J and M
[944] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011

Unrepresented defendants

As discussed in chapters two and four, evidence suggests that lawyers in summary criminal proceedings actually increase efficiency (and reduce delay) by negotiating pleas[945] and co-operating with proceedings.[946] Interviewees were similarly of the view that cases involving unrepresented defendants take longer to be processed. Delay is caused because, when defendants are unrepresented, "where they are unrepresented at trials they don't understand the procedure. It delays trials enormously because effectively they're trying to give evidence while they cross-examine you".[947] This comment supports earlier studies of unrepresented defendants in magistrates' courts, which describe them as inarticulate, often unable to understand the proceedings and unfamiliar with procedures.[948] Again, Kemp found that "defendants who were unrepresented had less understanding of what is happening when compared to those who have a solicitor".[949] The increasingly legalised nature of the proceedings, as discussed in chapter five, is likely to intensify that problem for unrepresented defendants.

To that end, five of the seven prosecutors[950] but only four of the 12 defence solicitors[951] interviewed felt that magistrates and district judges try to be helpful to unrepresented defendants. Approximately a third of interviewees, both prosecuting

[945] Mulcahy A, 'The Justifications of `Justice': Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts' (1994) 34(4) *British Journal of Criminology* 411.
[946] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, Richard and Wall, David (ed), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).
[947] Interview B; 9
[948] Justice, *The Unrepresented Defendant in Magistrates' Courts* (British Section of the International Cmssn of Jurists, 1971); Carlen P, *Magistrates' Justice* (Martin Robertson 1976).
[949] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011; 79
[950] Interviews H, J, M, N and P
[951] Interviews B, E, O, S

and defending[952] were of the view that unrepresented defendants are treated more leniently by magistrates' courts because they are allowed to introduce evidence into the proceedings that would not generally be allowed (such as hearsay). However, one of those prosecutors[953] and three defence solicitors[954] felt it was painful to watch unrepresented defendants in court because

> "There's obviously certain defendants who really want to have their say and the Bench is constantly trying to keep them quiet in the court room because they know, if they open their mouth, that they're going to stitch themselves up and probably say something that they shouldn't do."[955]

One of the defence solicitors further commented

> "It's rare than an unrepresented defendant says "no I don't understand", they will just say 'yes' and there's that heart sinking feeling for me of 'do you really understand?' and then the question of the plea and then the, the position on the law...it's the agony of watching the conversation that you would be having outside in consultation."[956]

The above concerns were demonstrated during the course of observing sentencing hearings that involved unrepresented defendants. When unrepresented defendants were asked if they wanted to say anything to the court about the offence, they tended to provide extremely brief answers to specific questions that the court clerk or magistrates asked, in stark contrast to the speeches made by defence solicitors that were often directed to offence mitigation in terms of sentencing guidelines and offender personal mitigation. In one instance, an unrepresented

[952] Interviews A, B, J, M, S
[953] Interview J
[954] Interviews A, F and K
[955] Interview J; 17
[956] Interview A; 12

defendant essentially admitted that he had committed the same offence on several previous occasions even though there was no record of the commission of those offences. Although the court did not act on that admission (and the defendant did not actually suffer any adverse consequences), it is highly unlikely that it would have occurred if the defendant had been represented.

Duty solicitors at court

One way in which the legal aid scheme has sought to mitigate problems experienced by unrepresented defendants is via the duty solicitor scheme. As mentioned in chapter three, all defendants who have either been charged with a potentially imprisonable offence or who appear while detained in custody are entitled to instruct the duty solicitor.

When the duty solicitor scheme was expanded by the Law Society in the 1970s and early 1980s, Ashworth describes it as considerably improving the provision of legal aid.[957] About a third of my interviewees[958] felt that the duty solicitor scheme generally provides a good service. Interviewee D said that the duty solicitor scheme is useful because a duty solicitor can help people make a sensible decision about plea, saying

> "A lot of people don't seek legal advice before going to court, a lot of people are disorganised and, frankly, getting to court on the right day and on time is represented as a success for them... All the more so given the problems in getting funding for that legal advice in advance of the court. So I think the duty solicitor scheme plays a vital role in ensuring that people who turn up to court

[957] Ashworth A, 'Legal Aid, Human Rights and Criminal Justice' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 64
[958] Interviews D, C, K, S for the defence and Q and P for the prosecution

without a lawyer make sensible decisions about what, what's going to happen to them. There have been many occasions where people have walked in saying 'I'm coming in, I'm pleading guilty' and you sit down with them and you actually work out 'actually no you're not'."[959]

However, several interviewees were of the view that the scheme does not operate well.[960] Both prosecution and defence advocates expressed the view that the duty solicitor is often over-burdened. This results in delay in the proceedings as courts wait for the duty solicitor to be ready.[961] This could also have a detrimental effect on the service that defendants receive as duty solicitors struggle to cope with workloads. This provides a further example of the conflict between a desire for efficiency and a requirement to act in the client's best interests which may require a degree of delay because the solicitor needs to review evidence and take instructions. However, when the duty solicitor is over-burdened with cases (which is more likely as the availability of legal aid is limited by means testing) he or she may be unable, as a result of time pressure, to provide as thorough advice and assistance as a solicitor who is instructed via a full legal aid Representation Order. The duty solicitor in these circumstances becomes somewhat of a triage service, only capable of providing limited, 'emergency' assistance rather than full access to justice. That said, I did not, during the course of courtroom observation, notice any discernible difference in the way that duty solicitors made representations to the court compared to advocates who were funded either privately or via a Representation Order.

[959] Interview D; 8
[960] Interviews C, J, L, M, N, O
[961] See, for example, interviews J, L, M

Conclusion

The ways in which the reintroduction of means testing has affected the summary criminal justice process are complex. The remuneration regime causes concern about the quality of criminal legal aid defence services. The changes brought about by reintroducing means testing appear to have exacerbated difficulties in the construction of relationships in magistrates' courts.

The fixed, or standard, fee system pre-dated the reintroduction of means testing. However, my findings support previous research which demonstrates that the payment scheme appears to incentivise standardised case progression which advocates recognise may hinder access to justice. Thus relationships between lawyers, clients, the courts and the executive had already been placed under strain by the increased influence of managerialism, which encourages volume processing in the proceedings. My findings do not support the supplier induced demand thesis. Rather, it appears that access to justice has been further eroded by governments' marketised approaches to legal aid in summary criminal courts.

Despite evidence which shows that levels of legal representation remain high in summary criminal cases, the reintroduction of means testing appears to have placed further burdens on the dynamics of the relationships that exist between lawyers, their clients and the courts. Interviewees appeared to believe that the legal aid application process is too onerous on defendants, the majority of whom have significant socio-economic problems. Defence solicitors and prosecutors alike regard the legal aid application process as unnecessarily complex and bureaucratic. These difficulties appear to result in delay when one is trying to obtain publicly funded representation (if it is obtained at all) and uncertainty for lawyers in

securing remuneration. Such delay and uncertainty affects the lawyer/client relationship in that it limits the ability of a solicitor to provide full advice at early stages in the proceedings, and potentially intensifies a 'need' to cut corners already brought about by the fixed fee system. Although defence solicitors may try to alleviate some of these problems by acting even when payment is uncertain, they also acknowledge that the level of service provided in those circumstances is limited. This may be exacerbated by the apparent feeling that defence lawyers have been over-burdened in the requirement to assist during the application procedure itself.

Further, although the duty solicitor scheme may alleviate some of the above issues, many interviewees also felt that this system was overly burdensome on defence advocates, and caused delay in court. Overwhelming duty defence solicitors with cases may also encourage limited advice given in haste.

It therefore appears that changes brought about to publicly funded representation in summary criminal courts have constructed relationships between lawyers, defendants and the courts in a way that advocates consider to be excessively bureaucratic and detrimental to both client and business needs. Unlike Newman,[962] I found that solicitors recognised, and expressed regret about, the competing interests that affected access to justice for defendants.

Publicly funded representation is therefore a facility that, despite existing as a way to avoid defendants being treated only as dummy players,[963] has faced challenges in remaining easily accessible and in enabling lawyers to provide a high quality service. These challenges appear to result from neoliberalism's desire to apply marketised approaches to access to justice.

[962] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013)
[963] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013)

Conclusion

Analysing the issues

It is clear from the literature in relation to both legal aid and magistrates' courts that defendants have always experienced marginalisation as dummy players in the process of summary criminal prosecution. This outcome is a result of the specialised nature of the process, court personnel behaviour and the court's desire to process cases at speed.

As is seen in chapter three, it was not until the beginning of the twentieth century that governments recognised that unrepresented defendants might be at a disadvantage in criminal proceedings, and that this might be politically problematic. At this time, governments began to acknowledge that the technical nature of the proceedings put unrepresented defendants at a disadvantage in being able to effectively put their case to the court. Once the executive identified that unrepresented defendants might not be able to fully exercise their role in the process, liberal approaches to government had to recognise that access to justice should be encouraged to maintain a sense of legitimacy in processes of state led prosecution.

Despite this recognition, the expansion of legal aid was resisted, based on governmental concerns that by increasing levels of legal representation, more cases would be contested and proceedings would be slower. It was not until the post-1945 welfarist government came to power that, ideologically at least, the executive recognised a need to expand legal aid provision. As such, legislation was introduced which was designed to enable more people to access publicly funded legal

representation. Even then, levels of publicly funded representation in magistrates' courts remained low because governments continued to be concerned about funding in the criminal justice system. Governments have remained apprehensive about the cost of legally aided representation but also needed to allow access to publicly funded lawyers to give the appearance of legitimacy in summary criminal proceedings. As a consequence of cost concerns, governments limited the scope of legal aid eligibility and did not publicise the scheme widely, as detailed in chapter three.

However, as a result of reports such as that of the Widgery Committee[964] in the mid-1960s and structural changes to the provision of legal aid (such as centralised funding), the number of defendants appearing in court with the assistance of a publicly funded defence advocate increased from the 1970s. At this stage, government began to accept that defence advocates could facilitate speedy case progression. At the same time, socio-legal scholars were conducting research which demonstrated how the culture of magistrates' courts - specifically the speed and technical nature of the proceedings – marginalised defendants and meant that they were unable to play an effective role in the proceedings. The presence of defence advocates therefore fulfilled a dual role for the executive; they increased courtroom efficiency while also providing at least a sense of legitimacy to the state led criminal justice process.

Just as levels of legal representation were significantly increasing in magistrates' courts, the then dominant welfarist ideology of government fell into crisis as a result of economic difficulties maintaining the welfare state, recession and

[964]'Report of the Departmental Committee on Legal Aid in Criminal Proceedings' (H.M.S.O. Cmnd 2934 1966).

rising crime rates. This paved the way for neoliberalism to emerge as the dominant political ideology in Britain. I argue that, because neoliberalism is both crisis responsive and lacks clear, universal definition, it has been able to adapt to challenges faced by governments and remains the ideology upon which modern policy initiatives are based. My interrogation of liberalism and neoliberalism in chapter three demonstrates that neoliberalism is not a clear, inflexible, monolithic philosophy. There are, however, identifiable themes in British approaches to neoliberal governance that have persisted since 1979.

Neoliberalism viewed those services that remained under state control as inefficient and wasteful. The preference for private sector managerial techniques resulted in increasingly intrusive forms of regulation of the criminal justice process via efficiency drives and legal aid contracting schemes, which encourage defence advocates to act in increasingly standardised and more co-operative ways – to the detriment of adversarial principles. At the same time, the social displacement that resulted from the preference for the market as social regulator pushed vulnerable members of society further away from 'acceptable' groups.

Neoliberalism legitimised the view of such groups as responsible for their own situation by encouraging individualism and consumerism, thereby removing any ideological need to provide any more than minimal levels of state funded assistance. While authors such as Wacquant,[965] Bell[966] and Squires and Lea[967] have alerted us to neoliberalism's tendency to produce precarious, demonised and

[965] Wacquant L, *Punishing the Poor. The Neoliberal Government of Social Insecurity* (Duke University Press 2009)
[966] Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011).
[967] Squires P and Lea J, 'Introduction: Reading Loic Wacquant - Opening Questions and Overview' in Squires, P and Lea, J (eds), *Criminalisation and Advanced Marginality. Critically Exploring the Work of Loic Wacquant* (The Policy Press 2012).

criminalised groups, my findings demonstrate that the same processes of marginalisation can be seen within the process of summary criminal prosecution. Demands for efficiency and alterations to funding, which effectively oblige lawyers to work to volume in order for their firms to remain viable, have exacerbated defendants' inability to play an effective role in the proceedings and thereby emphasised their status as precariat members of society.

The culture of magistrates' courts intensifies the marginalisation of defendants, who are – as Carlen[968] noted – unable to fully engage in the proceedings as a result of a number of factors including courtroom layout, and jargon and signalling between court personnel alongside bureaucratic requirements to process cases at speed. Neoliberal techniques of government have intensified the demand to deal with cases quickly because government not only viewed public services as inefficient but also began to view the activities of public service professionals with suspicion. Those views led to the introduction of legislation and initiatives that were designed to encourage more efficient working practices. Furthermore, by introducing a franchising scheme for legal aid funding, the government created a new type of legal professional which pushed lawyers away from altruistic service provision towards 'knavish' behaviour via managerial imperatives.

Governmental distrust of public service professionals justified not only greater intrusion in the system of publicly funded representation, but also the introduction of fixed fees for legally aided representation and, as austerity measures took greater hold, reduced payment rates which restrict the ability of lawyers to give

[968] Carlen P, *Magistrates' Justice* (Martin Robertson 1976).

cases and clients as much time as they might like. My data, Kemp's findings[969] and research conducted by Stephen, Fazio and Tata[970] indicate that fee cuts have resulted in lawyers reducing the level of service provided. This has exacerbated defendants' marginalisation from the proceedings.

The workgroup adapted to demands for efficiency as procedures became routinised and references to legal provisions and case management techniques became ingrained in the culture and language of courtroom proceedings. Legal representation does undoubtedly assist defendants who would otherwise suffer even greater marginalisation as they would remain unable to be involved in the jargon and signalling that would persist. Representation does not however, as Carlen[971] and McBarnet[972] predicted, operate to completely rectify the defendant's exclusion from the process because of the way in which laws and procedures designed to encourage efficiency became absorbed in workgroup culture. These procedures appear to have reinforced the professional networks operating in the courtroom via greater recourse to, for example, the completion of standard case management forms and the use of plea negotiations as a method of case resolution. These developments intensified the marginalisation of defendants, who are unlikely to be able to understand the increased implicit reference to legal provisions. The use of such implicit references and demands to work at greater speed also serve to strengthen the professional networks in the workgroup, who share the common

[969] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011
[970] Stephen F, Fazio G and Tata C, 'Incentives, Criminal Defence Lawyers and Plea Bargaining' (2008) 28(3) *International Review of Law and Economics* 212.
[971] Carlen P, *Magistrates' Justice* (Martin Robertson 1976).
[972] McBarnet D, 'Two Tiers of Justice' in Lacey, N (ed), *A Reader on Criminal Justice* (Oxford Readings in Socio-Legal Studies, Oxford University Press 1994).

goals of working at speed and maintaining their professional reputation. As a result, defendants suffer further exclusion as non-members of that professional network. The implicit reference to provisions introduced by neoliberal governments (including, for example, CJ: SSS and the Criminal Justice Act 2003) not only means that technical points are reduced to mundane professional practices but also that the use of jargon increases. This acts as a form of gate keeping to entry into the professional network.

Defence solicitors adapted to and incorporated neoliberal policy initiatives, rather than resisting them, for a number of reasons; to maintain good working relationships, maintain reputation, which is seen as useful for negotiating power, and to assist business needs. This supports Young's view of workgroup behaviour,[973] as well as Carlen's research[974] and Bourdieu's understanding of a 'field' as a site in which professionals will develop tools to manage, and adapt to, external intervention.[975] All of the reasons that solicitors cite for adaptation to politically motivated intervention can also be seen to be beneficial to clients, who will presumably want their advocates to be able to wield some power and have a good reputation in front of the magistrates. Solicitors also view some of these goals as beneficial to clients even though they also acknowledge that demands for efficiency and difficulties in obtaining, as well as levels of, funding can act counter to defendants' interests and encourage solicitors to make case management decisions prematurely. As a result, by absorbing rather than opposing initiatives designed to

[973] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203
[974] Carlen P, *Magistrates' Justice* (Martin Robertson 1976).
[975] Bourdieu P, *The Logic of Practice* (Stanford University Press 1990).

improve efficiency, defence advocates, perhaps inadvertently, bolstered professional networks and thereby increased defendant marginalisation.

There is clearly a complex set of practices at work in which a number of competing interests jostle for priority. It seems that defendants are expected to put their trust in the professional decision making that accompanied the view of public service professionals as benevolent and altruistic, despite the change in governmental attitude to such professionals. The networks that operate in magistrates' courts do predate governmental change in attitude towards public services but the patterns of behaviour attributed to those networks by earlier research appear to persist. This suggests that the culture of magistrates' courts remains strong in the face of political change. As such, the network continues to operate in such a way that the defendant is obliged to submit to the technical knowledge of the professional workgroup.

It is clear that defence advocates feel that they are operating as best they can in an increasingly challenging environment. Solicitors interviewed expressed both regret about, and insight into, the processes which mean they are required to expedite cases in a way that favours liberal bureaucratic principles, and acknowledge that workgroup demands mean that clients' needs sometimes suffer. Solicitors tend to blame externally introduced policy for that suffering but also acknowledge that they have not strenuously resisted neoliberal demands in relation to fees and case management because of the need to maintain a business and professional reputation – both of which advocates view as being to the long term benefit of clients. The existence of competition between criminal defence firms

serves to encourage efficiency and reduces the risk that solicitors will rebel against the needs of the court and, indeed, executive decision making.

However, as I write this, lawyers are refusing to accept conduct of cases at legal aid rates that were introduced on 1 July 2015 in protest at relentless budget cuts to publicly funded criminal defence services.[976] Resistance of this nature is extremely unusual in the legal profession and indicates that lawyers regard the proposed contracting scheme implemented under the Coalition government as something that will ruin both their business interests and any semblance of access to justice for defendants. It seems that lawyers have reached a point where they are prepared to risk their business interests in favour of taking a stand against cuts that will further hinder effective access to justice. The recently appointed Conservative Lord Chancellor, Michael Gove, has indicated that the Ministry of Justice intends to proceed with the new contracting system[977] but the long term effects of both the protest and the new contracting system remain unknown.

In essence, as seen in chapter two, defendants have always suffered marginalisation as a result of magistrates' court culture. Political agendas since the rise in popularity of neoliberalism (and particularly since New Labour's election in 1997) have focused on demands for efficiency in public services. Such demands intensified as austerity took hold during the Coalition government's time in power. The culture of the magistrates' court workgroup has absorbed those demands while

[976] Bowcott, O. 'Lawyers to refuse criminal cases in protest against cuts in legal aid fees' (2015) <http://www.theguardian.com/law/2015/jun/25/lawyers-to-refuse-criminal-cases-in-protest-at-cuts-to-legal-aid-fees> accessed on 3 July 2015; Fortado, L and Croft, J. 'Solicitors prepare to strike over legal aid cuts' (2015) <http://www.ft.com/cms/s/0/ee938770-1f07-11e5-aa5a-398b2169cf79.html#axzz3epXodL5X> accessed on 3 July.

[977] Bowcott, O. 'Lawyers to refuse criminal cases in protest against cuts in legal aid fees' (2015) <http://www.theguardian.com/law/2015/jun/25/lawyers-to-refuse-criminal-cases-in-protest-at-cuts-to-legal-aid-fees> accessed on 3 July 2015.

the demonisation of precariat groups has meant that concerns about the maintenance of due process have been ideologically devalued as efficiency, rather than just processes, becomes the main priority. Thus advanced marginality appears as both an effect and a by-product of the implementation of neoliberalism.

This premise is further supported by evidence of the legislation which is designed to standardise proceedings and manage uncertainty and risk. The workgroup culture has absorbed such legalisation and uses it in implicit terms that accommodate the workgroup's needs. This further increases the defendant's inability to participate in the proceedings. The evidence also indicates that lawyers will take risks with funding in order to suit the needs of the court even though they recognise that uncertainty about, and reductions in rates of, pay decreases the quality of the service that they are able to provide. Thus lawyers tend to accommodate court demands even when they feel that clients' interests are undermined, which serves to strengthen the professional network and in turn further reduces the ability of defendants to effectively participate in the process of summary prosecution.

Lawyers have been encouraged to accommodate the workgroup demands because they depend on the government for funding and various governments have paid insufficient attention to lawyers' ability to improve access to justice. It is not the case that lawyers, by their very nature, exacerbate defendant marginalisation, but that the political and cultural environment in which they operate encourages practises that worsen marginalisation. As is argued in chapter three, lawyers have multiple identities and governments have, in recent decades, seen lawyers as potential drivers of efficiency rather than as champions of access to justice. This

view undermines the importance of lawyers' roles and means that principles which encourage access to justice are neglected in policy design. This view has meant that the initiatives which have been developed in summary criminal proceedings, by which lawyers must abide to remain economically successful, do not pay sufficient regard to defendants' interests. As advocates who rely on government resources, defence solicitors are, through those initiatives, discouraged from practising in such a way that prioritises defendant needs.

Generalisability

The research has been conducted on a small scale in one court area and thus the results may not be generalisable. However, the fact that my data is relatable to similar studies suggests that the propositions advanced have broader applicability across the summary criminal justice system.

So far as neoliberalism is concerned, writers such as Garland,[978] Bell[979] and Squires and Lea[980] have identified a tendency for modern politics to criminalise precariat groups and demonise them via the apparatus of the criminal justice process by the use of quasi criminal orders (such as Anti-Social Behaviour Orders, now replaced by Criminal Behaviour Orders).[981] I argue that such processes of demonisation continue in the summary judicial process itself by the removal of traditional due process protections, such as reducing the availability of legally aided representation. This is an original way of analysing current issues in criminal justice,

[978] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2002).
[979] Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011).
[980] Squires P and Lea J, 'Introduction: Reading Loic Wacquant - Opening Questions and Overview' in Squires, Peter and John Lea (eds), *Criminalisation and Advanced Marginality. Critically Exploring the Work of Loic Wacquant* (The Policy Press 2012).
[981] Anti-social Behaviour, Crime and Policing Act 2014

but the ideas presented by academic writers on the phenomenon of advanced marginality appear to be transferable to the apparatus of the criminal justice system.

It is clear that governments influenced by neoliberalism have introduced several administrative changes to summary criminal justice nationally, such as CJ: SSS and the Criminal Procedure Rules, and it is possible that other workgroups have reacted to those changes in different ways. In this regard, it is important to note that my findings are congruent with those of Newman, in his recent examination of firms in a large city elsewhere in England.[982] He identified similar issues among the courtroom workgroup that he studied, even though I disagree with parts of his analysis of those findings.[983] This does however suggest that there are indeed broad themes that can be identified across adversarial courtroom cultures.

Further, Kemp's[984] findings in relation to the system of legal aid in summary criminal courts resonate with my own. Solicitors operating in another part of the country and advocates in east Kent spoke of similar concerns about bureaucratisation in the legal aid system as well as pressure to process cases quickly, which further suggests that my findings may be representative of difficulties in obtaining legally aided representation generally. It also suggests that, although the workgroups operated in different areas of England and Wales, common concerns exist among magistrates' court personnel. Kemp's own observations of court processes noted that the speed at which cases were processed, coupled with the complexity of court proceedings and jargon used by the workgroup, meant that

[982] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[983] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).
[984] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011

defendants were unlikely to fully understand what was happening.[985] These findings lend weight to the transferability of my own findings, in that further demands for speed, coupled with increased complexity and legalisation of magistrates' court proceedings have been absorbed into workgroup behaviour across a range of summary criminal courts. Given that advocates have been trained via the same procedures, by lawyers who operate in a system where the patterns of behaviour appear persistent, it is unsurprising that similar forms of implementation would occur nationally.

So far as courtroom culture is concerned, Carlen[986] identified, several decades ago, that the use of signalling and jargon among court personnel operates to exclude defendants from the proceedings. As identified in chapter five, that interpersonnel signalling is exacerbated by the ways in which law is used within the workgroup. Both Young[987] and Newman[988] identified similar patterns of behaviour among court personnel in their recent studies, both of which were conducted in different areas of England and Wales. This suggests that my conclusions are applicable beyond east Kent and lends support to the premise that it is possible to identify common themes in summary criminal justice nationally. In fact, it was possible, as noted in chapters two and four, to identify patterns of adversarial behaviour consistent with studies by

[985] Kemp, V *Transforming Legal Aid: Access to Criminal Defence Services* <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf> (2010) accessed 12 December 2011
[986] Carlen P, *Magistrates' Justice* (Martin Robertson 1976).
[987] Young R, 'Exploring the Boundaries of Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203.
[988] Newman D, *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing 2013).

Sudnow,[989] as well and Eisenstein and Jacob,[990] in northern America. This suggests that the findings could be relevant across adversarial criminal justice systems.

The data further provides a source of information from which others may make judgements about the transferability of the findings to other settings.[991] The work might thereby be able to contribute to a meta-analysis of summary criminal proceedings and provide information that could be useful for comparative studies. One obvious avenue for further research is to seek the views of defendants about their experience of magistrates' courts.

Reflections on the work

I appreciate that some of the participants in my research may not be pleased by my findings, particularly in relation to the prioritisation of court needs over defendants' interests. I have suffered a degree of 'standpoint crisis'[992] in relation to my role as practitioner. I have felt discomfort at reporting some of my findings and have been forced to reflect on my own behaviour as a defence advocate. I accept that my own experience of working in the criminal justice system for a number of years could have affected what I regarded as important when analysing the data. My ability to empathise with the defence advocates may also have affected both data collection and data analysis.[993] I do however believe that the fact that prosecutors were concerned about similar issues to defence advocates mitigates that difficulty to a

[989] Sudnow D, 'Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office' (1965) 12(3) Social Problems 255.
[990] Eisenstein. J and Jacob. H, *Felony Justice: An Organisational Analysis of Criminal Courts* (Little Brown 1977).
[991] Bryman A, *Social Research Methods* (Oxford University Press 2012).
[992] Wakeman S, 'Fieldwork, Biography and Emotion. Doing Criminological Autoethnography' (2014) 54(5) *British Journal of Criminology* 705.
[993] Wakeman argues that it is very important for researchers to confront their life histories and the ways that this may affect how research findings are presented (Wakeman S, 'Fieldwork, Biography and Emotion. Doing Criminological Autoethnography' (2014) 54(5) *British Journal of Criminology* 705.)

degree. I recognise that my biography is likely to have influenced my research and so, in order to try and present rigorous academic work, I have attempted to support my findings by reference to literature provided by other socio-legal scholars, particularly in relation to the professional networks that exist among the courtroom workgroup. Happily, I found that many of my findings are congruent with their conclusions and predictions.

I hope however that the participants in my research will see that, by their own acknowledgement, there has been little resistance to processes which have further marginalised defendants. I further appreciate (and indeed understand) that solicitors operate in a very difficult and complex area in which there is a constant struggle to balance competing interests even though they are acutely aware that their professional roles are being devalued. I hope that defence advocates will be able to accept my view that processes of neoliberalisation have effectively forced them into situations where, not only does government view their role with scepticism, but also further undermines their ability to act as altruistic public servants via demands for efficiency. I am keenly aware that the system of summary criminal justice is in a particularly volatile state of change as I write, and hope that the current crisis will result in effective dialogue between the agencies of criminal procedure to improve access to justice for all concerned.

Suggestions for improving access to justice

The task of improving access to justice is clearly an extremely difficult one given the complex political and cultural factors that have exacerbated defendant marginalisation in summary criminal justice for many years. It is of course unlikely that any of those factors operate in isolation but the 'trickle down' effect of change to

some structural factors might, alongside some awareness training, gradually alter some cultural practises of the workgroup. I preface what follows with the recognition that, given the current economic climate, very little of what I suggest is likely to occur in the foreseeable future.

Firstly, it seems clear that governments need to alter their approach to policy design by recognising that lawyers are able to improve the legitimacy of criminal proceedings as well as being able to improve courtroom efficiency. Indeed, governmental distrust of professional behaviour is somewhat incongruent with trust in market forces for regulation in the field of criminal defence services. Criminal defence firms have evolved in such a way that defence advocates operate in a competitive market to retain the goodwill of clients and of the court. As such, the structure of the 'market' is one that is subject to self-regulation in pure neoliberal terms. However, governments' distrust of professionals working in public services led to greater bureaucratic intrusion which has left lawyers feeling undermined and unable to properly exercise professional judgement. That intrusion has also increased their workload by requiring that particular forms be completed and procedures be followed. At the same time, income has reduced via the reintroduction of fixed fees and the removal of categories of work from the fixed fee payment scheme. In short, government distrust of professional behaviour has increased demands on lawyers who are increasingly expected to perform more work for less money. As such, reducing bureaucracy in summary criminal proceedings has the potential to produce several positive outcomes.

Firstly, it could promote mutual trust between government and the workgroup, thereby encouraging the possibility of meaningful debate. While

governments could be concerned that reducing bureaucratic, standardised procedures would encourage inefficiency, I argue that it would in fact allow resources to be directed to the most appropriate services and the competitive nature of the criminal defence service 'market' would regulate behaviour. It should be noted that the market, such as it is, only began to take shape in the mid to late 1970s while efficiency drives began to be introduced with gusto in the 1980s, meaning that the way in which services were provided was not perhaps as fully developed as it might now be. This means that service provision might in fact already be more efficient than earlier governments perceived it to be.

Secondly, reducing bureaucratic procedures would ease defence advocates' workload, meaning that there would be more time within the fixed fee system - which advocates did not in principle disagree with - to devote to client needs. Increasing fixed fee payments in line with inflation would retain an incentive to work efficiently while also allowing lawyers more flexibility in the way they work and greater control over their resources because profit margins would not be so strained. This might also rebalance professional relationships so that lawyers feel less compromised between business and client needs. This, in turn, could mean that lawyers would be better able to meaningfully negotiate and engage in greater discussion between workgroup personnel and executive agencies in policy design.

Another effect of reducing bureaucracy would mean that defence solicitors would have more time to take defendant needs into account which could, albeit slowly, start to shift professional culture so that greater priority is given to protecting defendant needs. I argue in chapter four that the use of forms encourages collaborative working practices and so the removal of that manifestation of

bureaucratic procedures could reduce the need, or desire, to work co-operatively in an adversarial system. Although it may seem like a trite point to make, a further way of encouraging professionals to engage with defendant interests in preference to workgroup interests would be by training. Advocates seemed to be aware of some of the ways in which their behaviour might marginalise defendants but did not appear to consider the extent to which courtroom layout and interpersonnel jargon could further marginalise defendants. It would be appropriate for lawyers to be made aware of these issues during training and development.

Essentially, defendant marginalisation appears to be exacerbated as a result of the competing rationales between the executive and the workgroup, and among members of the workgroup itself. Many of these problems seem to exist because governments have compromised lawyers' professional decision making powers with ever greater demands for efficiency. In short, governments have focused on lawyers' ability to increase efficiency and undermined their ability to improve access to justice. If those demands for efficiency were relaxed, it would relieve some lawyers' workloads, thus allowing more time to focus on defendant needs. It also has the potential to encourage meaningful dialogue between the agencies of criminal justice. Such dialogue can only be generated if government is prepared to modify its view of lawyers and pay greater attention to advocates' potential to improve access justice.

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Appendices

Appendix 1: Freedom of Information Request

HM Courts & Tribunals Service

February 2014

Reference No: FOI-88467

Freedom of Information Request

Your request has been handled under the Freedom of Information Act 2000 (FOIA).

I can confirm that the department holds information that you have asked for, and I am pleased to provide this to you.

Our data team supplied incorrect data for questions 1 and 2, all cases excluding road traffic cases, or summary motoring. We in fact supplied the total for summary

motoring rather than the total cases excluding them. I have therefore answered the questions for 2010, 2011, 2012 and for January to September 2013.

Data for the final quarter of 2013, October to December, cannot be released until Thursday 20 March when data for that period is published as Official Statistics in Court Statistics Quarterly.

Turning to your specific questions:

1) Total number of adult criminal cases appearing at magistrates' courts across Kent (not including Road Traffic cases)

2) Total number of adult criminal cases at each of the following magistrates' courts (not including Road Traffic cases):

I. **Folkestone**
II. **Dover**
III. **Canterbury**
IV. **Margate**
V. **Maidstone**
VI. **Medway**
VII. **Dartford**
VIII. **Sevenoaks**

Question 1 & 2 - Adult Criminal Completed Proceedings Excluding Summary

Motoring Offences [1] [2] [3]				
Year	2013 [6]	2012	2011	2010
Kent	22,284	30,693	28,482	26,965
LJA: Central Kent [4] [5]	6,438	8,491	8,486	7,796
LJA: East Kent [4] [5]	8,163	11,614	10,367	9,903
LJA: North Kent [4] [5]	7,683	10,588	9,629	9,266

Notes:

1. Includes Indictable Only, Either Way, Summary Non-Motoring & Breaches

2. Data are taken from the HMCTS Performance Database and provides the number of completed proceedings during the time period.

3. Data used in providing these figures is taken from a more recent extract of the data than that used in published Official Statistics and, therefore, may differ.

4. Magistrates' courts are managed within local justice areas. Each LJA manages its workload in relation to a local framework designed to meet local business needs and geographical requirements. Some LJAs have centralised administrations with a number of court houses being used as hearing centres, others may have administrative functions at each site. For these reasons data can only be accurately collated and reported at LJA level.

5. Central Kent LJA includes Maidstone and Sevenoaks magistrates' courts; East Kent LJA includes Canterbury, Dover, Folkestone and Margate magistrates' courts; and North Kent LJA includes Dartford and Medway magistrates' courts.

6. Data for 2013 are January to September only, October to December, cannot be released until Thursday 20 March when data for that period is published as Official Statistics in Court Statistics Quarterly.

3) Total number of imprisonable adult criminal cases appearing at magistrates' courts across Kent.

Data is not held in a way that allows us to collate it for all imprisonable offences.

Source: Ministry of Justice. 'FOI-88467' (2014) <http://www.gov.uk/.../excluding-road-traffic-cases-number-adult-criminal-cases-at-specific-magistrates-courts> accessed on 9 September 2013.

Appendix 2: Freedom of Information Request

HM Courts & Tribunals Service

www.gov.uk

Your reference:

Our reference: FOI-82425 May 2013

Your request has been handled under the Freedom of Information Act 2000 (FOIA).

Q1: Total number of Adult Criminal cases during 2012-appearing at Magistrates Court across Kent (not including Road Traffic cases)

I can confirm that the department holds information that you have asked for, and I am pleased to provide this to you. The information you have requested is in the table

below. I have included figures for 2010 and 2011 because, in the paragraph preceding this question, you asked for "…information for each of the following years – 2010, 2011 and 2012…"

Adult Criminal Completed Proceedings, excluding Summary Motoring Offences			
	2012	**2011**	**2010**
Kent	11,749	13,898	16,228

For background information about these figures, please see the **Explanatory Notes**

Q2: Total number of Adult Criminal Cases at each of the following Magistrates Courts (not including Road Traffic cases):

- **Folkestone**
- **Canterbury**
- **Maidstone**
- **Dartford**
- **Dover**
- **Margate**
- **Medway**
- **Sevenoaks**

I can confirm that the department holds some of the information that you have requested, and I provide this to you in the table below.

Adult Criminal Completed Proceedings, excluding Summary Motoring

Offences			
	2012	**2011**	**2010**
LJA: Central Kent i.e. Maidstone and Sevenoaks	4,197	5,170	5,818
LJA: East Kent i.e. Canterbury, Dover, Folkestone and Margate	3,719	4,495	5,196
LJA: North Kent i.e. Medway (Chatham) and Dartford	3,833	4,233	5,214

For background information about these figures, please see the **Explanatory Notes**

Q3: Total number of imprisonable Adult Criminal cases appearing at Magistrates Court across Kent

I can confirm that HMCTS does not hold the information that you have requested. To establish whether the information was held I made enquires with a colleague in our Performance Directorate, whose responsibilities includes statistical work. I have been informed that data is not held in a way that allows us to collate it for all imprisonable offences. When assessing whether or not information was held, adequate and reasonable searches where made of statistical data.

I have suggested below the public authority which you may wish to direct your request to because they may hold information as they have the policy lead/or responsibility for the issue enquired about.

You can also find more information by reading the full text of the Act, available at http://www.legislation.gov.uk/ukpga/2000/36/contents.

However, you may wish to contact Kent Police as they may hold some of the information you have asked for. You can contact Kent Police at the following website:

http://www.kent.police.uk/about_us/foi/formal_request/Makeper cent20a%20Request%t20for%20I.html

Alternatively, I have provided below, contact details for the Freedom of Information team

Freedom of Information Team
Data Protection Unit
Kent Police, Force Headquarters
Sutton Road
Maidstone
Kent, ME15 9BZ.

freedomofinformation@kent.pnn.police.uk

You may also wish to contact the Crown Prosecution Service to see if they hold the information you have asked for. You can contact the Crown Prosecution Service at the following website:

http://www.cps.gov.uk/foi/index.html

Alternatively, you can contact the Crown Prosecution Service as follows:

The Freedom of Information Unit

CPS Headquarters

Rose Court

2 Southwark Bridge

London

SE1 9HS

FOIUnit@cps.gsi.gov.uk

Q6: In reference to question number one, please confirm

i) the percentage of cases where Magistrates accept jurisdiction

ii) percentage of cases where jurisdiction was declined

iii) percentage of cases where the defendant elected Crown Court Trial

Magistrates decide whether to accept or decline jurisdiction in either way cases where the defendant has not pleaded guilty at a mode of trial hearing. If they accept jurisdiction the defendant can elect to be sent to the Crown Court for trial. A

proportion of the cases referred to in Question 1 are not subject to a mode of trial hearing, so it is not possible to break them down in the way you have requested.

Q7: Details of the boundary areas for each of the Courts in Kent as Listed above

I have made enquires with the Crime Directorate (a part of the Ministry of Justice), and have also made enquiries with our administration for Kent's magistrates' courts.

Having done so, I can tell you that Magistrates are appointed to LJAs and can only sit in those LJAs. Magistrates have jurisdiction to deal with any offence in England and Wales, but by convention deal with offences committed or charged in their LJA. I can also tell you that the LJAs in Kent comprise the geographical areas served by the local authorities listed in the table below:

For Central Kent LJA, the area served by …	**For East Kent LJA, the area served by ……**	**For North Kent LJA, the area served by ……**
Tunbridge Wells Borough Council http://www2.tunbridgewells.gov.uk/	Canterbury City Council https://www.canterbury.gov.uk/	Medway Council, http://www.medway.gov.uk/
Sevenoaks District Council http://www.sevenoaks.gov.uk/	Thanet District Council http://www.thanet.gov.uk/	Gravesham Borough Council http://www.gravesham.gov.uk/

Maidstone Borough Council http://www.maidstone.gov.uk/	Ashford Borough Council http://www.ashford.gov.uk/	Dartford Borough Council http://www.dartford.gov.uk/
Tonbridge and Malling District Council http://www.tmbc.gov.uk/	Dover District Council http://www.dover.gov.uk/Home.aspx	
Swale Borough Council http://www.swale.gov.uk/	Shepway District Council http://www.shepway.gov.uk/	

We do not hold records (maps, for example) that I can provide to you. If the information was held by HMCTS, or MoJ, it would have to be held by the Crime Directorate in MoJ, or the administration for Kent's magistrates' courts. The information is not held by HMCTS, or MoJ, because there is no legal or business requirement to hold the information.

I have been able to release this information to you under the Freedom of Information Act (FOIA). I hope you find this information helpful to you. You can also find more information by reading the full text of the Act (available at http://www.legislation.gov.uk/ukpga/2000/36/contents).

Source: Ministry of Justice. 'FOI - 82425' (2014) http://www.gov.uk/...data/.../adult-youth-criminal-cases-by-area accessed on 8 September 2014.

Appendix 3: Observation Template

Observation Field Notes

Date:
Courthouse: Canterbury Thanet Folkestone Dover

Bench composition: Magistrates District judge
Male –1 2 3 Female – 1 2 3

Virtual Court: Yes No **If yes,** Police station Prison

Defendant present? Yes No **If no, why?**.....

Defendant on bail: Yes No

Defendant DOB or approximate age:

Multiple defendants? Yes No
If yes, connected to observation form no's.....

Defendant: Male Female

Alleged Offence:

Purpose of hearing: Plea Mode of trial Committal Case Management
Trial Sentencing Bail/Remand
Other.....

Interpreter required: Yes No

Plea: Guilty Not Guilty

Defendant Represented: Yes No
As:

The proceedings:

Was defendant generally well prepared for court?	Yes	No	Somewhat	
Did defendant appear confident?	Yes	No	Somewhat	
Did defendant appear confused?	Yes	No	Somewhat	
Did defendant appear to be listening?	Yes	No	Somewhat	
Was the defendant respectful to the Judge and other court personnel?	Yes	No	Somewhat	
Did clerk/magistrates recommend the services of a solicitor?	Yes	No	N/A	
If yes, did the defendant want legal advice?	Yes	No	N/A	
If yes, did the court adjourn for advice to be obtained?	Yes	No	N/A	
If yes, for how long?	.....			
Did clerk intervene?	Yes	No		
Did a legal representative intervene?	Yes	No		
If yes, how?				

Did defendant/representative explicitly refer to a point of law/statute/case? Yes No

Did prosecutor explicitly refer to a point of law/statute/case? Yes No
Was the defendant representative able to explain the defendant's case clearly? Yes No
Did defendant/representative appear to have case papers? Yes No

If defendant unrepresented:

Court (clerk or magistrates) mentioned forms incomplete/wrong	Yes	No	
Court mentioned need for evidence or witnesses	Yes	No	
Was able to answer the court's questions	Yes	No	N/A
Needed clarification of legal terms	Yes	No	
Court clarified terms	Yes	No	N/A
Presented documents/evidence that court would not look at	Yes	No	
Court told defendant to be quiet	Yes	No	
Reprimanded by court during hearing	Yes	No	

Approx. length of hearing (minutes)……

Outcome:
Adjourned for: Trial Case Management/ Directions Sentence Further Remand Committal Plea Missing Evidence (defence/prosecution)

Legal Aid Non Attendance (defendant/witness/other……..)
Other……..
Bail granted/refused Acquitted Convicted (plea/after trial) Warrant issued
Discontinued Committed to crown court Sentenced

If sentenced, sentence type: Immediate Custody Suspended Sentence Community Order

Fine Conditional Discharge Other……

If Suspended Sentence/Community Order, requirements:

Unpaid Work Curfew Supervision Treatment Programme (details below)

Specified Activity (details below)

Ancillary Orders:
Costs Compensation Forfeiture and Destruction Victim Surcharge
Restraining Order ASBO Driving Ban Penalty Points
Other……..

Notes:
While magistrates present

While magistrates in retirement

Appendix 4: Interview Schedule

Interview Schedule

Preliminary Questions

What is your job role?

Approximately how long have you worked in that role?

Legal Aid

1. Do you think that the re-introduction of means testing has had any effect on proceedings in the magistrates' courts?
2. Are the magistrates sympathetic to difficulties that may occur when obtaining funding?

a) How is the view manifested?

b) Why do you think this is?

3. Are clerks sympathetic to difficulties that may occur when obtaining funding to represent clients?

a) How is this view manifested?

b) Why do you think this is?

4. What do you think about the procedure for obtaining legal aid?
5. Do you think a defendant would be able to complete the form effectively without assistance? Why or why not?
6. How often do you conduct cases when you are not sure that you will be paid for the work involved?
7. How often would you say that you conduct work that you are not in fact paid to do?
8. What do you think about the fee structure in relation to legally aided representation?

9. Are those services affected by changes to payment rates such as the introduction of fixed fees and the increase in payment rate for early guilty pleas in magistrates' courts?

10. Have you observed any changes in the number of advocates who are appointed by the court to conduct cross examination in trials?

a) If yes, what do you think this might be attributable to?

11. Have you observed any changes in the number of applications for payment from central funds?

a) If yes, what do you think this might be attributable to?

Practises in magistrates' courts

1. Have you observed any change in volume of work at magistrates' courts?

2. Do you think that initiatives such as CJ: SSS and Stop Delaying Justice have had any effect on summary criminal proceedings?

3. The Cr.PR, CJ: SSS and Stop Delaying Justice are designed to increase co-operation among advocates and the courts. Do you think this has occurred?

   If not, why not?

   If so, has this had any effect on court proceedings?

4. Have you observed changes over time in the number of cases committed to the Crown Court?

5. Do you think that the introduction of diversionary measures such as fixed penalty notices and conditional cautions has had an effect on magistrates' court proceedings?

6. What is your view of plea negotiations?

7. What role do you think forms (case management, ineffective trial, sentencing reasons) play on the proceedings?
8. Have you observed the role of forms change over time?
9. How much thought goes into completing forms?
10. Do you think forms are useful? Why or why not?
11. Do you think magistrates treat unrepresented defendants differently from represented defendants?
12. Do you think legal advisors treat unrepresented defendants differently from represented defendants?
13. Do you think District judges treat unrepresented defendants differently from represented defendants?
14. Do you try to explain law/procedure to clients before they go into court?
15. Do you refer to points of law in open court?

a) If so, how often?

16. If you refer to points of law, do you refer to the provision/authority or the just the principle?
17. Have you observed any change in case complexity in recent years?
18. Have you observed any differences in appearing before magistrates or District judges?
19. What do you think about the court duty solicitor scheme?
20. Is there anything you would like to say about the government's proposals to introduce PCT?