JUSTICE OF TRUTH?

ALLEGED OFFENDERS WITH INTELLECTUAL DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM

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By

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Abstract

This PhD study examines how people who are intellectually impaired are processed within the criminal justice system. In this context it analyses the understanding of intellectual disabilities, criminal justice decision-making processes, and the construction of crime and punishment by professionals involved in criminal justice.

Despite significant changes in mental health legislation and greater awareness by professionals of issues around intellectually disabled offenders, previous research has demonstrated that this population remains disadvantaged when coming into contact with the criminal justice system. The study focuses on how the criminal justice system maintains its traditional way of operating when engaging with people who are impaired in their intellectual capacities and who, therefore, often have difficulties in processing information and understanding complex situations.

The study draws on qualitative data generated through thirty five unstructured interviews with custody sergeants, forensic examiners, prosecutors, magistrates, judges and probation officers from three regions in the North West of England: Cheshire, Merseyside and Greater Manchester. Through those interviews, the provision of support to alleged offenders is examined and the process of legal representation evaluated.

By analysing decision-making processes around vulnerable defendants, two conflicting views that influence criminal justice professionals in their strategic behaviour were identified: protecting alleged offenders' rights and protecting the public from criminal behaviour. It is argued that the criminal justice system draws its normative and enforcement powers from a 'discourse of truth' that concentrates on capacity and intent. Defendants who are classified as vulnerable because of impaired intellectual functioning are incorporated into this system through a disjointed discourse of intellectual disability whereby capacity to reason and intellectual disability are functionally separated. This way, an alleged offender's vulnerability becomes a manageable object within the criminal justice system and is integrated into a person's risk management. The disjointed discourse around intellectual disabilities increases the risk that people with an impaired level of intellectual functioning become drawn into the mainstream criminal justice system and, therefore, further compromises the empowerment and social inclusion of this population.

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Introduction

Until fairly recently, the discourse surrounding people with an intellectual disability was characterised by disempowerment, exclusion and confinement (Simpson & Price, 2009).

An intellectually disabled person is usually defined as having a substantially below-average IQ and may, therefore, have difficulties with communicating, retaining and understanding information and coping with everyday life tasks[1].

Often people with intellectual impairments have been perceived as being unable to fit into society due to their incapacities preventing them from adapting to moral conventions and legal norms. Depending on cultural beliefs and moral values, societies at different times and in different places have implemented varying procedures for excluding this particular population. Foucault (1965) tells us in great detail how in Europe from the 14th century until the 18th century intellectually disabled people were either imprisoned or expelled from the cities and sent to wander the land. According to Foucault, change came during the time of the Renaissance when society started to be increasingly structured by a market system with productive labour at its core. An individual's ability and willingness to engage in productive labour became integrated into the system of moral values, and asylums and later hospitals became "moral fortresses in which were taught religion and whatever was necessary to the peace of the State" (Foucault, 1965, p. 62). Foucault goes on by arguing the "great confinement" was possible because of a specific discourse of truth stripping the insane of any reason and, thus, humanity, allowing them to be treated like wild beasts. Inherent to this view was that an individual and their intellectual incapacities were seen as an entity. Most importantly, a person and their disability as well as all resulting inabilities were seen as inseparably linked. This allowed an all-inclusive concept of intellectual disability to be constructed and an entire population to be labelled as dysfunctional.

With the emergence of the industrial society, the political and social discourse began to idealise economic effectiveness and functionality of the individual. People who for whatever reasons did not meet these expectations were perceived as a risk

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[1] See following section for more detailed definitions of terminology.

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to the pursuit of national superiority had to be controlled by confinement. This discourse had its peak during the eugenic movement, when individuals who were identified as socially and/or economically dependent and inefficient were proclaimed as not worthy to live (cf. section 1.1). Supported by legislation (Lunacy Act 1890), which favoured confinement of people who were perceived to pose a risk to the social order of things, the numbers of both psychiatric beds and institutionalised persons increased until peaking in the mid-1950s (Freeman, 2010).

Since 1978, in Britain as in most developed countries, psychiatric beds have been reduced continuously in numbers (Vickery, 2010). This development was accompanied by a change in the discourse surrounding people with substantially below-average intellectual functioning. Disabilities or impairments were no longer perceived as all-encompassing entities denying a disabled individual any potential capacities and abilities. The changed discourse of disability allowed detaching a person from their impairments, allowing for both to be treated as separate and distinct social objects. As will be demonstrated later, this discourse proclaims a rational and able actor to be 'hidden' inside an intellectually disabled person.

It has been argued that the subsequent shift from big enclosed hospitals to small community-based units has resulted in some empowerment of this population (Carling, 1993; Parkinson, Nelson, & Horgan, 1999). These authors have claimed that the reduction of psychiatric beds demonstrates a trend of inclusion of intellectually impaired people in society, allowing them to have more control and autonomy in their decision-making and organising of their lives.

However, previous research has shown that especially in countries where psychiatric beds were reduced over the last thirty to forty years, prison populations have been increasing dramatically (Priebe et al., 2005), and among these prison populations a disproportionate prevalence of intellectually disabled people has been identified (Hall, 2000; Hayes, 2005a; Talbot, 2008). Without wanting to ignore the existence of community care, and the much greater inclusion of people with intellectual disabilities, these findings nevertheless indicate a continuation of a discourse that appears to promote measures of control and discipline rather than self-advocacy. It is a discourse which based on medical evidence, promoting positivist thought around culpability, intent and guilt. In relation to intellectually

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disabled people, this discourse appears to increase significantly the risk for this population to be drawn into and processed through the criminal justice system (Hartford, Heslop, Stitt & Hoch 2005).

During the last twenty or so years, people with intellectual impairments have gradually been recognised as a group that is often disadvantaged within the mainstream criminal justice system due to their disabilities (Chappell, 1994; Cockram, 2005; Hayes, 2005a, 2007; Jones, 2007; Lyall, Holland, Collins & Styles, 1995; Talbot 2008). In this context, legislation has been increasingly either focusing exclusively on people with intellectual disabilities or considering them among other groups of individuals who have been assessed as vulnerable because of a disability and who are, or are at risk of, engaging with the criminal justice system. The Reed Report (Department of Health & Home Office, 1992) stressed that people with intellectual disabilities should be diverted from the criminal justice system whenever possible. In addition, the report suggested care for offenders be made available in the community rather than in institutions to provide intellectually impaired people with the means to live an independent life. The Mental Capacity Act (2005) and the Mental Health Act (2007) further identified support and safeguards that should be made available to people who are impaired in their intellectual functioning. The Valuing People Now (Department of Health, 2009b) paper considered people with intellectual disabilities as an independent group that needs specialist attention (Beebee, 2009). Such legislation implies greater awareness of criminal justice professionals to the vulnerability and needs of this particular group of people.

Though these advances, positive as they are, may represent a higher public and political awareness of vulnerable people in general and demonstrate attempts to improve social inclusion, the extent to which these developments have had the anticipated effects for people with intellectual disabilities remains unclear, or as Nicholson and Norwood stress "such developments point to what should be, not necessarily what is" (Nicholson & Norwood, 2000, p. 10).

Despite a greater awareness of professionals within the criminal justice system, vulnerable offenders appear to be still at risk of being processed without proper identification of their needs. The Gill case (see Appendix A) outlines the significant

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disadvantages and devastating consequences that might result from insufficient support to people with intellectual impairments. The claimant received a life sentence with a tariff of four years. When the tariff period had expired the parole board review suggested the claimant attend several offence-related programmes addressing areas of risk that had previously been identified. A year later, the claimant was assessed as having an IQ below the level required for attending the recommended programmes. As the responsible authorities did not have adequate resources to provide individual support to deliver the recommended programmes, the claimant's overall imprisonment exceeded the original tariff period by four years.

Within the context of this study, the Gill case is of interest not because it demonstrates that things still might go wrong. Instead, this particular offender's story exemplifies in a rather intriguing way that even if a person's needs are identified, it does not necessarily mean that safeguards will be put in place or that support will be made available.

It has been highlighted in previous research that when people with intellectual disabilities engage with the criminal justice system the response often tends to be extreme, whereby the defendant is either acquitted or given the maximum sentence (Cockram, 2005; Hayes, 2007). The punitive response to intellectually disabled offenders and their disproportionate representation among the prison population indicates a new form of institutionalisation.

This raises several questions. What understanding do criminal justice professionals have of intellectually disabled individuals? How is vulnerability constructed within a criminal justice context? What do professionals interpret as just and due process in relation to suspects who might have difficulties in understanding their situation and the investigations of which they have become a part? How are crime and punishment constructed with reference to this particular population? How are the concepts of intellectual disability and crime interrelated? The aim of this study is to analyse these questions in order to gain understanding of how criminal justice professionals rationalise their decision-making when coming in contact with people who have intellectual disability.

It will be examined how the discourse surrounding people with intellectual disabilities has changed from an all-inclusive to a disjointed discourse. Whereas the all-inclusive discourse defines a person, their intellectual disability and all resulting impairments to be inseparably linked as one social object, the disjointed discourse functionally disconnects impairments from the individual actor. It is argued that both discourses support the institutionalisation of people with intellectual disabilities.

The emphasis is on how the disjointed discourse is generated at various stages of the criminal justice system, allowing persons who are potentially impaired in their intellectual functioning to be presented as rational actors who can and should be held responsible for their actions. The main issue of this thesis will be to demonstrate how criminal justice professionals generate a discourse of truth around guilt and intent in relation to an alleged offender who has an identified or suspected intellectual disability. Attention will also be paid to how measures of support are strategically put in place, supporting the criminal justice system in its traditional proceedings rather than solely supporting a defendant in their understanding of those proceedings.

Following definitions of terminology (below), historic public and scientific perspectives towards people with intellectual disabilities will be reviewed in *Chapter 1*. It will be explained how a particular discourse created specific conditions in which, based on an exclusively liberal concept of citizenship, people with intellectual disabilities were seemingly justifiably institutionalised and confined. Subsequently, the chapter provides a critical discussion that concentrates on how the definition of intellectual disability changed after the eugenic movement of the early 20th century and became increasingly medicalised. This will be followed by an illustration of the discourse that is generated through criminal justice proceedings, taking account of some of the core elements of the system through which formations of power are maintained.

Chapter 2 discusses the methodological background and the epistemology that informed the analytic gaze of this project during the generation and analysis of the data. Two seemingly conflicting theories, symbolic interactionism and Foucault's theory of discourse and power, are analysed in their supplementing capacities.

Chapter 3 outlines the methods that have been used in this study. In particular, some of the challenges and problems that arose from implementing a Grounded Theory approach to generate and analyse the research data will be described. Furthermore, the chapter reflects on some of the social dynamics during interactions between researcher and respondent within an interview. Finally, the research sample will be introduced, and some of the difficulties that were encountered when potential respondents were contacted will be explained.

In *Chapter 4,* respondents' views are analysed to explore their understanding of justice, crime, fairness, punishment and vulnerability. The aim of this chapter is to follow the pathway of an alleged offender through the criminal justice system, starting with the police, continuing with the courts, and finishing with the probation service. At each stage, safeguards will be discussed that are meant to assist in identifying and supporting defendants' legal rights and entitlements. Some constraints and pressures will be highlighted to examine how decisions are made, and how such constraints and pressures may influence criminal justice professionals to favour measures of control and discipline or, conversely, measures of welfare in their response to offending behaviour. The overarching aim of this chapter is to analyse how professionals, through a functional interplay, generate a discourse of truth at each stage of the criminal justice system. This discourse concentrates on individual guilt and culpability based on a concept of offenders who have the intellectual capacity to rationalise their behaviour and understand the potential consequences of their actions. This will shed some light onto an area that has been largely neglected by academics, and will enable the reader to gain understanding of how vulnerable alleged offenders are processed through the mainstream criminal justice system.

Definitions of Terminology

Intellectual disabilities

a)   Social vs medical

An intellectual disability is defined as impaired intellectual functioning. It is a condition which has a lasting, significant impact on a person's ability to communicate and understand information. There are different intellectual disabilities and the degree of disability can greatly vary. The term intellectual disability has been introduced fairly recently, replacing the term learning disability. In the past, different terminology has been used in public, political and academic discourse to describe and define people with an intellectual disability, such as idiot, lunatic, imbecile, feeble minded, mentally retarded, mentally degenerated, mentally handicapped, developmentally disabled, learning disabled, intellectually impaired or intellectually disabled.

Inconsistent and constantly changing use of terminology can make it difficult and sometimes confusing to undertake research in this area. The situation is complicated further as terminology has not only changed over time, but different terms as well as definitions of intellectual disabilities have always coexisted. As such varying expressions have been used by authors in the reviewed literature, it was not possible to avoid varying terminology from occurring in this study.

Confusingly, the term intellectual difficulty is sometimes used synonymously with intellectual disability. The term intellectual difficulty normally describes a particular impairment such as dyslexia, whereas the term intellectual disability refers to a range of interrelated and more global needs (Beebee, 2009). Interviewees sometimes confused these two distinct terms, though most of the time it was clarified during the interview which term a respondent was referring to. If the term intellectual or learning difficulty appears in quoted statements then it reflects the language that was used by interviewees to address issues around intellectual disabilities.

Definitions of intellectual disability usually include both medical components, such as intelligence quotient (IQ) values, and social components, for example social functioning (Loucks, 2007).

> "Medicine and psychology are widely acknowledged as the root disciplines of the field of LD [learning disability] (as well as the institution of special education) and other categories of disability. It is, therefore, no surprise that traditional conceptualizations of LD embody aspects of these discourses" (Reid & Valle, 2004, p. 268).

Silver (1990), for example, stresses that:

> "[Intellectual disabilities] are presumed to be a neurological disorder that impacts on the basic psychological processes involved in the understanding or use of spoken or written language and in the imperfect ability to listen, think, speak, write or spell or do mathematics" (Silver, 1990, p. 395).

Accordingly, it is the medical professional's task to measure individual pathological differences in people's intellectual functioning (Skrtic, 1995). In this view, differences are defined as pathological variations from the norm (Linton, 1998). Thus, an intellectual disability is described as a deficit that has its roots within the individual (Goering, 2002).

One of the measures used to identify an intellectual disability is a person's IQ. On its website, the British Institute of Learning Disabilities (2011) states "that people with an IQ of less than 20 will be described as having a profound disability, those with an IQ of 20-50, a severe learning disability, and 50-70, a moderate or mild learning disability." Although they may be presented as hard medical measures, IQ values entail socially constructed assumptions about normality. IQ scales are based on socially constructed classifications in relation to the average intellectual capacity which a person is expected to possess at a certain age. In this context, IQ tests have been vigorously criticised for providing a scientific biological justification of social stratification, further oppressing groups which are already disadvantaged in society because of their gender, race or class (Gould, 1996; Schonemann, 1997).

In contrast to medical classifications, definitions based on social models of disability suggest that intellectual disabilities are constructed within specific social

settings and situations, or as Dudley-Marling (2004) points out, "learning and learning problems dwell in activities and cultural practices situated in the context of social relations rather than in the heads of individual students" (Dudley-Marling, 2004, p. 482).

Intelligence itself is a social construct, and classifications and standards used to measure intelligence vary among cultures as well as they change over time. The age of criminal responsibility, for example, which is the age at which a person is believed to have capacity to distinguish between right and wrong as well as foreseeing and understanding consequences of their behaviour, has changed over time and still varies significantly among nation states, ranging from six years in some parts of the USA, to ten years in England and Wales, and up to eighteen years in Belgium.

The concept of intelligence is based on assumptions of what a person should have learned at a certain time in their lives. Consequently, the way intellectual disabilities are measured and categorised is linked with access to education, qualifications and training. In exclusively medical definitions of intellectual disabilities, social forces that inevitably have an input on how people acquire knowledge and perform academically are ignored. Hence, different positions within the educational system are discussed in isolation from the structural forces that generate them (cf. Bourdieu, 1973, 1977). Through processes of masking and covering, a public misconception is evoked whereby effects of structural forces become personalised through processes of individualising responsibility, allowing unequal formations of power to be maintained and reproduced in society (Carrier, 1983).

Medical explanations, in this context, are based on identifying personal characteristics of previously categorised groups of people. Once identified, models of causation are applied in order to explain these people's behaviour, excluding any social structures into which these people's lives are embedded. Ironically, these non-social models are then used to generate definitions about the social world from which intervening and corrective actions are derived.

> "In other words, the theory identifies, defines the significance of and explains a
> set of attributes […] in terms of the nonsocial events and processes of neuro-

psychiatry. This explanation is persuasive in part because it relies on a realm which we take to be real and neutral and to operate independently from the 'merely social'" (Carrier, 1983, p. 951).

Grobecker's (1998) definition of intellectual disabilities can be taken as exemplifying this strategy. In a very close relation to Tredgold and Soddy's (1956) model of intellectual disabilities (see section 1.1), he describes the process of learning as an intrinsic need to acquire new behaviour that improves an individual's adjustment to their physical and social environment. Hence, a person's ability to adapt to changing conditions in their *Lebenswelten* is defined as being the result of internal forces. Grobecker concludes by stressing that intellectual disabilities are "a lesser degree of integration and coordination in the biological structures of mental activity […] which prevents the self-generation and reflection of age-appropriate inferences in tasks" (1998, p. 224). The social construction and meaning of age-appropriate inferences in tasks, unsurprisingly, remains unchallenged in Grobecker's work.

Using a medical model of intelligence, therefore, assumes that learning is equal for any individual who participates in it regardless of the social structures by which their lives are surrounded. In a way, it proposes that learning happens in a social vacuum. This marginalising view has been taken to such extremes that some defenders of the medical model explicitly state that the social context can be neglected as long as the outcome of an intervention has the desired effect. "How "it works" is important but secondary to "what works"' (Shah & Mountain, 2007, p. 376). It is difficult to comprehend how these two inseparably linked questions can be looked at in isolation from each other.

In literature it has been stated that a concentration of intellectual disabilities as well as higher rates of low intelligence can be identified in people with socially deprived backgrounds (Farrington, 1995). This inevitably raises the question whether low intelligence and intellectual disabilities, as measured in IQ tests, are the function or the result of the social status that a person occupies in society. Findings based on seemingly hard scientific data can be corrupted easily when data are interpreted without paying attention to the social context in which the data have been generated.

For example, it appears reasonable to assume that members of the middle and upper social classes will have the means and resources to secure specialised education for their offspring, which in return improve employment opportunities. Families with socially deprived backgrounds will not have access to such means. In addition, the socio-economic burden resulting from the care for an intellectually disabled relative will be much more severe for these families. Limited social and economic resources have a negative impact on access to education and qualifications. Thus, it does not surprise when members of lower social classes have performed less well in intelligence tests than members of the higher and middle classes. This might also explain why in the past the label *mild intellectual disability* used to be falsely imposed especially on low-income children (cf. Mercer, 1973).

b)   Definition of intellectual disabilities

In the present study, the aim is to analyse decision-making by criminal justice professionals in relation to suspects who have special needs because of impaired intellectual functioning. In this context, it is not of importance to use a precise medical definition of intellectual disability to exclude or include a specific group of people in accordance to their IQ value. In general, it has also been demonstrated that people with an IQ of 70 and above can have significant problems in understanding and communicating (Talbot, 2008).

This study focuses on how traditional values within criminal justice, such as culpability, guilt, remorse and punishment, are constructed in relation to alleged offenders who due to their intellectual impairment may not fully grasp the severity of their situation, and may have difficulties in understanding the various investigative and court proceedings. In this context, a definition of intellectual disabilities has been purposefully adopted which concentrates on impairments in social functioning as outlined in the UK Government's Valuing People White Paper (Department of Health, 2001), whereby an intellectually disabled person has:

- A significantly reduced ability to comprehend and process new or complex information.
- Impairments in their social functioning, particularly in relation to getting by independently.

- The impairments in intellectual functioning have to be present before adulthood, with a lasting effect on development.

By concentrating on social interactions between intellectually disabled people and their physical and social environment, the definition of intellectual disability which is used in this study is explicitly social and less medical in nature (Scheff, 1966). The definition supports analysing the concept of vulnerability in relation to social constructions of crime, punishment, intent and guilt, to gain an understanding of how the interplay of these concepts creates a discursive framework within which criminal justice professionals interact with people who have intellectual disabilities.

Offender/alleged offender

The terms offender and alleged offender are applied with caution in this study. The term offender is only used in the context of a person who has been found guilty by the court or pleaded guilty. Otherwise, the term alleged offender or suspect is used in order to avoid unjustified and unfair labelling of individuals that engage with the criminal justice system.

Criminal justice system

The term criminal justice system is used to describe the agencies that are involved in processing and managing alleged or convicted offenders. These include police, custody suites, prisons, Crown Prosecution Service, magistrates' and crown courts, probation services and institutions that are involved in assessing individuals in their intellectual functioning within a criminal justice context.

Discourse of truth

Discourse of truth shall be defined as a discourse that conveys a seemingly objective and factual as well as universal reality, having a unifying and normative power towards those it addresses. Such discourse is unifying as it utilises commonly known knowledge about the social world and incorporates commonly accepted values and attitudes. It generates normative and disciplinary power as it promotes judgements based on a moral classification and categorisation of objects in the social world, allowing statements to be made in relation to right and wrong, good and bad and so on (cf. Lacombe, 1996). Whilst generating formations of power,

discourse of truth is at the same time a vessel of power. Therefore, the definition of discourse of truth used in this study is in accordance with Foucault's (1980) definition of truth, whereby discourse of truth has a circular relationship with power and the "power-effects" that it creates. Like power itself it must not be understood as a solely negative force. Discourse of truth can also create, produce, and enable as well as protect.

1. Literature Review: Intellectual Disabilities – A Discourse of Truth

The beginning of the twentieth century marks the start of the eugenic movement. At no time before did intellectually disabled people gain so much attention in public and political discourse. Political strategies at the time concentrated in particular on exclusion and separation leading to ""institutionalisation" or "familisation", with little or nothing in between to promote independence" (Simpson & Price, 2009, p. 181).

In order to deconstruct discourse one has to uncover the rules that govern it. This requires the natural appearance of a discourse, its self-evident nature, to be challenged and laid bare (Holmes, Murray, Perron & Rail, 2006). It is one of the aims of this study to scrutinise how the discourse surrounding people with intellectual disabilities has changed from a concept of intellectual disability being inseparably linked with the person affected by it, to a completely opposing concept whereby intellectual disability and the person affected by it are understood as distinctly separate objects. It will be argued that this might be the result of a changed interplay between science and the economic powers that have been structuring society.

1.1 Eugenic discourse and institutionalisation of people with intellectual disabilities

At the beginning of the eighteenth century hospitals were usually run by volunteers out of religious and humanitarian motives who saw in those for whom they were caring nothing more than pitiful human beings. "Although these unfortunate creatures are, indeed, the offspring of Homosapiens, the depth of their degeneration is such that existence – for it can hardly be called life – is on a lower plane even than the beasts on the field" (Tredgold, in Penrose, 1933, p. 3).

At the beginning of the twentieth century, in public and political discourse social and economic ineffectiveness equalled worthlessness, and had to be controlled and excluded by confinement in order to protect society. Hence, Porter (2002) suggests that the discourse surrounding people with intellectual disabilities has to be seen in a functionalist view in that it supported the emerging industrial society. This supports Scull (1984) who argues:

"[The] institutionally based system allowed the maintenance of conditions of relief which ensured that no one with any conceivable alternatives would seek public aid. In such a context, the asylum played its part, removing from lower-class families the impossible burdens imposed by those incapable of providing for their own subsistence" (Scull, 1984, p. 129-30).

At the beginning of the twentieth century the "disease model" (Clarke & Clarke, 1974) of intellectual disabilities was established giving the medical profession undisputed power over the management of people suffering from it. For example, when defining intellectual disabilities, Tredgold and Soddy (1956) begin by outlining basic behavioural characteristics that all 'normal' creatures have in common, such as securing food, escaping enemies or avoiding obvious danger. The authors define intellectual disabilities as an individual's inability to adapt to their environment in order to maintain an independent existence. Tredgold and Soddy's model can be seen as an attempt to develop a social order by which society should be structured. The model comprises two classic dimensions that were established during the eugenic movement. First, the authors address the biological strength of a society that comes under threat by genetically defective and therefore dependent individuals. Second, the model includes social conventions and moral values, which constitute its theoretical basis, allowing people who do not sufficiently and satisfactorily meet these criteria to be justifiably labelled as abnormal and to be separated from mainstream society. "Social misconduct and visible organic pathology are brought together in a perfect confirmation of the applicability of the medical model" (Goffman, 1991, p. 307).

The term medicalisation refers to a process "by which nonmedical problems become defined and treated as medical problems, usually in terms of illness or disorders" (P. Conrad, 1992, p. 209). Thus, the process of medicalisation was not limited to establishing a doctor-patient relationship. The process was accompanied by new technological inventions that generated a different discourse of truth based on a new power-knowledge balance with medicine at its centre (P. Conrad, 1979).

The success of the medical model was based on linking the symbolic scientific character of medical science to explanations of social conflicts under the umbrella of a seemingly progressive humanitarianism. As Castel (1988) outlines:

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"The doctor assumed the mantle of enlightened auxiliary to the political power in reducing misery and educating the people by contriving for it an hygienic and rational framework for existence. […] The political mandate claimed by the doctor was […] based upon the privileged knowledge of human life that he possessed. It was illuminating enough to be capable of dispelling prejudices, reducing arbitrariness and in the last analysis, controlling by the use of reason the organization of daily life." (Castel, 1988, p. 114-15).

Medicalisation takes place on different levels. First, symptoms of an illness are identified that hinder an individual suffering from a disability, preventing them from functioning adequately and independently in society. Second, the symptoms are presented using a discourse highlighting their relation to social disorder, moral inadequacies and socio-economic costs for society. This way, a link is established between individual and personal characteristics on a micro level and social disorder on a macro level, allowing psychiatrists to act "as society's policemen or gatekeeper, protecting it from the insane" (Porter, 2002, p. 186). Consequently, the medical model gains its power from "a particular set of (medical) definitions realized in both spirit and practice" (P. Conrad, 1992, p. 216).

In literature, it has been expressed that with the process of secularisation, especially during the Enlightenment, religion as the dominant moral ideology and institution of social control was replaced by medicine in an almost linear way (Zola 1972). "As the theological game was the "opiate of the people" in the past ages, so the medical-psychiatric game is the opiate of the contemporary peoples" (Szasz, 1962, p. 304). However, Bull (1990) argues that if indeed religion was simply replaced by medicine it would imply that one moral ideology would govern all social behaviour in modern society. Bull correctly demonstrates that in various parts of social life different ideologies, secular and religious in nature, exist side by side at the same time. In this context, Conrad (1992) highlights that the process of medicalisation is hardly ever complete, but tends to compete with other definitions that might exist at any one moment, creating new formations of power. This supports Scull (1993) who stresses:

"During the nineteenth century, mad-doctors manoeuvred to secure such a position for themselves, and acceptance of their particular view of madness,

seeking to transform their existing foothold in the marketplace into a cognitive and practical monopoly of the field, and to acquire for those practising this line of work the status prerogatives 'owed' to professionals – most notably autonomous control by practitioners themselves over the conditions and conduct of their work" (Scull, 1993, p. 186).

It is a form of medical fascism whereby medical discourse as a dominant ideology excludes and eradicates any alternative discourses and, therefore, any alternative forms of knowing (Holmes et al., 2006).

Thus, it seems legitimate to argue that a sacred law which was based on myths and faith and which used to order all things in the social world was maybe not completely replaced, but certainly dominated by a secular law based on scientific reasoning.

In opposition to the medical model, the social approach to disability concentrates on external phenomena that restrict, limit or otherwise disadvantage a disabled person compared to non-disabled people (Scheff, 1966). Attention is paid to external responses to behaviours and structures that create the reality in which a disabled person has to negotiate their identity. "The medical model of disability, by contrast, holds that disability is internal, a problem with the person's physical or mental self, and is a state that deserves medical attention and/or curative treatment whenever possible" (Goering, 2002, p. 374).

Social Darwinism with its proclamation of the survival of the fittest increasingly gained in popularity and was used to define standards that were thought to describe a functional, healthy and efficient society. In essence, the discourse regarding people with intellectual disabilities comprised three dimensions. First, on a biological level attention was paid to outlining in great detail the inferiority of intellectually disabled people, suggesting measures of population control. Second, on a social level the potential dangerousness of intellectually disabled people was stressed by emphasising a higher propensity of this group to engage in criminal or otherwise immoral behaviour, suggesting measures of confinement. Third, socio-economic costs were highlighted, generated by life-long care that intellectually disabled people required whilst being unable to compensate for any of the costs by performing productive work.

1.1.1 Biological discourse

By focusing on an intellectually disabled person's potential inability to live in compliance with social demands, social discourse increasingly concentrated on population control by means of institutionalisation and sterilisation. Especially during the first third of the last century, attention was mainly paid to the negative impact that intellectually disabled individuals were perceived to be having on society. This discussion arose during a time when western societies were obsessed with efficiency and national superiority. Thus, when identified as having a genetic condition, an individual was deemed useless for society and was deprived of their right to reproduce.

> "Eugenic sterilization as a measure for controlling feeble-mindedness is hedged about with many difficulties, legal, social, religious, and diagnostic. […] In order to promote a practical program for sterilization, it therefore becomes necessary to evaluate dispassionately the many objections to such a program and to overcome these difficulties on a rational basis, conserving all the interests involved" (Doll, 1930, p. 173).

Scientific discourse surrounding intellectual disabilities almost exclusively concentrated on inheritable inabilities and dependencies. In both public and scientific perception a person with such dependencies was seen as unable to be a good parent.

> "They [people with an intellectually disability] can neither look after their own nor their children's health. They act as a kind of dead weight which the social group has to drag along in its progressive efforts to hygiene. It is, thus, arguable that this group of persons, though themselves technically normal, may constitute a danger to the community and that, therefore, any preventative systems which will ensure that their members do not increase, but decrease, is justifiable on ordinary medical grounds" (Penrose, 1933, p. 157).

The population of intellectually impaired people was controlled by prevention of marriage, by sterilisation and by strictly separating males and females in institutions. In the above quotation, Penrose addresses two themes central to the discourse surrounding intellectual disabilities at that time. First, the perceived

economic burden is outlined that intellectually impaired people put on society. Second, the threat is highlighted that this population poses to the moral values of the community. In the literature from the early twentieth century, authors often stress the inability of intellectually disabled people to adapt to social and normative demands of the communities in which they live: "They lack moral control, which has been defined as the control of activity in conformity with the idea of the good of all" (Anden, 1911, p. 231). Thus, a link was established between an individual's intellectual capacities and their susceptibility to engage in criminal or immoral behaviour. In this context, it was often emphasised that an intellectually disabled person's inability to sustain themselves independently would have irrevocable genetic causes. As Tredgold and Soddy (1956) outlined:

> "A person suffering from mental disorder may be compared to one in a state of temporary financial embarrassment; the person suffering from dementia to one in a state of irrecoverable bankruptcy; whilst a person whose mind has failed to attain complete development may be linked to one who never possessed a banking account" (Tredgold & Soddy, 1956, p. 1).

Before the Second World War, the discourse surrounding persons with intellectual disabilities focused on incapacities that were beyond the control of affected people. The inherited and therefore incurable inability to comply with social norms and the reliance on help of others became a key variable within the discourse of truth regarding people with intellectual disabilities. Any hope of reintegrating an individual with intellectual disabilities into society through training and education had to be abolished, making the provision of care and support a life-long necessity. Such discourse allowed devaluing the lives of people with intellectual disabilities to such an extent that people with special needs and dependencies were perceived as being socially unacceptable, making population control of 'genetically defective' individuals an essential task in society for the sake of public protection and safety.

Measures used for controlling the population of intellectually impaired people were preventative in nature, concentrating on protecting future generations from large and growing numbers of dependent and potentially dangerous people. In particular, the number of so-called 'feeble minded' was perceived as vastly increasing. In this context, people with intellectual disabilities were sometimes seen as part of and

discussed together with people who were mentally ill. Both groups were seen as a burden to society, characterised by irrational and potentially dangerous behaviour and a livelong dependency on the help of others. This gave weight to measures around population control by institutionalisation and sterilisation.

For example, when discussing sterilisation of "certain mental degenerates", Rentoul (1906) notes that in the English Lunacy Commissioner's Report in 1905, one in 285 of the population had been diagnosed as insane[2] whereas in 1896 it had been only one in 319. He continues by quoting the 1901 census, which showed a constant increase of intellectually impaired people since the mid nineteenth century, stating a total of 484507 identified "mental degenerates" in 1901. In order to underline that the phenomenon of a vastly growing number of people with intellectual impairments was not restricted to one particular geographic area, Rentoul (1906) highlights that whilst the population in Ireland had decreased by 31.9% at the beginning of the twentieth century, the proportion of "the insane" had increased by 198%.

The way in which Rentoul (1906) constructs his argument exemplifies how scientists at the time helped to create a specific discourse in support of the eugenic movement, based on arbitrarily, partially and uncritically using statistical data. It appears likely that the increase of intellectually impaired people might have been the result of the more capable people having had the means, the resources and the capacities to leave the country at a time of economic crisis whilst their physically or intellectually disabled countrymen simply had not. Hence, instead of demonstrating a real increase of physically and intellectually challenged people in the Irish population at the time, the statistical data quoted by Rentoul (1906) could also be understood as an initial indicator of a socio-economic segregation of certain groups in Irish society.

Furthermore, the 1901 census to which Rentoul (1906) refers showed indeed a somewhat dramatic increase of intellectual disabilities in the English and Welsh populations. However, this was mainly due to the term 'idiot' having been replaced

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[2] Nowadays, a strict distinction is made between mental illnesses and intellectual disabilities. In the English Lunacy Report (1905), however, "feeble-mindedness" then listed as "idiot", the term which at the time referred to an individual's intellectual disability, was listed as a subcategory of insanity (see Humphreys (1907) next page).

by the term 'feeble-minded', resulting in a 21% increase of people being categorised as 'insane' between 1891 and 1901.

> "When householders' or occupiers' schedule, to be used at the census in 1901 was under discussion, the desirability of substituting the term "feeble-minded" for "idiot" was urged upon the Registrar-General by persons officially connected with the care of the insane, on the ground that such substitution would lead to greater accuracy in the returns. It was urged that householders who would hesitate to return a member of their family as "lunatic" or "idiot", might not object to describe such member as feeble-minded" (Humphreys, 1907, p. 206).

Although large numbers of people with intellectual disabilities remained living with their families (Rolph, Atkinson, Nind & Walmsey, 2003), the growing number of people with intellectual disabilities listed in official statistics clearly demonstrates the increase of mechanisms of institutionalised control and surveillance that particularly targeted people with intellectual impairments. This might confirm claims in the literature (Cooper & Sartorious, 1977; Oliver, 1990) that the growing detection of people with an intellectual disability could have been the result of processes of industrialisation in Britain and the increasing urbanisation which accompanied it. This process, the authors argue, eroded traditional family structures and, thus gave greater visibility to intellectually disabled people in society, evoking the attention of various scientists.

The perceived dangerousness of intellectually disabled people combined with their statistical growth within society, controlling them by means of sterilisation and castration was seen not only as legitimate, but also as a matter of utmost importance. In one of its reports the Yale Law Journal Company (1899) stated:

> "It [castration] is what many sociologists are gravely considering as a possible and permissible mode of preventing the propagation of a degenerate class of imbeciles or paupers. It is what, in fact, is being actually done in a quiet way by not a few of the medical profession who are in charge of almshouses and other public institutions in which are feeble minded children, the progeny of a worthless stock. Their castration is sometimes deemed an appropriate remedy to which to resort to prevent their falling into vices or disorders, to which their

nature makes it difficult for them to offer any effectual resistance; and none the less appropriate, because it will end the line of a family which is misusing the earth" (Yale Law Journal Company, 1899, p. 382).

The above quotation is of great importance in many respects. First, it highlights that at this moment the discourse of truth surrounding intellectual disabilities was not exclusively medical but also sociological in nature. Second, reference is made to depriving impaired individuals of their right to procreate in order to avoid an even greater socio-economic burden being put on future generations. Third, the welfare of the impaired individual is addressed on a social dimension. In the statement above it is implied that castration might be a measure of behavioural control that is beneficial for the intellectually disabled individual. Goffmann (1975) identified this type of strategic discourse as characterising disempowerment and institutionalisation of people with an intellectual disability. Similarly to the discourse in the Yale Law Journal Company quoted before, medical experts often pretended to reach a balance between measures of control and measures of support, "demonstrating that all along [a person] had become sick, that he finally became very sick, and that if he had not been hospitalized much worse things would have happened" (Goffman, 1975, p. 260). In the specific context of the reference above from the Yale Law Journal Company, the concept of quality of life was based on the happiness that a person might be able to experience resulting from their capacity to conform to their social role, insuring their integration into society.

The discourse of truth, which was generated to justify measures of particularly spatial control that were used against intellectually disabled people, always concentrated on the welfare aspect of care. Consequently, institutionalisation was not perceived as solely depriving an individual of their liberty. Instead, the asylum system was presented as a place where the insane could be "mercifully controlled" (McCandless, 1983, p. 84).

The discourse of truth at the time maintained the social structure of society based on strict social stratification. This social structure was seen as being under threat by intellectually disabled people who, due to their impairments, were regarded as being unable to recognise or acknowledge this social structure and thus were identified as potentially acting as a counterweight to it. Nevertheless, by linking the rather

general concept of moral behaviour to a sound mind, this discourse marks the beginning of the medically governed discourse of truth that was to follow, making way for psychiatry to gain power as an institution of social control.

1.1.2   Social discourse

The concept of measuring an individual's quality of life in relation to their capability to adapt to the demands of society was equally prominent in political and social discourses as it was dominating the scientific discourse at the time. Hence, it is not surprising that the scientific definition of intellectual disabilities was linked with an individual's inability to comply with existing social role expectations.

> "Feeble-mindedness may be defined as a state of mental defect from birth or from an early age due to incomplete or abnormal development, in consequence of which the person afflicted is incapable of performing his duties as a member of society in the position of life to which he is born" (Goddard, 1911, p. 505).

Public and political discourse surrounding intellectual disabilities were never one-dimensional in their nature and, therefore, not limited to a medical discussion about society's genetic health. Instead, in historic discourse the label of mental retardation was applied in a specific social context. Under the Lunacy Act 1890, the powerful label given to people who had been identified as having to be institutionalised due to their intellectual incapacities was "unsound mind". The definition of a person suffering from an unsound mind was deliberately indistinct and did not only comprise people with intellectual impairments. Consequently, under the Lunacy Act 1890 potentially anybody who did not meet general moral demands could be diagnosed as insane and be locked away indefinitely.

Thus, a powerful discourse of truth on a socio-medical dimension with real social consequences had been established, emphasising the threat to society from people who were perceived in public as being morally weak to the same extent as they were intellectually disabled. In this context, a person's ability or willingness to comply with moral norms was integrated into the concept of intelligence. Recognising different states of mind became an administrative exercise with the purpose of detaining and institutionalising people who had been labelled as mentally defective.

All classifications – in this case a person's intellectual capacity – created by an individual or a group of individuals through public, political or scientific discourse reflect how a society is structured at a given moment, regardless of whether the process of classifying is of an intentional or unintentional nature. Social classifications reveal common social orientations and concepts as well as issues emphasised in social discourse at specific times. The function of such classifications is to create an order of things defining precise and strict boundaries among all objects in the social world. The powerful process of applying classifications is a process of labelling, whereby the label that is being utilised has to be understood as a social construction that is based on assumptions about social processes which definitions about measures of social control are derived from. Through the process of labelling, reality is constructed in terms of a precise balance between measures of control and support.

Hence, in terms of intellectual disabilities, the process of labelling through classifications during the early twentieth century was serving administrative purposes in that it allowed defining access and denial of access to social space. Therefore, the label 'unsound mind' became a measure of social control and was used to maintain a system of unequal formations of power. It appeared to be justifiable for many academics at the beginning of the twentieth century to be in favour of sterilising people who, due to whatever reasons, did not comply with the moral conventions of their time. A person did not necessarily have to suffer from intellectual impairments. An individual who was seen as being unable to comply with moral conventions in general was classified as unfit to have children (cf. Gosney & Popenoe, 1931). Accordingly, by drawing on a prison sample, Gibbons (1926) recommended sterilisation of all "unfit", whereby "unfit" is describes people whose behaviour and lifestyle prevent them from integrating into society as positively contributing and productive individuals, including the unemployed and homeless.

Lennerhed (1997) highlights that in countries throughout Europe women were predominantly affected by eugenic sterilisation. "It is therefore assumed that the figures reflect in a rather brutal way, women's lack of power. Put simply, women did not feel they had the right or were in a position to say no" (Lennerhed, 1997, p. 157). Other similar examples show how eugenic programmes affected socially

powerless people. In relation to ethnic minorities Reilly (1987) stresses that the eugenic movement in the USA was particularly strong in Southern states, making cohabitation of mixed-coloured couples illegal and forbidding interracial marriage. Reilly (1987) emphasises that this process went parallel with the black population gaining more independence. This demonstrates how the eugenic discourse supported population control and socio-economic segregation. Sharp (1902), for example, particularly focused on people with socially deprived backgrounds when suggesting mass sterilisation to be carried out on any institutionalised persons detained in prisons, asylums, and almshouses.

Hence, the discourse surrounding intellectual disabilities at the beginning of the twentieth century was not concentrated exclusively on a person's intellectual capacities. In fact, a person's inability to comply with moral conventions and values was of at least equal importance when the diagnosis of intellectual disability, or 'mental retardation' as it was labelled at the time, was made. People from lower social classes, from large families, living in poor conditions or being of foreign origin were often referred to as being at greater risk of having an intellectual disability as well as becoming criminal. Although environmental factors were well recognised to have an effect on a person's opportunities and chances in life, usually individual, personal factors were emphasised as having a greater impact on a person's development (cf. Erickson, 1931). Once again, attention was diverted away from disadvantaging social structures towards the individual. Environmental factors were not questioned or researched in themselves, but taken as observable risk indicators causing mostly powerless and socially disadvantaged individuals to be afflicted by processes of labelling and eugenic measures.

Thus, in historic thinking a close relationship between crime or otherwise immoral behaviour and intellectual disabilities was seen as a matter of fact. In this context "scientific views were consistent with "respectable fears"" (Holland, Clare & Mukhopadhyay, 2002, p. 7). V. Anderson (1923), for example, stressed "75% of confirmed criminals are suffering from mental and physical conditions that have everything to do with their delinquent and dependent behaviour. These surveys show that the mental factors involved in human failure are probably the most important" (V. Anderson, 1923, p. 93). Hence, scientific findings of researchers, who themselves appear to have been extensively biased and influenced by public

views and prejudices, provided the basis for politicians and decision makers to disempower people with intellectual disabilities. This way, corrupted science helped to maintain and reproduce imbalances of power in society. Moral values in society backed up by 'scientific facts' became political issues.

1.1.3   Economic discourse

As mentioned before, during the early twentieth century attention was paid in particular to the unproductive nature of intellectually impaired persons that resulted from their inability to contribute to society's economic wealth. Supporters of this view often highlighted in great detail the economic and social burdens that intellectually disabled people put onto their community due to their dependencies. As Goddard states:

> "The highest group, the "moron", comprises those persons who to the superficial view are often considered normal but somewhat backward or dull. As the definition tells us, there are two characteristics of affected people. In the first instance, they are unable to compete on equal terms with fellow members of society. In addition, they are unable to manage their affairs with ordinary prudence. The result of the latter is that it […] requires a large army of people to take care of these morons, and to see that their affairs are managed with prudence" (Goddard, 1911, p. 506).

The tendency to judge people in relation to their intellectual ability to comply with social role expectations was actively supported by researchers at the time who, in their often biased view, developed many self-fulfilling prophecies that reinforced common myths and clichés surrounding intellectual disabilities. When assessing and evaluating the effect of intellectual disabilities on a person, scientists approached such individuals by using measures that had been developed for non-impaired people. This helped to reinforce existing unequal formations of power, as attention was diverted from disadvantaging social structures and channelled towards the deviant individual. It also allowed perceiving intellectual disability and the person affected by it as one social object.

Best (1930), for example, researched the extent to which intellectually disabled people could be trained and educated. In his project he compared deaf, blind and

intellectually disabled persons in their ability to acquire certain skills allowing them to pursue economically productive activities. He noticed that whilst it was possible to use mainstream techniques of teaching in the blind and deaf groups of his study, intellectually disabled people did not appear to benefit from such methods at all. This led him to conclude that only the physically challenged respondents in his research could be integrated into society when appropriately educated. Although Best (1930) recognised that the members of this group would always be limited in their performance depending on their kind of impairment, he emphasised personal characteristics, such as trustworthiness and reliability, advantaging the physically over the intellectually disabled. With regards to intellectually disabled people he stated the following:

> "Much remains to be discovered as to the capabilities of the feeble-minded. Perhaps they may become not wholly a burden and an object of solicitude, but in some part an element with a modicum of productiveness or serviceability. […] But intellectual education as we understand it, despite the brave and heroic efforts of the early workers who sought to carry it to the feeble-minded, has found this one class alone of all in society largely beyond its far reaching powers and largely closed to its beneficent transforming influences. Their treatment by society must be established on a different order" (Best, 1930, p. 639).

Best's study can be interpreted as an example representing common views at the time. First, Best shared a widespread marginalising understanding of disabilities, lacking any distinction between physical and intellectual disabilities, assuming the effects to be similar in that an affected individual would not be able to compete with other members of society on similar grounds. Second, and equally explicitly, in his study Best (1930) like other researchers of his time (e.g. Erickson, 1931) focused on an individual's adaptability to mainstream society. Thus, he was interested in how an individual would cope with the demands of common educational systems, rather than paying attention to developing a scheme that might be best adapted to the disabled individual's needs. Hence, as a result of disadvantaging structures, intellectually disabled people were lacking the educational background allowing them to become involved in any kind of productive activities whilst at the same time their ability to be schooled was being questioned. Third, Best's (1930)

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research exemplifies how education became integrated into the discourse of truth. In Best's (1930) study, education is being used as a means to define normal and 'sub-average' levels of intelligence and adaptability. Best's (1930) argument supports an institutionalised process of separation whereby being normal is defined as being 'educable'.

This is not to say that there were no other, more critical voices within the world of academia. Ten years prior to Best's (1930) article, Hodson (1919) highlighted the moral obligation of any society to make education accessible to intellectually disabled people while tailoring the training to the special needs of this population. It had also been well recognised by certain scholars that a higher propensity to engage in acts of criminal behaviour that could be observed in people with intellectual disabilities was by no means necessarily linked to their intellectual capacities, but had to be seen as an immediate result of the disadvantaged position this group of people occupied within society.

> "It will be admitted on all sides that a person born with a degenerate and feeble constitution is much less likely to obtain employment and to earn a livelihood than a normally constituted man. Such a person is therefore much more likely to become a criminal, but it is economic causes in this instance which directly drive the man to crime, and not an innate perversity arising from physical defects" (Morrison, 1892, p. 507).

Morrison implicitly addresses tendencies of exclusion deeply anchored in the social and economic structures that organised social life at the time. In general, the frequently highlighted close link between a person's intellectual capacities and their propensity to engage in a life of crime (Anden, 1911; Anderson, 1919; Erickson, 1929; Haines, 1917) was questioned by many scientists at the time (Bronner, 1914; Doll, 1920; Weber & Guilford, 1926) with regards to sample, sample size and the tests that had been used to measure an individual's intellectual abilities.

However, only a few authors like Morrison (1892) were critical in their view and concentrated on the disadvantaging social construction of intellectual disabilities and the devastating effects of it. Taking a sociological rather than medical view, Powdermaker (1930) stressed that unsuccessful attempts to reintegrate intellectually impaired people into society after their release from institutional care were often not

due to the individual's limited capacities, but were the consequence of the social setting that the person was released into; a setting that was characterised by hostility, contempt and rejection. In this context, Powdermaker (1930) argued that almost on the day of their release the intellectually disabled person was doomed to fail in their efforts to organise their lives according to the normative structures in society.

However, due to the political and social discourse being based mainly on public incomprehension and an almost hysterical fear of intellectually disabled people, as well as increasing economic constraints from the 1920s until the end of the Second World War, these voices did not manage to control the public and political agenda. Eugenic studies and practices gained worldwide support and were implemented in many countries. Barrett and Kurzman (2004) argue that this was mainly due to two factors. First, processes of globalisation created a trans-national polity that changed the ideology of national statehood. Thus, structures were in place allowing increasing communication and exchange of ideas between countries. In addition, Barrett and Kurzman (2004) argue that in order to secure public and political support all social movements need to integrate local cultural conventions and common values inherent to the specific social setting within which they operate. Therefore secondly, the eugenic movement integrated national and political targets of which strengthening the national population was one of the most important.

> "All creatures would agree that it was better to be healthy than sick, vigorous than weak, well-fitted than ill-fitted; in short, that it was better to be good rather than bad specimens of their kind, whatever kind that might be. So with men" (Galton, 1904, p. 2).

Most notable in Galton's statement is the concept of Social Darwinism, which is inherent to the eugenic movement. With the beginning of the twentieth century medical scientists and biologists started to dominate the discourse surrounding intellectual disabilities, evoking a conceptual shift in public and scientific perception whereby a previously sociological problem was increasingly perceived to be medical in nature. Of particular importance in this context is the nihilistic approach to people with intellectual disabilities which was taken by these professionals. Any treatment was perceived as being fruitless as well as potentially

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opposing population control (Freeman, 2010). This allowed new measures of institutionalised control to be established as well as social positions and roles to be reorganised in society.

Although the eugenic movement stopped after the Second World War, general concerns about an apparently increasing population of intellectually disabled people in society remained strong, allowing the number of institutionalised people to grow until peaking in 1954 (Freeman, 2010). However, the discourse of truth surrounding people with intellectual disabilities significantly changed. To some extent, this was marked by a change of language that was used to describe intellectually disabled persons, from lunatics, idiots, imbeciles and feeble minded towards a more disjointed terminology such as mentally retarded, learning disabled or, most recently, intellectually disabled. Increasingly, intellectually impaired individuals were described in medical terms defining symptoms and suggesting potential treatment. Whereas at the beginning of the twentieth century an intellectual impairment and the person affected by it were perceived as an inseparable entity, this novel discourse allowed detaching an intellectual disability from the affected person. Consequently, a shift took place emphasising abilities, self-control and free will.

These changes have been described as marking processes of de-institutionalisation and, at least to some extent, empowerment (Carling, 1993; Parkinson et al., 1999). A probably more accurate interpretation of these processes, however, may be that instead of being discontinued there was a shift in the way people became institutionalised. As Kinsella (2005) highlights:

> "There is a danger in thinking of an institution as just a large building (a hospital, special school, day centre). Institutions are a state of mind. Institutional practice and thinking can happen when one person is being supported on their own, just as much as when 100 people are. Making services smaller is not the key […]. Changing the balance of power and control is the real key to deinstitutionalisation; this is how people really get to choose how they lead their own lives" (Kinsella, 2005, p. 41).

1.2   Criminal justice and institutionalisation

Until the closure of many big psychiatric units in England during the 1980s, some people with intellectual disabilities continued to be segregated from mainstream society in the name of public safety. As during the eugenic movement, minorities and powerless groups in society such as black people and women were particularly targeted. In 1972, the *Guardian* gave an example of two completely sane women who had an illegitimate child at the age of nineteen and as a consequence were institutionalised as morally defective for forty four and fifty one years under the Mental Deficiency Act of 1913 (The Guardian, 1972, cited in Szasz, 1975).

It has been well recognised in the literature that in the past psychiatric wards have been used as a measure of social control. As Morton (1975) stresses: "from the beginning, the institution functioned as an extra-legal prison, not only for "mental patients" but […] for persons who were confined without any pretence of illness or treatment" (Morton, 1975, p. 12-13). Mason and Mercer (2000) highlight that both the criminal justice system and services for people with an intellectual disability pursue a similar ideology, which supposedly concentrates on protection of the public. "This single fact [protection of the public] has served to govern the development of services for the mentally disordered offender, with every bar, lock and fence as testimony" (Mason & Mercer, 2000, p. 104).

In this context, Goffman (1991) challenges the welfare aspect of institutional care altogether by highlighting the imbalance of power between carer and patient, which according to Goffman (1991) is not a relationship between server and served, but governor and governed. In agreement, Porter (2002) argues that the incurable nature of intellectual disabilities in particular was perceived as legitimising the captive character of institutions where sedatives would be used habitually whilst denying inmates any form of meaningful occupation.

As in most developed countries, in Britain psychiatric beds have been reduced in numbers since 1978 (Vickery, 2010) and different forms of community-based care models have been established. It has been argued that this shift from big enclosed hospitals to small units and community-based care was not necessarily the result of increasing doubts about the usefulness of psychiatric hospitals, or scandals that had come to light in relation to mistreatment and abuse of patients in these institutions.

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Scull (1984) argues that the process of de-institutionalisation was put in motion mainly because of economic reasons. The problem of overcrowded hospitals as well as the need to modernise the mostly old institutions would have necessitated substantial investments. Hence, Scull stresses that closing hospitals "allowed governments to save money whilst simultaneously giving their policy a humanitarian gloss" (Scull, 1984, p. 139). The increasing life expectancy of institutionalised individuals put an additional strain on the system. These developments were accompanied by a shift in politics, which strengthened neo-liberal tendencies (Simpson & Price, 2009). A central theme of the neo-liberal state is shifting responsibility to the individual and the market by emphasising self-reliance. Neo-liberalist discourse is characterised by "a combination of progressive social policies (de-institutionalisation and 'normalisation') and neo-liberal economic policies to create a new welfare landscape…" (Simpson & Price, 2009, p. 182). This policy, the authors argue, resulted in general funding cuts of institutional care as well as individual support. The former led to a reorganisation of care delivery, the latter to poorer service and support, increasing the risk that intellectually disabled people would experience exclusion and disempowerment.

> "A decade of such politics naturally produced a further deterioration in the already squalid conditions of many mental hospitals; as well as a series of scandals which could be (and were) used as further evidence of the necessity of phasing out the irredeemably flawed institutional system" (Scull, 1984, p. 71).

General funding cuts affected not only big institutions. In addition, neo-liberal policies resulted in wide ranging budget cuts, which affected the overall system of care provision, including community care programmes. In this context, Scull (1984) claims that at the moment it was established, community-based care was doomed to fail. Following the neo-liberal agenda, community care settings were notoriously underfunded from the outset, leaving people in need of care with insufficient support and supervision. It has been argued that this might have been a contributing factor to the increasing number of intellectually disabled people appearing to engage with the criminal justice system (Kebbel & Davis, 2003), as well as explain their high prevalence within the prison population (Petersilia, 1997).

Indeed, Priebe et al. (2005) discovered that in West European countries the numbers of forensic beds are increasing again, a trend that has been confirmed by Salize, Schanda and Dressing (2008). In addition, Priebe et al. (2005) made an interesting observation confirming earlier similar observations (Gunn, 2000): the authors noticed that states with low numbers of psychiatric beds, namely England and Spain, had at the same time the highest prison populations. Combined with recent research findings (Hall, 2000; Hayes, 2005a; Talbot, 2008) that have highlighted a disproportionate prevalence of intellectually disabled offenders within the prison population, the findings of Priebe et al. (2005) might indicate new forms of institutionalisation that contradict principles of community-based care and promote measures of control and discipline rather than self-advocacy. This trend, it appears, significantly increases the risk of people with an intellectual disability to be drawn into the mainstream criminal justice system (Hartford et al., 2005).

In previous research it has been shown that intellectually disabled people commit a range of offences (Winter, Holland & Collins, 1997), although there has been evidence that this group might have a higher predisposition to committing crimes of arson, sex offences and violent assaults (Cullen, 1993; Day, 1993; Hall, 2000). If a crime suspect's intellectual capacities are in doubt, medical examiners will be consulted to assess such a person's level of functioning, to judge their culpability as well as assessing the risk that they might pose to themselves and society.

In their socio-legal status, intellectually disabled persons are legally formalised, e.g. in anti-discrimination laws. At the same time intellectual disability is medically defined (see section 1.1). However, the social constructions of reality on a day-to-day basis can vary significantly from legal and medical constructions. In this context, attention has to be paid to processes by which social and economic resources are distributed in society. In 1931 Erickson, although in a different context, mentioned the disadvantaging structures of the labour market that exclude people with intellectual disabilities.

An individual's status is constructed within socio-economic power formations generated by a capitalist market system. Jenkins (1991) highlights that this has traditionally been what sociologists have paid most attention to. Consequently, as people with intellectual disabilities are not actively involved in class struggles,

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Jenkins (1991) argues, this particular population has not received a lot of attention from sociologists and thus has been mainly the subject of medical scrutiny. This especially causes concern in that not only classifications of intellectually disabled offenders are rather arbitrary social constructions, but also the inabilities and impairments attached to these classifications have to be seen as socially constructed. It is important to keep in mind that the label 'intellectual disability' is not an objective existing 'fact'. Hence, when using medical categories that have been developed out of 'observed' attributes in order to describe social events, one has to critically scrutinise whether the body of knowledge gained by such observations consists of true discoveries or, instead, simply reveals social constructions (Bury, 1986). Titchkosky (2000) expresses concern about the extent to which medical categories have become integrated into sociological discourse. He disapproves in particular of the marginalising concepts of intellectual disabilities whereby any behaviour performed by intellectually disabled persons is perceived "not as speech and life, but instead as symptom" (Titchkosky, 2000, p. 217).

Hence, the closure of psychiatric hospitals was not accompanied by a loss of power for the medical profession. On the contrary, the medical model of intellectual disabilities has lost none of its dominating explanatory value; it simply shifted its focus. Most significantly, by recognising abilities and capacities, the current medical model of intellectual disability has become far more optimistic and less nihilistic in its concluding argument.

1.2.1 *Medical discourse of truth (in relation to guilt and crime)*

As the medical model continues to dominate the discourse of truth surrounding intellectually disabled people, medical professionals are as influential as ever and continue to act as agents of institutionalised social control. Indeed, in recent years the psychiatric gaze has significantly increased. As Kleinmann (2006) puts it:

> "Perhaps the most devastating example for human value is the process of medicalization through which ordinary unhappiness and normal bereavement have been transformed into clinical depression, existential angst turned into anxiety disorders, and the moral consequences of political violence recast as post-traumatic stress disorder" (Kleinmann, 2006, cited in Vickery, 2010, p. 366).

As a consequence, a discourse of truth has been generated in which law and science appear to have merged in their focus on individual culpability.

When the medical profession gained power within criminal justice it also provided scientific confirmation of some of the most central ideological concepts that are inherent to modern criminal justice. In the natural sciences, medical discourse allows categorising phenomena based on the identification of specific attributes or symptoms. Thus, the process of categorisation is an observational process that produces knowledge, which determines and legitimises some form of treatment.

Within criminal justice, medical discourse concentrates on the 'patient' rather than focussing exclusively on symptoms. Medical authorities involved in criminal justice not only categorise the criminal but also their social position, their status and rights as derived from their physically and/or intellectually impaired persona. The medical discourse within criminal justice is a form of discursive power that determines what is (diagnosis), how this reality can be influenced (treatment) and what the future outcomes will be, both if the treatment is or is not applied (Holmes et al., 2006). In this context, medical knowledge combines information about historical and present behaviour that has occurred in specific situations. On this basis, medical experts make assumptions about how a person might behave when being exposed again to similar conditions. This way, medical experts assess the risks that a person might pose to society at a given moment.

The risk assessment in relation to criminal justice is a continuous process, which assures constant involvement of medical experts throughout the time an alleged or convicted offender engages with the criminal justice system. It starts with the alleged offender entering the criminal justice system. By applying a model of causation, medical experts inform the decision as to what sanction needs to be implemented as the appropriate response to both an offender's personality and their deviant behaviour. While the sanction is being applied, the offender is constantly reassessed to determine the effect of their penalty. Eventually, a final assessment is carried out when the offender is released back into society to determine the conditions of their discharge. This can include continuing close observation by medical experts until the offender leaves the criminal justice system involving different powers to implement various actions (cf. Table 1).

Table 1: Decision making and power

Decision-making and resulting power of medical experts	
Identification	Power of control
Classification	Power of labelling
Diagnosis	Power of knowledge
Treatment	Power to intervene

Criminal law in its content is based on the same medical paradigm. For example, by making reference to previous and alleged current offences committed by a defendant, a character is constructed based on assumptions about human nature, e.g. a person who has committed a theft in the past is more likely to commit another theft compared to a person who never committed a criminal offence (cf. section 4.3).

Hence, the concept of criminal justice is based on a positivist and medical philosophy, which concentrates on individual psychological characteristics emphasising criminal culpability. The discourse in criminal justice, therefore stresses, "(1) that we humans have a free will to decide our action, (2) that we are intelligent and reasoning creatures who can recognize values […] and (3) that we can distinguish between right and wrong" (Schafer, 1973, p. 482).

Haney (1982) argues that the medical stand of psychological individualism conquered the concept of criminal justice with the emergence of capitalism. Traditional social units such as the family became eroded, and an individual's status in society commenced to be determined by their physical and psychological capacities to adapt to social expectations of efficiency and productivity in the capitalist market system. In this context, Haney (1982) states three basic 'facts' that are inherent to the system of criminal justice:

> "(1) individuals are the causal locus of behaviour; (2) socially problematic and illegal behaviour therefore arises from some defect in the individual persons who perform it; and (3) such behaviour can be changed or eliminated only by

effecting changes in the nature or characteristics of those persons" (Haney 1982, p. 195).

Law in this context constitutes the ideological framework which prescribes due process measures of oppressive social control in consideration of pathological individual characteristics of both the offender and the committed offence.

Explaining social behaviour by using the medical model means to define absolute causes for an observed phenomenon. In the following section it will be discussed how using a medical model to explain social behaviour and/or social processes creates a naturalistic and therefore seemingly objective reality while hiding social factors. In particular, attention will be paid to how using the medical paradigm evokes a public misconception whereby structural forces become individualised. It is hoped that this will help in understanding the persuasive power of the discourse of truth that is generated within criminal justice based on a positivist and medical model of crime.

1.2.2 *Medicalisation of social conflicts in criminal justice*

Bourdieu (1977) argues that unequal formations of power and the social order they establish are peacefully maintained and reproduced by a discourse of truth that claims the causes of social disparity to be neutral in nature and rooted externally to the social order and institutions of social control. In this context, the results of unequal formations of power and social control are ignored and masked by making reference to potentially neutral and objective events. With regards to intellectually disabled individuals, Carrier (1983) argues, this process is characterised by the usage of knowledge about normality, especially normal behaviour, to demonstrate how intellectually disabled persons might deviate from average parameters in their intellectual functioning, and then to causally explain how such individuals are impaired in their ability to adapt to social role expectations. Thus, by identifying personal characteristics of previously categorised groups of people, causative models are generated to explain people's life-worlds whilst denying taking into consideration the social forces that shape and constantly reorganise these life-worlds. The persuasiveness of such an explanation lies in the way by which "it relies on a realm which we take to be real and natural and to operate independently of the merely social" (Carrier, 1983, p. 951). However, the social construction of

intellectual disability becomes clear when attention is paid to variations in the manifestation of intellectual disability in correspondence with educational, socio-economic and political factors (Szasz, 1962).

On the one hand, the methodological ignorance inherent in medical explanations of social phenomena can be interpreted as diverting attention away from other – social – factors that might have an impact on an observed event, decreasing the chance of gaining a comprehensive understanding of a matter. On the other hand, taking a more critical perspective, it can be argued that medical discourse in relation to social processes generates deliberately simplified and marginalised explanations of results of social conflicts; explanations that mask and thus legitimise and maintain structures of power and domination. As Carrier (1983) highlights:

> "Legitimisation of these things entails an ideology portraying them as not arbitrary, not merely a manifestation of power relations in the society, but based on something over which neither the dominated nor the dominating have any control. Any purely natural attribute will serve here (e.g. intelligence conceived in the appropriate way or variability in the integrity of cerebral structure), as will non-natural attributes which are seen to be independent of one's position in the social order" (Carrier, 1983, p. 964).

The criminal justice system and all agencies involved in it gain their authority and status by maintaining and reproducing the medical discourse and thus its ideology as it has been manifested in law.

Laws comprise an institutionalised system of norms in a given society. Furthermore, laws also contain assumptions about the nature and the causes of human behaviour. This led Foucault (1979b) to argue that when science began to produce more detailed knowledge about human behaviour, punishment of criminals began to focus on the criminal soul in order to change the criminal character of an individual, rather than punishing an offender's body.

Hence, by scientifically defining the causes of human behaviour to be internally rooted, social conflicts are addressed by implementing measures of social control that punish the individual. For example, as part of a probation order, one of the more welfare oriented measures within the criminal justice system, offenders often

have to attend regular training programmes that aim to improve an individual's faculties and competencies in order to increase their chances of finding employment in the labour market. Such programmes do not address social conditions that restrict people's chances and opportunities in life, for example the disadvantaged position of older or disabled unemployed people, but instead aim at enhancing a person's capacities to better utilise their environment. Consequently, the social failure of an offender in society is not perceived as being caused by a restrictive environment, but rather as being the result of a restricted personality (Hurst, 1956).

Besides diverting attention away from potential structural forces, the medical model of crime supports, through a very powerful discourse of truth, the infallibility of the criminal justice system. The criminal character of an offender is perceived as medical abnormality and punishment as the appropriate cure. As Foucault (1979b) highlights, the medical model allows recidivism to be interpreted not as failure of the system, but simply as the need for the 'cure' to be reapplied more severely and extensively in order for the offender to meet society's standards of what is a normal character and personality. Therefore, an offender who has gone through the criminal justice system and has remained unreformed simply demonstrates that their attempts to deliberately act against society's norms and values are more persistent than had been apparent in the beginning.

Based on the medical concept of crime, the criminal justice system produces popular knowledge about human nature and how human actions might be influenced and controlled.

> "Although penal justice preserves the forms that guarantee its equity, it may now be opened up to all manner of truths, providing they are evident, well founded, acceptable to all. The legal ritual no longer generates a divided truth. It is resituated in the field of reference of common proofs" (Foucault, 1979b, p. 98).

The effects of social conflicts are individualised and redefined as individual deficiencies, a process Foucault (1979b) calls the main symbolic function of criminal justice.

Consequently, despite probably still enjoying some popularity in public discourse, the concept of the born criminal has been discarded within the criminal justice system as it, firstly, undermines the concept of individual responsibility and, secondly, eliminates any hope of changing a criminal. The latter especially would significantly threaten the foundation of the criminal justice system as it questions the ability of any sanction to result in positive change. If criminal behaviour were perceived as being mainly based on biological, genetic factors, the ideology of prisons as institutions of change and deterrence would have to be discarded. Horwitz (1981) describes this as the fundamental conflict between welfare oriented medical concepts and the criminal justice system with its emphasis on deterrence. Thus, the medical concept of crime justifies individualism in criminal justice, in that it concentrates in particular on categorising and classifying psychological defects within criminals without necessarily granting absolution for their criminal conduct. This also applies to intellectually disabled offenders. Deviants are only labelled sick when their offence or conduct appears to lack rationality to such an extent that the act itself becomes incomprehensible and inexplicable for criminal justice professionals (Horwitz, 1981).

The process of medicalisation is of an interactive nature whereby the two involved systems – criminal justice and medicine – reinforce each other within their ideologies. Medical professionals give evidence in court determining an individual's intellectual capacities to form a guilty state of mind, and thus confirm the concept of individual responsibility. The court's demand to make the criminal distinguishable from the law-obeying citizen, in return, accepts the medical account of the impaired but nevertheless culpable criminal. As outlined before, the medical model diverts attention from social conflicts caused by individualising politics and a capitalist market system. Hence, socio-economic and medical measures are opposing and excluding each other in their explanatory value. This also explains the power of medical experts within criminal justice: it allows simplifying social tensions and marginalising people in their needs whilst proclaiming effective and immediate solutions to the problem of crime.

"The process of medicalization may thus be said to involve four closely related developments: the construction of a scientific discourse of the body; the examination of the discourse to a narrowly defined social group; the extension

of the discourse to include hitherto unrelated phenomena and the non-rational acceptance of the system by persons outside the group that controls it" (Bull, 1990, p. 249).

Within the context of criminal justice, the medical profession should not be understood as an exclusive and dominant mechanism of social control like Zola (1972) argued. However, by providing the underlying epistemology, medical experts, nevertheless, contribute to the discourse of truth through which social control is exercised (cf. Conrad, 1992).

1.3   Discourse in criminal justice

In order to analyse the discourse of truth that is generated within the criminal justice system in relation to people with intellectual disabilities, it is necessary to reflect upon some of the general core elements inherent to criminal justice: efficiency and control, discipline and risk. As it will be shown later during the course of the analysis, it is within this framework that professionals construct intellectual disabilities, determining how this particular vulnerability should be addressed during criminal justice proceedings.

1.3.1   Criminal justice and efficiency and control

Foucault (1980) tells us that for any system to maintain its supremacy, power needs to be applied in absolute terms in relation to efficiency and infallibility. In this context, excessive or ineffective use of power poses the biggest threat to the criminal justice system, as whenever it occurs it compromises strategies of solving conflicts by utilising measures of control and discipline that are publicly perceived as appropriate and legitimate.

Consequently, any wasteful use of power by social institutions will ultimately undermine their rule-giving and rule-enforcing authority. In support of applying power in an infallible manner within the criminal justice system, the way in which evidence is secured and presented by investigative units is ultimately channelled towards prosecution in that it demonstrates a seemingly factual truth regarding an alleged offender's individual guilt.

This produces certain constraints as well as expectations regarding the role of members of criminal justice agencies. Public expectations are produced by the criminal justice system itself. Through sanctions, the criminal justice system grants certain measures of control to the social body. As part of the sentencing process two sets of laws become apparent; first, the set of policies by which the justice system works and functions, and second, a set of normative principles that ought to govern and organise social interactions in society. Both sets of rules are being conveyed as well as reinforced through a discourse of truth, which proclaims the detection, capture and punishment of the guilty. In other words, within the criminal justice system this discourse aims at establishing and enforcing seemingly value-free and objective rules that govern social interaction. However, this discourse of truth at the same time constitutes the basis of any critique, which might result in renunciation of the system's core values and ultimately generate resistance to the system itself. Foucault (1980) was aware of these self-challenging and potentially self-destructing tendencies that seem to be inherent to any relations of power.

> "Whenever power invests itself in the body there inevitably emerge the responding claims and affirmations, those of one's own body against power, of health against the economic system, of pleasure against the moral norms of sexuality, marriage, decency. Suddenly, what had made power strong becomes used to attack it" (Foucault, 1980, p. 56).

Expectations and constraints are closely interwoven. For example, the public might have a strong opinion in relation to whether intellectually disabled offenders should be incorporated into the criminal justice system based on publicly perceived risks posed to others and capacities held by this particular population. In an interplay with the legal framework, such expectations constitute a setting in which all agents that are involved in criminal justice have to negotiate and organise their actions.

In order to analyse the process of decision-making in relation to the transition of people with intellectual disabilities through different stages of the criminal justice system, it is vital to scrutinise such constraints and expectations as both have a significant impact on how truth and crime are constructed by members of the criminal justice system. Hence it is not enough simply to identify seemingly objective constraints and pressures to which agents of criminal justice might be

exposed in their daily routines. In order to understand complex decision-making processes, it is necessary to recognise the interpretations of such constraints through which members of the criminal justice system negotiate their reality.

Becker (1963) was one of the first academics perceiving the order of things in society not as given reality but as socially constructed – mainly through language. He defined social reality as being a course of action whereby meanings are assigned to things and processes. Through interaction, people agree with these meanings and act correspondingly to them. Becker saw his theory as an attempt "[…] to enlarge the area taken into account in the study of deviant phenomena by including in it activity of others than the allegedly deviant actor" (Becker, 1963, p. 179). He defines crime as the result of people making decisions and defining certain behaviour as deviant. In other words, criminal justice is done symbolically and only becomes reality in people's behaviour. Bessant (2002) is very explicit on this point when he articulates "a criminal act is not an objective phenomenon but is made into a criminal act because of the definitions and meanings given to it" (Bessant, 2002, p. 223).

The concept of criminal justice is far from being free of ambiguity. On an individual as well as on a structural dimension, criminal justice has always been an instrument of power, a measure of control that is linked to specific, pragmatic political and economic targets. Throughout history it has been used to control and negotiate the effects of social conflicts in a capitalist society.

Following Marxist thought, unemployment is inherent to capitalist systems. The threat of un- or insufficiently paid redundancy, on the one hand, forces people to sell their labour. Furthermore, unemployed people, especially in greater numbers, act as a counterweight to potential claims for increased wages. In this context, unemployment assures an inflationary supply of the 'good' labour. The part of society that is not in employment, Marx called the surplus society. The majority of prisoners belong to this surplus society, which outlines an apparent bias within crime statistics regarding socio-economic status. In a publication by the British Parliament it is stated that in 2009:

- One-half of male and one-third of female sentenced prisoners were excluded from school. One half of male and seven out of ten female prisoners have no qualifications.
- Two-thirds of prisoners have numeracy skills at or below the level expected of an 11 year old. One-half have a reading ability and 82% have writing ability at or below this level.
- Two-thirds of prisoners were unemployed in the four weeks before imprisonment.
- Around 70% of prisoners suffer from two or more mental disorders. In the general population the figures are 5% for men and 2% for women.
- Nearly three-quarters of prisoners were in receipt of benefits immediately before entering prison.
- 5% of prisoners were sleeping rough prior and almost one-third were not living in permanent accommodation immediately prior to imprisonment.

<div align="right">(Prison Population Statistics, 2009)</div>

Young (2003) argues that in order to analyse crime it is a necessity to analyse structures of exploitation and domination that are manifested in institutionalised processes. Dismantling the discourse that surrounds these processes, therefore, will enable the researcher to understand the unequal chances and opportunities that people have in their lives and that often cause crime. In accordance with this view, deviance is mainly rooted in economic inequalities; or in other words, it is the result of social conflicts caused by and inherent to the capitalist system. Hence, criminal justice and socio-economic and political discourse are symbiotically interwoven. As a result of this dual relationship, a discourse of truth is being generated and internalised in such a manner that justifies the actions of the government aiming at social control.

"Social control in this context implies the unilateral suppression of disturbances, […], stressing at every turn the legitimacy and supremacy of state power over the claims of the accused" (Sung, 2006, p. 314). In his definition Sung also implicitly agrees with Foucault's (1980) argument whereby every crime that the government fails to prevent ultimately means a loss of sovereignty. Thus, punishment becomes a means by which the government presents itself. Hence, the symbolic function of criminal justice demonstrates that power is not only maintained by a monopolised

use of force but, as Garcia-Villegas (2003) notes, through a concentration of cultural capital which supports the generation of a discourse of truth that maintains and reproduces power inequalities. Criminalisation, in this context, underlines the legitimacy of the government to the extent that it is based upon a system of 'shared' and 'agreed' values within society – in this case expressed in laws and maintained through the monopolised execution of power, force and control. As Pratt mentions "[…] for most, the state is seen as neither repressive nor threatening but as a welcomed force whose presence can assure us that the machine is still capable of functioning" (Pratt, 2002, p. 176)[3].

The process of criminalisation reflects power relations in society as it reflects the ideologies and interests of the powerful. It is within these power relations that social and cultural conventions are made. Therefore, the bigger the threat of the government losing credibility and authority, the more punitive sanctions will become. Such a view, whereby governments perceive crime as a direct attack against their claim of power and sovereignty resulting in extremely punitive responses, has traditionally been applied to authoritarian and dictatorial regimes with judges functioning as mere puppets of the ruler and criminal justice being nothing more than a bureaucratic machine securing the positions of the powerful (Sung, 2006). This does not mean, though, that in democratic states criminal justice does not serve the purpose of social control. The means by which social control is exercised might be more subtle, which makes them, however, no less real in western capitalist states.

1.3.2   Criminal justice and discipline

During the last decade, the criminal justice system has become much more punitive (cf. section 4.3.2.1). In particular, changed sentencing policies have resulted in an unprecedented rate of imprisonment. "Between 1995 and 2009, the prison population in England and Wales grew by 32,500 or 6%" (Ministry of Justice, 2009). In December 2009 there were 84,231 people imprisoned in England and

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[3] By defining certain individuals as 'others', 'unwelcome' or 'criminals', the nation state gains power as this process directly applies to the notion of certain values and moral attitudes or, in other words, to the concept of national identity. One's identity is said to be conditioned, not only through an inward looking self-consciousness, but, more significantly, by defining who is a differing member of the group of 'others' (cf. Bauman, 1990; Triandafyllidou, 1998).

Wales (HM Prison Service, 2009). By June 2010, this number further increased to 85,000 (Ministry of Justice, 2011a). The recent wave of imprisonment following the riots in London resulted in a further increase, bringing the number of prisoners up to 86,821 (The Independent, 2011a). When ignoring the extraordinary events of the London riots, during the same period the overall crime rate first decreased and then remained fairly stable (Ministry of Justice, 2011a).

With its monopolised power to define deviance and deciding on how it should be sanctioned, the government demonstrates and maintains its power; or to put it differently, power is maintained by prohibiting certain behaviours and reinforcing those decisions (Bohm, 2008). Following this argument, by maintaining and protecting the capitalist system, the state is indirectly producing crimes that it can then sanction. It becomes a circle that reinforces the power of the state, a literally self-perpetuating system. In this functionalist view there is an element of creation attached to crime. However, there is a difference from the traditional Durkheimian theory: Durkheim (2003) argued that crime has to be seen as a characteristic feature of a healthy society, necessary to advance and develop the system of shared values within this society.

Hence, crime as a social object gives birth to a system of criminal justice that perpetuates class struggles as it governs the privatisation of property to which certain privileges are attached; as Feinberg puts it, rights as manifested in law "are both an expression and manifestation of individual selfishness" (Feinberg, cited in Corlett, 2006, p. 142). Legal norms get their power through political discourse that converts law into social reality that, ultimately, deeply penetrates the consciousness of individual actors. Thus, a particular reality is constructed allowing specific behaviours to occur whilst condemning and sanctioning others. Therefore, it is argued that the system of criminal justice can be used as an indicator depicting class struggle, whereby the extent of harsh punishments can be utilised as a measure of the intensity that social conflicts have at a certain moment.

Consequently, the state that maintains itself through its lawgiving powers represents the economic conditions and the social conflicts arising from them, whilst the criminal justice system becomes the place where these social conflicts are being fought out. In this context, Vincent (1993) stresses that:

> "Both the "general" rule-of-law principle and "particular" property, contract or criminal laws are simply there to buttress the property owners of capitalism. The rule of law is a typical example of legal fetishism, namely, giving law a false autonomy from the economic and class base of society" (Vincent, 1993, p. 384).

Displaying such autonomy of the law is crucial, as in order to be perceived as just and fair the law has to appear impartial.

Adamson's (1984) research is an example in support of Vincent's theory. Adamson studied the connection between economic fluctuations at different times during the nineteenth century and public perceptions of imprisoned people and criminals. In broader terms, Adamson (1984) researched how the economic situation at a certain moment is linked to how criminal justice is shaped. He concludes that the criminal justice system functions as a buffer of social conflicts in that it helps to regulate fluctuations in the distribution of resources. In other words, the way in which criminal justice is executed assists in controlling social conflicts in times of economic crises. Adamson shows that in times of economic growth and increasing demands for labour, criminals are perceived to be less of a threat to existing economic formations of power and, thus, prisoners are used as an exploitable source of labour. In times of economic crises, though, which are usually accompanied by a dramatic increase of the surplus society, criminals are perceived as a threat. During such times humane and reformative measures of criminal justice are rejected in favour of strategies of deterrence.

It will be shown that current supporters of harshening criminal justice particularly highlight that the distinction between the law-obeying citizen and the imprisoned criminal has become eroded. It will be demonstrated later in this thesis that respondents from the police particularly picked up on this point. In this context, harshening sentencing policy and the conditions of incarceration itself serve to distinguish the criminal from the non-criminal on the grounds of restricted liberty. It will be shown, that equally, a more punitive criminal justice system is believed to better achieve its deterring function (cf. first part of section 4.1.1.4). In the light of a steadily increasing prison population, however, criminal justice professionals in

high positions seriously doubt major reformative work can be done in prisons (cf. section 4.3.2.1).

The question arising at this point is: what is the use of having prisons altogether if they do not seem to be very efficient? Foucault (1979b) argues that prisoners are an exploitable part of society just like any other part, although in his analyses of criminal justice he concentrates in particular on how prisoners are used as a source of information and a potential means of intimidating the public in order to maintain and secure unequal formations of power. In one of his enlightening quotes Foucault (1979b) states: "What makes the presence and control of the police tolerable, if not fear of the criminal? This institution of the police, which is so recent and so oppressive, is only justified by that fear" (Foucault, 1979b, p. 47). Later Foucault (1980) added weight to his argument by outlining that an institution like the police whose sole existence is based on observation and social control would not have been allowed to come into existence without the prior invention of the criminal.

The criminal is presented as the dangerous other, a person who has hardly anything in common with the law-obeying citizen (cf. Rose, 2002).

> "It is a criminology of the alien other which represents criminals as dangerous members of distinct racial and social groups which bear little resemblance to 'us'. It is, moreover, a 'criminology' which trades in images, archetypes and anxieties, rather than in careful analyses and research findings" (Garland, 1996, p. 461).

In his comment Garland expresses a new trend within criminal justice: the system has changed in that not only the crimes that have been committed are targeted, but also the fear of crime, the fear of becoming a victim of it.

1.3.3   Criminal justice and risk

Whilst the discourse of truth that is generated within criminal justice still addresses traditional key issues such as moral values, culpability, reformation of the offender, and justice for the victim, new techniques have been implemented that focus on identifying, measuring, categorising and managing risk (cf. Feely & Simon, 1992). This is probably most evident in the work of the probation services. The task of a probation officer is to assess the risk that a person poses, on the bases of which a

recommendation is made to the court as to the appropriate sentence. After a person has been convicted and sentenced, the probation officer will manage the convicted person by putting different measures in place that are believed to rehabilitate and re-socialise an offender.

This is a form of case management that increasingly characterises the penal system (Bottoms, 1983), allowing what Rose (2000) calls governance at a distance where "a criminal is seen as a violator of his or her moral responsibilities" (Rose, 2000, p. 337). This concept of moral responsibility has been identified by Foucault (1979b) to be the basic element of the discourse by which any sanction is legitimised. As Foucault outlines, a law is basically a contract between the citizen and society. Therefore, when engaging in deviant behaviour the criminal makes himself an enemy of society who deserves to be punished.

> "Indeed, he is worse than an enemy, for it is from within society that he delivers his blows – he is nothing less than a traitor, a monster. How could society not have an absolute right over him? How could it not demand, quite simply, his elimination" (Foucault 1979b, p. 90)?

In broader terms, this discourse leads to a construction of reality that is based on a binary paradigm of exclusion (Young, 2002), with society being divided into a good society that comprises people who are in employment, independent and have stable families, vs. a problematic society described as "in short, a spoiled, petulant immature culture at the bottom of the social structure" (Young, 2002, p. 468)[4].

Thus, when criminal justice is being exercised, individual cases are dealt with in an indirect, almost abstract way whereby a person is assessed and identified as belonging to a certain sub-group that is characterised by specific risks, such as psychopaths, people with intellectual disabilities or recidivists. Within the current criminal justice system this is achieved by the prosecution when making an "unused material application for bad character".

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[4] Interestingly, Cavadino and Dignan (2002) address the importance of a person's social status when engaging with the criminal justice system. 'Traditionally, the fact that an offender has a job and a steady work record has been regarded as counting in his favour, whereas unemployment has been seen as reflecting negatively on the offender's character' (Cavadino & Dignan 2002, p. 173).

It appears that social control in form of punishment, whereby the physical setting and the conditions within which a person operates are changed, is organised not only with regards to an act deemed as criminal that has been performed by a person, but also in relation to the sub-group of which this person has been identified as a member. There have been many examples in the history of criminal justice giving evidence for this claim, such as the crackdown on gang related crimes or racist crimes. Racism, for example, is understood to be not only a crime committed by a single person against another individual. On the contrary, racism is perceived as a specific risk to the general public. The racist crime and the racist perpetrator lose their individual character and become objectified in relation to genuine concepts around the social order in society, which makes racism much more severe in its perceived consequences.

If members of a subgroup have been labelled as unremorseful and therefore un-reformable, an apparatus of risk management is put in motion such as indefinite detention or constant observation. Simon (2005) mentions that we are now confronted with "a quasi-actuarial process that generally uses a matrix or checklist to assign a sentencing range based on objective factors of crime and of criminal record" (Simon, 2005, p. 407). The exercise of assessing an individual's risk informs the decision as to what level of security should be applied in order to secure an efficient management of this person.

In their article about Aids and criminal justice, Kane and Mason (2001) tell us that political discourse about crime is often structured around characteristics of individuals that allow these individuals to be categorised in groups corresponding to the perceived risk they may pose to themselves and/or their physical and social environment. This process comes into existence through a discourse of truth that is based on the use of quantitative language, permitting certain individuals to be targeted and to become incorporated into different procedures that allow managing the risk to society that such people might pose. This is the way by which general rules, and sanctions that these rules might involve, can be imposed onto individual behaviours in isolation of their socio-economic context.

> "Complex economic and social power dynamics are often masked or distorted
> as statistical associations between dichotomous variables. Race/ethnicity as

variables reify culture and map risk group labels onto vastly differentiated categories of people ("Hispanic", "black", "men who have sex with men")" (Kane & Mason, 2001, p. 459).

Within the criminal justice system, the characteristics by which such risk groups are distinguished become an integral part of the reflective interactions upon which professionals base their strategic actions. In some cases, for example, stereotypes and clichés which are operationalised into profiling tactics have been proven to guide the police in stop-and-search operations. After a Freedom of Information request, the BBC gained access to police figures about stop-and-search operations showing that, between 2006 and 2008, people from the Asian and black communities had been disproportionately stopped by the police for ID checks using a fingerprint scanner that had been introduced for testing to twenty police forces across Britain. "Of the 29000 people stopped, 14% were Asian and 16.5% black despite those ethnic groups representing just 4% and 2% of the population respectively" (BBC, 2009). Corresponding information was published in *The Times* in 2009.

> "Last year the number of white people searched rose from 29900 to 73000, blacks from 3600 to 15000 and Asians from 5500 to 20700. Although whites made up the biggest number, in terms of population, blacks and Asians were more likely to be stopped" (The Times, 2009).

A similar article has been published by *The Independent*, outlining that the police's stop-and-search powers under the Terrorism Act 2000 have been used excessively against black and Asian people. "The available statistics show that black and Asian people are disproportionately affected by the [stop-and-search] powers" (The Independent, 2010). The above newspaper articles seem to confirm Kane and Mason's (2001) claim that in times of political or economic crises, the powers of the state to sanction are often extended, and that usually the most powerless and/or vulnerable people in society are particularly affected by these extended measures of punishment.

Profiling, in this context, marks a new power/knowledge relationship whereby, based on statistical 'facts', stereotypes are being constructed that inform both how criminal justice operates and what procedures take place, as well as how

professionals involved in criminal justice interpret events and social interactions in their environment. However, the profiling techniques described above are of interest not primarily because they demonstrate how cognitive stereotyping informs police actions. More importantly, these actions have to be looked at as preventive measures within the fight against crime. Such preventive actions are often managerial in their symbolic, and bureaucratic in their practical meaning. Whilst, on the one hand, preventive strategies symbolically demonstrate how state institutions manage certain groups and the risk they might pose to society, on the other hand, preventive strategies demonstrate the extent and limits of possible state responses to these threats.

There have been clear developments in favour of preventive actions in current mental health legislation. This has become particularly evident in the latest Mental Health Act (2007), which includes a number of legal principles governing involuntary treatment and preventive detention of people with an impaired mind due to a mental illness or intellectual disability.

In general, involuntary treatment of a person with a physical illness is only possible if the person is intellectually impaired to such an extent that they are perceived to be unable to make a decision in their best interest. In addition, the treatment has to be in the best interest of a person. In the Mental Health Act (2007), however, involuntary treatment is justified if a person lacks capacity due to an intellectual impairment linked to a notion of risk, such as the person is perceived to be a risk to themselves or others. Hence, the autonomy of an intellectually impaired person is factually eliminated. As Szmukler (2010) outlined in a lecture at Gresham College:

> "The key considerations are the presence of a mental disorder and risks to the patient's "health or safety", presumably from the perspective of the clinician or treatment team (or other representatives of society), not the patient's. […] People with mental disorders are unusual in being liable to detention (in hospital) because they are assessed as presenting a *risk* of harm to others, but without having actually committed an offending act."

Such preventive measures, however, must not be understood exclusively in terms of a display of strength and superiority through which the nation state maintains its

power. Garland (1996) suggests that at the same time such bureaucratic actions lower public expectations as to what the state is able to do. Certain risks cannot be eliminated and thus have to be accepted as part of everyday life and managed as effectively as possible, just as Ulrich Beck told us in the mid-1980s when drawing a picture of modernity in which society would be increasingly organised around risk management, a society he named 'Risk Society' (Beck, 1992). Garland (1996) identifies two strategies, denial and adaptive behaviour, that the government uses in order to cope with its own geographically and legally limited options to tackle risks. As a consequence more punitive measures as well as an increasing responsibilisation of local communities within the context of crime control, mark the way the government has reorganised its responses to maintain sovereignty.

So far, it has been demonstrated that the developments following the eugenic movement up until the 1980s have not resulted in a complete empowerment of people with intellectual disabilities. During the eugenic movement, an all-encompassing model of intellectual disabilities was developed in which a person and their disabilities and all resulting incapacities were seen as inseparably linked. By defining intellectual functioning as an exclusively medical issue, psychiatric hospitals were established as the key institutions to deal with intellectually disabled people.

It has been argued that the closure of psychiatric hospitals and the resulting significant decrease of psychiatric beds were accompanied by a new discourse, a disjointed discourse of disability, in which a person is conceptually detached from their impairments. As it will be demonstrated during the analysis, this discourse marks a new form of institutionalisation through the criminal justice system, as it allows for an intellectual disability to be dealt with separately from an offender and their alleged offence. By drawing on a medical model of crime, this disjointed discourse, it will be argued, integrates positivist ideologies around free will, culpability and guilt and satisfies central aspects of criminal justice, such as efficiency, discipline and risk avoidance.

2. Methodology

In this chapter the methodology will be outlined by explaining the underlying epistemology by which this study is guided. The methodology is a vital part of every study as it informs the researcher's understanding of the social world, perception of the order of things and, indeed, construction of reality.

In very broad terms sociological research often examines the history of different social institutions, the processes they evoke, the way institutions structure society and how they shape people's lives. When scrutinising criminal justice, however, one cannot focus on agencies of social control by simply asking how well the criminal justice system works. This question is more likely to cause confusion rather than enabling the researcher to provide any answers of explanatory value. The complexity of criminal justice becomes clear in its dichotomous target that appears to be as simple as it is self-contradictory: doing justice while at the same time protecting society (cf. Nettler, 1979). These aims comprise various conflicting disciplinary procedures such as education vs. punishment and re-integration vs. exclusion. Nettler (1979) therefore argues that whatever the specific research context may be, a judgement with regards to how well criminal justice works needs to simultaneously address two dimensions. Firstly, the researcher has to identify pragmatic standards against which they will assess the efficiency of the way criminal justice is presently structured. Secondly, moral principles inherent to the way in which criminal justice is done have to be considered. These two apparently conflicting dimensions outline an operational problem a researcher is confronted with when trying to analyse criminal justice procedures.

Justice has to be based on a principle of universality and equality in the way it operates, yet it is also noted that a justice system that is thoroughly rigid in its nature, ignoring individual histories and circumstances, cannot be characterised as fair. This matter was expressed by respondents of this study as being a central issue of justice and fairness (cf. section 4.3.1.1 or 4.3.2.1). Thus, at an observational macro level the criminal justice system operates through institutions that are organised in and interact with each other through discursive formations of power whereby fairness is measured through the equal application of universal rules. At an interpretive micro level, fairness is negotiated on the basis of the particulars of

individual cases by those who administer criminal justice such as judges, prosecutors, police officers and probation officers. At this point it becomes clear that judicial procedures cannot be understood comprehensively by limiting the research focus to institutional structures that shape the system of criminal justice. Neither must the study be restricted to the level of the individual as this would exclude formative rules of discourse anchored in institutional structures. Therefore, in order to understand everyday decision-making processes of individuals within criminal justice agencies, subjective representations have to be taken into account considering the objective structures that determine the ideological framework in which individuals make their decisions.

In the present study it is argued that in order to develop a more complete appreciation of criminal justice processes, two theoretical stands need to be combined using a mixed method approach that considers both the individual negotiations of reality as well as the structural formations that generate discursive practices of truth. Correspondingly, the theoretical premise of symbolic interactionism has been integrated into Foucault's claim of discourse and power. Usually, the methods are used independently from each other. However, in this study it is argued that if the two theoretical premises are used in conjunction, a more comprehensive framework is created allowing significant and more holistic explanations to be put forward.

In the following section, the strengths and limitations of both approaches will be outlined with regards to the subject matter of this study. In addition, it will be discussed how explanatory restrictions can be overcome by combining these two seemingly opposing theoretical strands to form a cohesive method. Finally, it will be demonstrated what significance this innovative paradigm has within the context of studying processes by which intellectually disabled alleged offenders engage with the criminal justice system.

2.1 Symbolic interactionism

The aim of this section is not to provide a full account of the history or all underlying epistemologies of symbolic interactionism, as this has been done elsewhere (Blumer, 1969; Charon, 2004; Denzin, 1992; Elliott, 1979; Lauer, 1983). The intention is rather to analyse what the benefits and limitations are when using this theoretical premise in order to explain criminal justice procedures and processes of decision-making.

According to symbolic interactionism people constantly interact with their environment, with other people or with themselves. In these interactions people reflectively define meanings of objects including themselves (Boydell, Goering & Morrell-Bellai, 2000) and act correspondingly to these definitions, a process that Goffman (1970) called strategic interaction. Blumer (1995) tells us that strategic action is an interpretive indirect process whereby people do not respond directly to each other, but to the meaning of other people's actions. Blumer (1969) emphasises that the meanings of any object in an individual's physical and social environment are constituted and changed through social interaction. The concept of the self as an object is central to the concept of reflective behaviour. In this context, it is argued that the subjects are aware of themselves and their position in the social world. Therefore, an objectification takes place whereby during interactions with themselves and others individual actors make classifications regarding their own position and the position of others in relation to the existing social order. Hence, no human behaviour can be seen as a simple response to a stimulus, but is instead the result of the complex perception that an individual has of their physical and social environments. Of great importance in this respect are a person's past experiences within which reflexivity is anchored (cf. Clark, 2006).

In symbolic interactionism structures are defined as being the result of micro-interactions. Structures become reality through interactions of individual actors who recognise them and act accordance with them; or as Fine puts it "all large scale systems are ultimately grounded in the symbolic constructions that individuals use in coping with their local reality" (Fine, 1993, p. 79).

The debate addressing the relationship of processes at micro and macro levels is at the heart of any dispute regarding limitations and strengths of symbolic

interactionism. In the following sub-section it will therefore be discussed how researchers supporting the symbolic interactionist paradigm have tried to reach a balance between the effects that both structure and micro-interactions have on social order.

2.1.1   The micro/ macro debate

Whilst Foucault strictly rejected the concept of the reflective subject having an impact on the construction of the self, supporters of interactionism are often accused of overstating self-awareness and consciousness at the level of the agency. In fact, there has been a tradition of accusing symbolic interactionists of being ideologically biased for overestimating the self and human consciousness (Hunter, 2006) without paying sufficient attention to structural powers that channel and constrain individual behaviour (Coser, 1976; McPhail & Rexroat, 1979; Meltzer, John & Reynolds, 1975; Stryker, 1980). However, in an increasingly globalised world people are constantly confronted with new as well as rapidly changing constraints and demands for flexibility in a society that is organised by a capitalist market system. As a consequence many of the traditional structural formations that previously organised the social and professional biographies of individuals have become eroded. Hence, the construction of the self as being based on conscious choice and conscious decision-making has become the focal point of various studies proclaiming an identity crisis that has been forcing people to use different language and new symbols to construct their self through interactive behaviour (cf. Beck, 1992; Sennett, 1998).

The following two sections will discuss the attempts that have been made by followers and supporters of symbolic interactionism to respond to the above criticisms.

2.1.2   Social structures in symbolic interactionist thought

In supporting the view that addressing formations of power and social structures has always been inherent to symbolic interactionism, Lyman (1988) points out that analysing processes by which individuals structure their own behaviour necessitates focusing on how actors identify and assess objects in their social and physical environments. Such objects include structure, class, social roles, power and

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resistance. Accordingly, he emphasises that authority and resistance have to be essential to any interactionist analysis. Goffman (1975) specifically addresses this point in an essay about the 'career' of a mental health patient. "Here one begins to learn about the limited extent to which a conception of oneself can be sustained when the usual setting of supports for it are suddenly removed" (Goffman, 1975, p. 262). This means that the self must be a product of social structures. "The ward system is an extreme instance of how the physical facts of an establishment can be explicitly employed to frame the conception that a person takes of himself" (Goffman, 1975, p. 263).

Elaborating on this idea, Mains (1977) develops an interactionist model of social order that concentrates on interactions between macro-level structures and micro-level behaviours, whereby social order is sketched out by external structures which are constantly challenged, questioned, disputed and reorganised through negotiations by individual actors who use their autonomy and discretion in everyday life behaviour. Eleven years prior to Lyman (1988), Mains argued that far from excluding class and social institutions, symbolic interactionists pay more attention "to the selection of topics and research problems rather than to the explanatory power of the perspective itself" (Mains, 1977, p. 235). This point is picked up by Dennis and Martin (2005) who stress that the interactionist analysis of such structural forces is distinct from methods and terminology used in mainstream sociology. Thus, the authors highlight:

> "Much misunderstanding and misrepresentation arises from the fact that the very concepts invoked in the debate – power, social structure, and so on – are themselves drawn from and are constitutive of a 'macrosociological' discourse which is incompatible with the underlying premises of interactionism" (Dennis & Martin, 2005, p. 196).

Lemert's (1962) classic study, for example, outlined the social construction of a medical condition such as paranoia and highlighted the limitation of theories based exclusively on medical concepts, ignoring social and cultural impacts. In this context, he analysed how the power to label, power to stigmatise, and power to exclude are exercised in institutions. Another classic and well known study was realised by Glaser and Strauss (1964) who by observing care staff in their

interactions with dying hospital patients analysed processes through which individuals negotiate reality in organisational settings. These classic studies demonstrate that considering the impact of structures and formations of power in general was never entirely discarded by symbolic interactionists. Indeed, Mead (1943) considered structural inequalities in society when discussing multiple constructions of reality of the self in relation to the social position of an individual.

Mead included social structures in his concept of the "generalised other", an entity that is embedded in social structures and institutionalised processes. By constituting the conceptual basis of self-reflexive strategic behaviour, the generalised other is inseparably entwined with the reflexive self. "The 'other' should be viewed as exercising power over the emergent self, and to a certain extent, determining the character of that self" (Perinbanayagam, 1975, p. 502). As mentioned above the 'other' is constructed with reference to the social structural forces that shape the social setting in which people act. It is a setting of opportunities and chances, but also constraints and limitations; it consists of rights, but also obligations. The generalised other can therefore be described as an entity that gets its meaning in correspondence to institutionalised formations of power that structure society and shape the interpretive *Lebenswelten* of individuals.

In symbolic interactionism this relationship is reciprocal in nature. As much as the generalised other has an impact on the construction of the self, the self constitutes, via interactions, the role of "the other". It needs to be emphasised that the generalised other is 'revealed' to an individual only through interactions with groups of other people, where the individual has to interpret not individual behaviour but the behaviour of many. For example, when a child interacts with their mother, who Mead would call a significant other, the child learns expectations, norms and general attitudes of society – the generalised other.

The reference to structure is an indirect one and structural forces have, therefore, an indirect impact on people's negotiations of reality. To use an example given by Mead (1967) himself, when a person wants to buy certain goods, they above all need to know about their own needs as well as about the needs of the person(s) from whom they want to purchase something. They also need to know about the value of the goods as well as the value of whatever they might want to offer in

exchange for them, for example money. This knowledge enables the individual to negotiate the purchase.

In addition, the individual needs to know about the institutions and structures into which this purchase is embedded, such as the general laws that regulate this sale. For example, all involved individuals have to be the legitimate owners of the goods that they want to exchange, e.g. the seller legitimately owns the product that is up for sale. Equally, the buyer has to be the legitimate owner of the money that is needed to purchase the item in question. All these rights, such as private property, as well as the rules and regulations regarding the value of certain goods, and how and under what conditions these goods might be exchanged between people or groups of people, are recognised and protected by the wider society, the "generalised other", in which this exchange takes place. This example demonstrates that in symbolic interactionism the interaction between individual behaviour and structural forces is an indirect one, and attention is paid to structures only insofar as they influence people's immediate individual negotiations of reality.

Nevertheless, it appears questionable when Coser in his critique of Blumer (1969) writes, "that this orientation [symbolic interactionism] prevents the understanding of social structures and their constraining characteristics or of patterns of human organisation such as class hierarchies or power constellations" (Coser in Maines, 1977, p. 237). By partially agreeing to criticisms of an inherent ideological bias within symbolic interactionism, supporters of this tradition have made an attempt to broaden its theoretical framework in order to concentrate more explicitly on structural effects on individual actors' negotiations of reality (cf. following section).

2.1.3   *The structural enhancement of symbolic interactionism*

In further response to criticisms, symbolic interactionists have tried to change the epistemological basis of their paradigm, allowing more attention to be paid to social structure. Stryker (1980) stresses that symbolic interactionists have always acknowledged social structures by paying attention to situational factors in social settings that can limit the choice of options available to individual actors. Yet Stryker recognises that in interactionist thought the agency-structure relationship has often been conceptualised insufficiently.

In order to overcome this limitation Stryker (2008) suggests a modification of the theoretical interactionist framework that takes into consideration structural processes constituting the self: "Society shapes the self shapes social interaction" (Stryker, 2008, p. 19). This adjustment enables the researcher to take an analytical perspective of social structures and institutions to identify how they support, hinder, constrain and facilitate access to social space where individual actors organise and negotiate their interactive behaviours. Hence, Stryker argues that in social sciences objective structural factors and subjective individual behaviours have to be equally accounted for.

Thus, rather than the two viewpoints opposing each other, they stand in a dialectical relationship (Bourdieu, 1995). Callero's (1989) thoughts about the concept of social roles are a good example of trying to find a balance between structure and agency. He challenges the perception of roles as being mere expressions of power inequalities in society. Callero (1989) argues that community perceptions are the 'observable'[5] basic concepts that coordinate individual perceptions. Therefore, social roles have to be understood as both social objects, allowing universal structures of inequality to be considered whilst also acknowledging individual strategic behaviour.

2.1.4   Remaining problems

Despite referring to structures, power relations and social institutions to a certain extent, in symbolic interactionism attention is mainly paid to micro processes in order to analyse resulting constraints under which individual actors negotiate reality. Taking such an approach takes for granted a certain concept of reality created through discourse that will prevent the researcher from fully appreciating power relations of political and economic domination. Musolf correctly points out, "those who own the means of production own the means of mental production; hence their definition of the situation is usually accepted as legitimate and official" (Musolf, 1992, p. 174). This 'cultural dominance', the author argues, often remains

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[5] It is obvious that perceptions cannot be observed as such, but have to be identified through the analyses of qualitative data. Hence, the term 'observable' simply outlines that through analytical procedures it is possible to discover community perceptions that have an influence on how individuals comprehend the hierarchical organisation of society.

undetected and unquestioned. However, Musolf fails to completely understand the limitation to the symbolic interactionist idea when he later states:

> "Symbolic interactionism not only treats power and ideology, but also brings a unique insight into how they figure in all facets of everyday life. It extends the research agenda beyond 'traditional state and politics' into the everyday social worlds where we are all assaulted, dominated but also struggle and triumph" (Musolf, 1992, p. 181).

The main difference between symbolic interactionism and other philosophies is the supposition that actors structure their behaviour by interpreting their environment in a self-reflective manner. This process, however, does not take place in a cultural vacuum. People are born and educated into a pre-existing society that perceives structures and categories of the world in specific ways, enabling such a society to engage with its environment in a particular fashion through collective behaviour.

Cooperative or collective behaviour is based on shared values which are maintained over time through socialisation. For example, a child is expected to internalise community perspectives, such as traditions and rituals, but also norms, values and attitudes, before forming their own individual opinions. In general, this process has been acknowledged and considered in interactionist thought in terms of multiple and at times opposing identities (Miller, 1982) which allow individuals to reflect on the contradictory forces of adaptation and differentiation from others (cf. Brewer, 1991) during interactive behaviour. Nevertheless, there is an absence of critical analysis of how structures are being generated. Insufficient attention is therefore paid to how an order of things is defined through language that carries the dominant ideology, allowing a system of inequalities to be maintained and reproduced.

Whilst attention is being paid to the channelling and constraining effects of structures on people's interpretations in a way that goes beyond a marginalising cause-and-effect-model (cf. Denzin, 1990, 1991), at the same time it marks how far symbolic interactionists' analytical theorising stretches. Despite the attempts of many supporters of symbolic interactionism, it appears that there has never been a really balanced understanding of the structure-agency relationship: "While some employ the idea of the interconnection between structure and agency to show the cognitive importance of social construction premised on agency, others use this

supposition to illustrate how domination is produced" (Garcia-Villegas, 2003, p. 371).

Taking a symbolic interactionist approach to the system of criminal justice involves understanding it as an ongoing process which results in specific restrictive and constraining structures that are constantly challenged and renegotiated in micro-sociological interactions of individual actors. Such an approach, nevertheless, to a certain extent neglects the strategic character of constitutional law, and therefore simplifies the dual relationship of criminal justice and socioeconomic and political discourses, as well as ignoring how criminal justice is used to secure unequal power formations (Young, 1991).

2.2 Foucauldian power of discourse in criminal justice

In contrast to symbolic interactionism, in Foucault's understanding subjectification is the process by which individuals internalise power relations: the individual recognises a rule and behaves in accordance with it. In other words, power relations create a setting that create the subject. The theory of language being used to illuminate social processes is rejected; instead, language itself should be deconstructed to reveal power relations in social processes (cf. Brown, 1990). "Research becomes a matter of deconstruction, the tearing apart of texts by showing the contradictions, repressed meaning and, thus, the fragility behind a superficial level of robustness and validity" (Alvesson, 2002, p. 29).

All objects in the social world are understood as products of discourse. Consequently, there cannot be an objective reality and therefore no universal human experience either: "Personal identity of this sort, if [it] ever existed, was only an illusion, and is no longer possible" (Rosenau, 1992, p. 43). Foucault (1980) argued that the self has to be understood mainly as a vessel of power, a puppet of structural forces. "From Foucault's perspective, the self is coerced into existence, not to become an agent but as a mechanism of control where systems of discourse work from the inside out by creating a self regulated subject" (Callero, 2003, p. 118). This can be seen as the basis of the suspicions that Foucault had in relation to the existence of a conscious subject. As he says:

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"I believe the great fantasy is the idea of a social body constituted by the universality of wills. Now the phenomenon of the social body is the effect not of a consensus but of the materiality of power operating on the very bodies of individuals" (Foucault, 1980, p. 55).

Therefore, individual behaviour, individual decision-making and forms of knowledge are mainly expressions of cultural and social conventions; or, as Callero notices, for Foucault the self can only be understood and described as a result of power as manifested in discourse, "imposing disciplinary practices on the body" (Callero, 2003, p. 117).

However, Foucault did not completely reject the subject, a subject that is able to form and organise resistance. Foucault (1980) tells us that interpreting phenomena and objects in the social world is a process that takes place within structural constraints. It is a cognitive process that reflects cultural values regardless of whether the subject is perceived to be the product of socialisation in relation to socio-economic inequalities, or whether agency is defined as actively negotiating reality. Thus, the way in which the social world is interpreted and how reality is constructed by individuals reflect the structures of that world (cf. Bourdieu, 1995). Therefore, the position a person occupies in society is the space where practices are being both produced and internalised. "Thus, in a way, the power/knowledge relationship, and the field in which it operates, is its own cause and effect: the rules of formation emerge within it, but cannot exist apart from it" (Castellani, 1999, p. 251). This means that the cognitive process by which people both understand and construct reality comprises two dimensions. The first dimension encompasses the objectively existing structures that represent unequal power relations and create the ideological framework in which, second, individuals develop their perceptions and interpretations of the social world, articulated in language and behaviour.

Thus, Foucault's definition of power has to be understood in terms of being a force that constrains, but also creates.

"If power were never anything but repressive, if it never did anything but to say no, do you really think one would be brought to obey it? What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces, it

induces pleasure, forms of knowledge, produces discourse" (Foucault, 1980, p. 119).

Lacombe (1996) takes the productive nature of power in Foucault's theory as the starting point for his analysis of resistance and agency. Lacombe uses "The History of Sexuality" as an example to demonstrate how at the beginning of the nineteenth century through a particular discourse the emerging bourgeoisie tried to establish itself as a distinct social class. "Hence, the bourgeoisie, through the organization and elaboration of procedures of 'power-knowledge' on sex, not only controlled its own body but 'positively' transformed it; the bourgeoisie provided itself with a body which needed to be maximised" (Lacombe, 1996, p. 341).

This concept of subjectification can also be observed within Foucault's analyses of the criminal justice system. Foucault (1979b) explains in great detail the transition from punishment focusing on the criminal act and operating as a fable, to a different form of punishment where the criminal is constructed as a subject of free will, with autonomy and a personal history. Foucault emphasises that laws do not simply exist independently from the agents that they are supposed to govern in their behaviour and decision-making. On the contrary, laws are constantly required to prove that they have the power to create realities because only then will they be celebrated as "the proclamation of peace and liberty" (Foucault, 1979b, p. 110). Once again, power is defined as an enabling strategic process. Thus, structure and agency are interdependently bound together. However, as Lacombe points out: "While he [Foucault] asserts that people resist, his explanation as to how this happens is weak" (Lacombe, 1996, p. 343).

Foucault does not address individual struggles, other than the self being coerced into existence through unequal formations of power. Foucault's analytical approach, therefore, does not take account of why people chose sides, or why they opt for certain behaviours. In this context, Hoy (1986) stresses, Foucault fails to answer the most obvious question: why should domination be resisted and under what circumstances? Taken to its nihilistic extreme, Hoy (1986) continues, Foucault's theory questions any learning and any progress because for as long as there is anything human there will be a certain code of discipline. Hence, nothing can be reformed or improved as there is either an anarchic judicial vacuum or a tight

system of control. To some extent this is the result of "Foucault's reluctance to acknowledge the role of any values other than power and control [… leading him] to neglect the political and ideological forces that put up a principled opposition to the introduction and extension of disciplinary practices" (Garland, 1986, p. 876).

Consequently, solely to base the analysis on Foucault would result in the analysis being limited to how individuals conform to the social order of things around them. Therefore, within this study, an attempt will be undertaken to combine the premise of symbolic interactionism with Foucault's strand of power as a 'strategic situation' (Foucault, 1979a) within a particular social setting.

In the present study it is argued that one of the functions of criminal justice is to generate a discourse of truth that depicts the offender as an alien other, compared to the law-obeying citizen. Success, in this context, is measured by the successful demonstration of factual guilt (Sung, 2006). The criminal is being constructed in opposition to the law-breaking person in every personal characteristic; the abnormal individual criminal vs. the normal law-obeying members of society (cf. section 1.3.2).

Ainsworth (2000) indirectly picks up on how criminal justice professionals interpret reality in relation to this discourse of truth. Ainsworth (2000) argues that during police interviews, an officer's objectivity may often be compromised due to assuming that suspects have to be guilty, otherwise they would not have been arrested in the first place. In addition, Ainsworth (2000) argues that this perception might not only impact on what evidence will be secured by the police, but also how this evidence might be interpreted. Some of the respondents from the police, for example, expressed the ability to literally read the body of a suspect, to interpret their body language and thus determine whether a person is telling the truth or not.

Thus, it appears to be of particular importance not to underestimate structural elements in individual behaviour in relation to how the criminal justice system is organised and how it functions. By taking an approach that combines the symbolic interactionist premise with Foucault's theory of power, this study makes it possible to analyse the criminal justice system in a way that integrates systemic forces and constraints affected by socio-economic factors with the symbolic interactive

processes by which individual agents negotiate their reality informing their strategic behaviours.

Combining these seemingly opposing paradigms is, however, not as simple as it might first appear. Dennis and Martin (2005), for example, argue that both theories are guiding principles, different in their methods and different in their underlying epistemologies, yet seemingly equally useful to understand and explain social behaviour. Indeed, the authors outline that both paradigms make sense of the social world in their distinct approach to social phenomena. Any phenomenon can be explained using either paradigm as a guiding principle. "So, for instance, one can use the "same" facts to demonstrate that ethnic inequality is the result of individuals' discriminatory attitudes – or that those attitudes are the products of being socialised in a society based on structural ethnic inequalities" (Dennis & Martin, 2005, p. 206). Discussing the theories in such a preclusive way means, nonetheless, to ignore both theories' weaknesses and strengths in their explanatory scope.

A similar mistake was made in the past by sociologists when ferociously arguing about advantages and disadvantages of quantitative and qualitative methods (Barton & Lazarsfeld, 1955; Huber, 1973; Land, 1981). Very often the discussion demonstrated a conflict between scientists who were in favour of one of the methods and rejected the other. More recent studies, nonetheless, have demonstrated that one method does not necessarily exclude the other. In fact it is now agreed by many that combining both methods appears to be very fruitful and sometimes might even be the only way to research a particular problem (cf. Hofstede, Neuijen, Ohayv & Sanders, 1990; Tashakkori & Teddlie, 1998; Wolstenholme, 1999).

Like quantitative and qualitative methods, symbolic interactionsm and Foucault's theory of discourse and power do not necessarily exclude each other. Instead, the paradigms share some central theoretical assumptions about processes of interaction. Positions of individuals are negotiated through indirect interaction. On the level of the actor, Goffman (1969) informs us, responsive behaviour is performed not as a direct response to a stimulus. Instead, it must be understood as an individual's interpretation of this stimulus. This mode of indirect interaction is

shared by Foucault's concept of power, whereby "what defines a relationship of power is that it is a mode of action which does not act directly and immediately on others. Instead it acts upon their actions" (Foucault, 1982, cited in Ricken, 2006, p. 552). Foucault defines power not as a function of interactions, but rather as a structure of practices, e.g. rituals and traditions, by which positions are being constituted. In other words "one force is only made real by its relation to the forces against which it acts…" (Castellani, 1999, p. 261).

Combing symbolic interactionism and Foucault's theory of power will allow attention to be paid to negotiations between different competing and at times even contradicting practices, while at the same time considering the effects of the reflexive interacting agent. Hence, full credit can be given to the dual relationship of structural formations that create the setting of power relations, within which individual interactions take place that in return continuously challenge and renegotiate these power relations. This way the researcher will be able to understand the interplay of strategic individual interpretative activities and the social order of things in which these activities take place, constructively linking micro and macro levels.

3. Methods

3.1   Ethics

Ethical codes are a decisive part of every research project. The nature of these codes determines how the researcher approaches their research subject, and how data and findings are handled throughout the research process. Addressing ethical issues does not become less important in projects like the present study, where participating does not pose a direct risk to the participant's health. Taking part in research as a respondent might, nevertheless, cause anxiety and result in revelations of private and personal information. Ethical guidelines help the researcher to be prepared for handling sensitive data appropriately and dealing with concerns and apprehensions of respondents.

However, in more recent literature, many scientists have argued that ethical guidelines and especially the bureaucracy that is involved when applying for ethical approval have become an obstacle to research rather than supporting it (Peto, Fletcher & Gilham, 2004). No scientist, however, rejects ethics entirely even when expressing strong concerns about procedures used to gain ethical approval. Winship (2007), for example, emphasises the importance of ethical guidelines in order to avoid unnecessary hazards to participants resulting from taking part in a study. Nevertheless, he expresses particular concern that overregulation in research guidance can have a negative impact on research and, thus, on patient treatment (cf. Winship, 2007, p. 174). In particular, he concentrates on informed consent and the publication of research findings. Winship (2007) emphasises that research participation needs to be of mutual beneficence: the researcher gains data that can be used to improve the participant's situation and conditions of living.

Taking up this issue, Lowes and Gill (2006) highlight that beneficence can be achieved by trying to disseminate research findings in order to improve services or treatments. In addition, the interviewee should be given the opportunity to reflect on his or her own performance. Underlining this point, Winship (2007) argues that even if the participant has not explicitly given consent for his case to be published, this can be ignored if the publication of findings is for the benefit of the public. Thus, Winship (2007) implies that it is justifiable to break previous arrangements

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that had been made with respondents in order to secure participation. This completely contradicts the notion of informed consent, whereby research participants are expected to make an informed decision whether to take part in a study, a decision that is made on the grounds of extensive and true information. "In essence, the principle of informed consent requires that sufficient information be conveyed to allow the subjects to make decisions about the risks and potential benefits of participation …" (Larossa, Larossa, Bennett, & Gelles, 1981, p. 304).

In this context, one may raise a question: why address ethical issues at all when it is done as superficially as in Winship's (2007) example? An answer may be found when reflecting on the purpose of ethics. When analysing current literature it becomes obvious that ethical codes are perceived as having two interwoven dimensions. On the one hand, ethical guidelines address the way in which research is conducted. On the other hand, ethical standards, when applied thoroughly, are supposed to generate public trust in, and provide reassurance about, the scientist's competences. By defining what procedures and techniques are approvable, ethical guides demonstrate attitudes, norms and values that underpin a certain profession. The nature and content of ethical codes depend on the function that they are intended to have. Banks (1998) lists four issues that ethics address: client protection, enhancing professional status, creating and maintaining a professional identity and professional regulation. By rejecting ethical guidelines entirely, the researcher consequently loses identity as a professional scientist.

3.1.1 Ethical issues in qualitative interviews

As pointed out above, ethical codes are supposed to assure certain standards within research activities. When Banks (1998) stated his four issues that are addressed by ethical guidelines, he implicitly revealed the two dimensional character of ethics. On one hand, they are aimed at the researcher by defining general research standards such as objectivity, validity and reliability. On the other hand ethical guidelines are about protecting participants by avoiding or at least minimising harm and distress for respondents. The protection of interviewees appears to be of particular significance when conducting qualitative interviews where the researcher interacts face to face with the respondent and often explores very personal and sometimes even intimate details of the respondent's life. "Qualitative interviews

have the potential to provoke painful, hidden feelings and stimulate many emotions" (Lowes & Gill, 2006, p. 590). Therefore, issues such as objectivity, confidentiality and most importantly informed consent need to be adequately addressed. However, as will become clear, addressing these points can be complicated depending on the methodological framework that is implemented in a project.

3.1.2 Objectivity

How to maintain objectivity when using qualitative methods has inspired many challenging debates. "People just don't realize how representative they are. Their thing is everybody's thing" (Fletcher, 1974, p. 141). However, discussing objectivity from an ethical perspective addresses mainly one issue: is the researcher free of biases, prejudices and subjective interpretations when approaching his subject and analysing the generated data? In other words, is it possible for a different researcher with a different political or cultural background to reproduce previous research findings when using similar methods? Thus, objectivity in this context addresses questions of validity and reliability. The question arising at this point is: what kind of knowledge is used in a specific context during the analysis? The answer to this question will vary according to what paradigm the researcher believes in when approaching their research subject.

What does objectivity mean? Evans and King (2006) give the following definition:

"When you take an objective stance towards your work you try to keep some sort of distance from your material […] like aliens from another planet who observe their surroundings but feel no engagement or attachment to the events or people under observation. […] Only by applying these rules, and strict, logical thinking, can we ensure that […] we transcend personal understandings, prejudices and subjective values in order to be able to analyse information in an objective way" (Evans & King, 2006, p. 137).

Consequently, when trying to be truly objective, the researcher finds himself in a twofold dilemma. Firstly, is it possible that a researcher can look at a subject while being completely detached from it? Secondly, is it useful for a researcher to adopt the position of an outsider who is a stranger to the phenomena under observation?

With regards to the first question, when attempting to explain social processes, the scientist is always part of the events being scrutinised. In his classic study *Outsider: Studies in the Sociology of Deviance*, Becker (1963) reveals an important aspect of social research by simply asking: "Whose side are we on?" Becker argues that the issue is not whether a researcher is objective in their scientific work. The question is merely which side does a scientist decide to assist in their struggle for power. Consequently, objectivity appears to be an idealisation of social research that is impossible to achieve in reality.

In taking this idea one step further, Foucault (1994) argues that it is not even in the scientist's power to consciously make such a fundamentally moral decision as who to support. Not only is the researcher attached to and a part of the world that he scrutinises and tries to understand, but he also has a function within it. Additionally, Foucault claims that the task of the individual researcher depends on the social position that they occupy: "It is a question of how he, who speaks as a scientist, as a philosopher, is himself part of this process, in which he is to find himself, therefore, both element and actor" (Foucault, 1994, p. 140).

The issue of objectivity, therefore, does not only provoke discussions about what can be achieved when undertaking social research, but also raises an essential question: What is social science about? Whether social science is perceived as an attempt to understand the world we live in by analysing the historic context of social structures (Mills, 1959), whether social science is about understanding our place in the world (Berger & Luckmann, 1966) or, according to Marxist thought, whether social science is providing us with the knowledge to free ourselves, the researcher will not only be an active element within the events he focuses on, he will also look at those events from a particular cultural position which in itself depends on time and space. Thus, it appears questionable that the social scientist has the capacity and ability to take a distanced stance toward their work as Evans and King (2006) suggest. But is it actually desirable for a social scientist to do so?

As Evans and King (2006) noticed, when trying to dissociate themselves from their research subject, the researcher becomes alienated from it. Social processes that might be identified and social behaviour that might be observed during the course of an empirical study will appear strange and unintelligible. By trying to find

concepts that make life explicable, social scientists ask such questions as: how do we see the world and what would happen if we could see it differently? According to this idea, the social scientist makes an effort to get a philosophical understanding of the nature of the events and processes under question. When Winch tried to analyse the meaning of social science he argued: "… it is only in a situation in which it makes sense to suppose that somebody else could in principle discover the rule which I am following that I can intelligibly be said to follow a rule at all" (Winch, 1990, p. 30). In other words, if the researcher is a complete stranger towards the phenomenon under scrutiny and hence unaware of certain rules, particularly informal conventions, it is more likely that observations will be misinterpreted and it might, indeed, become impossible to make any sense of what is being observed.

In general, it remains questionable how objectivity could be achieved in social science through a detached researcher, taking into account that knowledge is always constructed depending on certain cultural norms and values (Bury, 1986). In addition, ignoring the researcher's identity and self by limiting the discussion about social science to 'rigorously' applying research methods, one risks a 'dehumanisation' of social science, forcing it to proceed "by standardization, marginalization, and exclusion based on the application of a rationality which itself is a construct, a product, and outcome of those very social processes which constitute "normal social science" itself" (Linsteadl, 1994, p. 1337).

With regards to qualitative research, a concept of objectivity based on an unbiased and value free researcher who must not have any knowledge about the social processes under observation has to be abandoned. There is a conceptual dispute inherent to this discussion. Requiring a researcher to exclude their personal experiences and knowledge from their work is based on a positivist notion of a universal objective reality that can be discovered. In qualitative research this concept is rejected. Thus, positivist standards derived from natural science appear to be incompatible with qualitative epistemologies. "To strive to attain more credibility according to an alternative philosophical standpoint appears to be at best inappropriate and at worst, a distraction from the potential that creativity can bring" (Cutcliffe, 2000, p. 1479).

Therefore, in the present study the concept of validity is understood in accordance with Glaser and Strauss (1967) whereby first, all generated theories have to be grounded: in other words, the theory has to evolve from the data. Second, all theories have to fit in their explanatory scope. It is thought that this way theories can be developed that comprehensively explain and predict social phenomena (Jeon, 2004).

3.1.3 Informed consent

In the present research, the issue of gaining informed consent was recognised as being of major importance. However, putting this rather theoretical standard into practice can be complicated when working with qualitative methods. Gaining informed consent not only means that all information regarding the research is being made accessible to the interviewee; it also means that the researcher knows everything about possible risks and benefits for the individual respondent. The extent to which this can be realised is limited when, as in the present project, a Grounded Theory approach to the research subject is chosen. Here the researcher works exploratively, making it difficult to define in advance the precise cost-benefit balance for the participant. The researcher assesses the importance of given statements in accordance with concepts emerging from the data during the course of the analysis; hence at a time long after the interview has been conducted. This situation compromises informed consent, as it becomes almost impossible to explain to potential respondents what issues the project will focus on and what questions will be asked during an interview. With regards to the latter, the researcher was confronted with a second problem. In the present study unstructured interviews were used to collect the data, therefore it was unpredictable what issues would arise during the course of the interview.

In an attempt to address these problems, research participants were given increased ownership of their statements. As part of the consent form, interviewees had the opportunity to state that they wished to view the transcribed interviews before any data could be subjected to analysis. It was explained to the interviewee that for the purpose of validity, statements could not be altered; but if the respondent required it, parts of the transcript would be marked and not be used in any future publications. It was also stressed that those statements would still be analysed. In

addition, before an interview began it was highlighted that the interviewee had the right to refuse to answer questions and to withdraw from the interview at any time without giving reasons. None of the interviewees refused to answer any questions put to them by the researcher, nor did any of the participants refuse to give permission for their interviews or parts of their interviews to be published.

3.1.4   *Confidentiality and data protection*

When using statistical data, anonymity and confidentiality can be easily maintained as results are usually published in the form of aggregated summaries; in such cases, respondents and events appear only as numbers. Qualitative data, in contrast, refers to personal information that might be known to others or reveal the position of the respondent as some information within an agency might be accessible only to certain individuals. Hence, it might be possible for an interviewee's friends or colleagues to notice certain details that are particular to the respondent, revealing the informant's identity. Another problem in this context, which has been almost ignored in scientific discourse, is the possibility that the interviewee detects himself and his life, or at least personal details of it, being discussed in public. Some authors (Anderson, 1998) suggest disguising cases by changing names of places and all socio-demographic details such as names, age, sex or ethnicity. It is suggested that even events should be changed. However, although unarguably acting in good faith, it appears that the scientist taking this approach literally invents cases.

As within the context of informed consent, the issue of confidentiality was addressed by giving the interviewee the option to view all transcripts. Hence, analysis of individual interviews was not started before transcripts were approved by the respondent. None of the respondents disapproved of any of the transcripts or parts of the transcripts.

Finally, attention had to be paid to maintain anonymity. Unfortunately, a certain degree of exposure of participants was inevitable. Due to the nature of agencies that interviewees were members of, respondents could often not be contacted directly. In such cases, contact had to be made through 'gate-keepers'. These were members of the same agency as the interviewee and consequently anonymity was compromised. However, it can be assumed that if they were expecting negative consequences to result from merely participating in the present study, potential respondents would

have refused to take part. This, once again, emphasises the importance of sufficient information being made accessible to potential respondents in order to enable them to make an informed decision. Therefore, information sheets were sent at first to the gatekeeper, extensively outlining the purpose of the research as well as what participation would involve. After direct contact with the interviewee was established, similar information sheets were posted to the respondent. The potential interviewee was then given seven to ten days to reflect upon the information. After this time, the interviewee was contacted by phone or email in order to discuss possible concerns and to arrange the time and the place for an interview.

The problems stated so far demonstrate that although ethical guidelines should be very specific and followed thoroughly throughout the entire research process, they nevertheless have to be applied to the particulars of a distinct research project. Therefore, ethical guidelines have to be open to interpretation. Ethical codes and guidelines must be used and applied according to the situation that a researcher might be confronted with; have to be implemented and developed in consideration of the setting that research is embedded into; or, as Banks stresses, a dynamic relationship needs to be established between ethical codes and research practice "so that both inform and develop each other" (Banks, 1998, p. 29). Only then will ethical guidelines maintain their constructive character, supporting the researcher in their endeavours without being restrictive and limiting in nature.

All recordings of interviews were saved on a computer that was password secured. Interview notes and other written information regarding the interview or the interviewee were kept in a locked storage compartment within a locked room at the University of Chester.

3.2   Interview

When scrutinising social phenomena, there are a variety of approaches by which the researcher might gather information to develop an understanding of their research subject. Following ethnographic tradition, one might chose to observe a given group of people over an extended period of time in their natural environment to gain an intimate understanding of their behaviours. The main advantage of observational methods is constituted by the situation in which data is generated, which is less constructed and artificial than interactions that take place during an interview. The

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observer might, therefore, be able to identify hidden and informal behaviours that are less likely to emerge during interviews.

However, observation as a method of data collection has its limits. First of all, the researcher will be restricted in the generation of data to processes that take place at a time when they are physically present. Social behaviour or decision-making that might have occurred in the past, for example, cannot be observed. Thus, the researcher has to have access to the social space at the time when the social phenomena which they wish to scrutinise take place.

In relation to the research subject of the present study, observational methods would have restricted data collection to such an extent that the project would have become unfeasible due to the limited breadth of data: for example, it would not have been possible to observe some of the vital processes through which suspects are transferred through the criminal justice system. The screening of evidence by custody sergeants, prosecutors, probation officers or judges and magistrates, for instance, on which these professionals base their decisions, cannot be observed. Neither can it be observed how various kinds of evidence might be weighted. It is also unlikely that the central aspect of this study – how criminal justice professionals construct crime, vulnerability, discipline, and welfare according to their professional identity – could be observed in any way.

For these reasons, interviews were used for collecting the data. It was decided that this method would best facilitate developing a comprehensive understanding of how various criminal justice professionals make decisions when engaging with intellectually disabled people. Within the given time constraints for completion of this study, using interviews allowed for a wider cross-section of respondents to be recruited, ensuring a greater breath of coverage compared to observational methods.

Atkinson and Hammersley (1994) highlight that regardless of whether the observed group of people know that they are monitored within the context of a research study, an observation requires the researcher to be an established member within the group they observe over an extensive period of time as this will allow establishing trust. As outlined in section 3.3.3, gaining access to some of the agencies involved in this study proved extremely time-consuming: for example, it took almost two years to arrange first interviews with members of the police. Within the given

timeframe for this project, it would have been unfeasible to undertake an observation extensively enough to ensure it was meaningful.

In addition, by using interviews rather than observational methods it was possible to consider past and present decision-making, providing insight into the historical and current legislative context in which respondents negotiate their realities.

The data in this study were generated by using unstructured interviews. In every interview three broad areas were addressed:

- The process by which an individual's capacity for understanding is established.
- Experience with suspected offenders with intellectual disabilities.
- Preparation and training for interviewing and dealing with intellectually disabled alleged offenders.

In accordance with Glaser and Strauss (1967), interviews were conducted as un-standardised as possible to give respondents utmost freedom in their answers and maximum control of the conversation. As part of gaining informed consent, respondents received detailed information before the start of the interview, regarding the purpose and focus of the present study. Hence, participants were aware of the broad context of the interview. As a result, interviewees automatically addressed all three areas mentioned above and tended to freely explain their own experiences of dealing with alleged offenders with intellectual disabilities. The interviewer developed clarifying questions spontaneously and according to the conversation at the time. In addition and as suggested by Glaser and Strauss (1967), the interviewer occasionally asked questions addressing issues that had emerged in previous interviews. These questions changed as issues identified in previous interviews changed. Therefore, no universal guideline or interview schedule was used for generating the data within the context of this study.

A setting was created with which respondents were familiar, allowing them to engage in a natural conversation. Instead of following an interview schedule or guideline with questions that are detached from the context of the interview and, thus, rather abstract in nature, the researcher concentrated on examining issues as they were mentioned and addressed by interviewees.

Using this method appeared to be beneficial for two reasons. First, the purpose of the project was to explore decision-making processes of professionals working within criminal justice. In particular, attention had to be paid to the way in which reality is negotiated on the basis of professional identity, personal experiences and knowledge. It was seen as vital to allow respondents to make comprehensive statements and give explanations at their own pace, revealing the perceived importance and significance of topics, concerns, and meanings (Rubin & Rubin, 2005). Consequently, there was only a minimal risk of the researcher forcing their perceptions and expectations upon the respondents, which eventually would have resulted in a potentially biased interview. Furthermore, all respondents interviewed within the context of this study were very powerful decision makers in their occupation. As Neal (1995) highlights, by allowing respondents relative freedom to explain and recall opinions and decisions that have been made, the researcher passes control of the conversation, and thus power, to the interviewee, allowing them to recall events and processes important to them.

Therefore, using an unstructured interview allowed both taking an explorative approach and taking account of respondents' unfamiliarity with the interview situation. In addition, it supported generating a friendly and kind atmosphere in which the interviewee felt that their statements were listened to and acknowledged. It also helped establishing good rapport with the respondents, as the interviewer enjoyed the freedom to structure every interview according to its unique setting and the personality of the interviewee. Guidance and control of the conversation were exercised in a subtle way. For example, interviewees were never interrupted or cut short even when including information that had no immediate relation to the research subject. At the same time, guidance was exerted by asking open questions that allowed respondents to clarify specific issues of interest.

Although it has been recognised that good rapport between interviewee and interviewer does support good data collection (Fowler & Mangione, 1990; Rubin & Rubin, 2005), the idea of rapport is controversial. It appears to be difficult to define a concept of mutual understanding between interviewer and respondent (Batty, 1995). Thus, when trying to measure the impact of rapport on data collection, Weiss (1971) suggested that it might be more useful to concentrate on attitudes of both interviewer and respondent during their interactions instead of using the rather

vague concept of rapport. Equally important is the question of how rapport influences, first, the course of the interviewer-respondent interaction and, second, the nature of the data that is being collected.

3.2.1 Interviewer-respondent interaction

Dean, Eichhorn and Dean describe in a very metaphorical but accurate way the general dynamics inherent to an interview.

> "Good interviewing is much more akin to feeding pigeons in the town square. First you throw a few grains near the birds to see if they won't move a little closer; gradually you establish confidence until hesitantly and tentatively they sidle up to take from your hand. Any false move or slip on your part and they retreat, and you have to begin anew. The rapport that exists between the interviewer and the informant is very much like this" (Dean, Eichhorn & Dean, cited in Goudy & Potter, 1975, p. 542).

Olesen and Whittaker (1967) call this situation a "balanced instability" whereby the interviewer negotiates and establishes their role in stages. However, this role is always under pressure and has to be renegotiated because of tensions and social as well as power inequalities between interviewer and respondent (De Santis, 1980; Neal, 1995). For the interviewer, the situation is complicated further by contradictory demands on their role. During the interview, the researcher is supposed to establish intimacy in order to ask difficult or intimate questions. At the same time, the interviewer is supposed to maintain their status as a professional by being impersonal (Rosenblum, 1987). Thus, it appears unlikely that a real conversation will occur.

In this context, Mills, Bonner and Francis (2006) suggest avoiding putting the respondent in a subordinate state to the researcher. This way, the respondent will be encouraged to suggest topics and to raise issues important to them and, therefore, the risk of the interview being biased due to interviewer errors will be minimised (Ruane, 2005). "Actually, the psychological field of the respondent must be thought of as developing throughout the process of the interview, and the interviewer must be thought of as a major influence on the respondent's psychological field during the interview" (Kahn & Channel, 1967, p. 35). The interviewer controls the

situation by encouraging or discouraging answers. When exercised extensively, this kind of control can cause the interview to be biased with regards to an interviewer's preferred answers. Having used an unstructured interview in this study, control of the conversation was given to the respondent minimising any influence from the interviewer.

3.2.2   Rapport and data collection

The literature focusing on the impact that rapport has on data collection is contradictory. As mentioned above, on the one hand it is argued that good rapport between interviewer and respondent can help reduce the subordinate status of the interviewee, and thus minimise interviewer related errors and biases. On the other hand, Lavin and Maynard (2001) stress that rapport makes an interview situation less standardised and thus increases the influence of the interviewer on the nature of the data.

In his classic study, Hyman (1954) argues that all interviewers have certain expectations and beliefs regarding their respondents, which may compromise the validity of the generated data. The author stresses that particularly in the context of less standard or unstandardised interviews, generated data are more likely to be biased when interviewers have strong beliefs and expectations. The more unstandardised the interview situation, the less control is exercised over the interviewee, so "that subsequent experiences, even if contradictory, will be assimilated into the framework of the initial expectation" (Hyman, 1954, p. 88-9). At the same time, Hyman stresses that such expectations, even when intense in nature, will never bias the entire data collection as such expectations are usually limited to a few issues and never comprise all matters addressed in a study. "The bias would be maximal only for those interviewers whose expectations tend to be comprehensive in scope and rigid or persistent in the face of contradictory appearance and remarks of the respondents" (Hyman, 1954, p. 92). In this context, Hyman (1954, p. 138) distinguishes between two interactive behaviours that can occur between interviewer and respondent. "Task involvement" describes an interaction that is limited to a question-answer conversation, whereas "social involvement" addresses interactions of respondents with the interviewer's

personality. According to Hyman (1954), biases are more likely to occur in the latter form of involvement.

In this context, Rosenblum criticises the traditional model of scientific interviewing whereby "conversation, as opposed to simple exchange of questions and answers, may be taken as a measure of the operation of a sociable as opposed to a professional stance" (Rosenblum, 1987, p. 390). Rosenblum calls for the rules in social science to be broadened and adapted to the conditions of the interview setting in which interviewer-respondent interactions take place. Thus, questions should be direct responses to answers given by the interviewee. This not only enables the researcher to better adjust to the unexpected, but also stimulates respondents to articulate their experiences, thoughts and knowledge, revealing the rules under which people structure and choose their behaviour.

In general, the investigator is actively involved in generating data as the interview has to be seen as an interplay between researcher and respondent. As Mills, Bonner and Francis (2006) stress, "the interview becomes the site for the construction of knowledge, and clearly the researcher and informant produce this knowledge together" (Mills et al., 2006, p. 9). Hence, the researcher does not merely observe the respondent; instead, researcher and respondent engage in a situation of mutually shaping each other in their perceptions and expressions (Turner, 1981). Responses by the interviewee are affected by direct but also indirect communication (Gergen & Back, 1966) such as body language or gestures. Whereas it might be possible to control direct communication in a way that minimises interviewer related biases, it appears less possible to completely control the indirect communication of an interviewer. Briggs (1986) highlights the implicit positivist understanding on which the attempt to avoid any interactive factors between interviewer and respondent is based. As mentioned above, revealing the true order of things (cf. Brenner, 1981) by excluding such factors as age, gender or political views, which might influence an interviewer in the questions they raise or in their data analysis, implies that there is a universal reality waiting to be discovered by the researcher who is able to appropriately use the correct tools. It would mean that a single and universal truth about reality exists which can be analysed in isolation from the social context in which it was observed.

Goffman (1969) tells us that in social interactions, people react based on a complex system of experiences, knowledge and attitudes. An interview is a social interaction whereby answers given by the respondent demonstrate the various concepts that an individual has of their social and physical environment. Interviewees do not simply answer questions, but react to the interview situation which is internally structured by tensions, motives, goals and attitudes and externally influenced by social norms (Kahn & Channel, 1967). This makes the interviewer a participant, rather than allowing them to be an objective observer. Hence, neutrality based on a concept of objective observations made by an emotionally detached researcher has to be discarded. Gorden (1980) stresses that this questions the reliability of qualitative interviews because the precise meaning of any question raised during the course of an interview always depends on a person's individual understanding of it, which itself is based on such unique characteristics as social background, education or lived experiences.

Perceiving an interview as social interaction shaped and structured in its course by social norms and expectations necessarily puts constraints upon both interviewer and, more importantly, the respondent. Consequently, the latter might be more unwilling to disclose certain information in a personal interview. This has to be categorised as a further interviewer related effect (Hyman, 1954). There are many studies, especially within the fields of medicine (Iverson, Brooks, Ashton & Lange, 2010) and sexuality (Castel-Branco, 2010; Langhaug, Sherr & Cowan, 2010), where this effect has been well documented. However, there have also been studies where no difference could be found in the results generated by self-completed questionnaires and face-to-face interviews (Hahn, Rao, Cella & Choi, 2008). It has also been demonstrated that in certain instances respondents actually preferred personal interviews to answering questionnaires (L. Eriksson et al., 2008).

Hence, it appears that the responsive behaviour of an interviewee and the nature of information that is revealed depend on much more than simply the physical presence of an interviewer. As the examples above demonstrate, responses will depend on the research topic and the atmosphere during an interview, but also on the type of interview that is used.

In this context, Schütze's (1983) analyses of the dynamics during an interview and their effect on an interviewee are of great importance. Although Schütze's method of narrative interviewing is very specific with regards to the setting that has to be created during an interview, it is likely that his general argument is applicable to any kind of semi- or unstructured interview. Schütze (1983) describes three constraints that impact on a respondent during their narratives. First, Schütze argues, during their narratives interviewees will feel obliged to explain any themes completely and sufficiently to make the narrative intelligible to the interviewer (*Gestaltungszwang*). Second, in order to make their narratives comprehensible, respondents will give a condensed account of events, excluding any unrelated information (*Kondensierungszwang*). Third, and most importantly, the respondent's narrative will be detailed, including additional and background information or related events that are essential in producing a narrative that is comprehensive and yet comprehensible (*Detaillierungszwang*). In other words, building rapport and enabling a respondent to engage in a conversation that is not restricted by an interviewer who is exercising control excessively will create a setting in which those three constraints will allow the generation of rich and valuable data. "You should take the least intrusive route to what you do need, leaving the choice of whatever and what to reveal to the interviewee after you have expressed an interest in the matter" (Rubin & Rubin, 2005, p. 34).

3.3   Analysis

3.3.1   Grounded Theory

The interviews were analysed taking a Grounded Theory approach. Indeed, with certain limitations, the entire project was organised within the Grounded Theory strand. However, the method had to be compromised to meet particular PhD regulations and deal with specific practical problems. The difficulties in 'meticulously' applying the original Grounded Theory method as developed by Glaser and Strauss (1967) have been discussed in great detail in the literature (Dey, 1999; Robrecht, 1995). Following Glaser and Strauss' original model, a study that is based on Grounded Theory must not begin with more than a "general wonderment". Even the exact topic must be unknown and, therefore, any research questions should be as general as possible. In this context, Glaser and Strauss

(1967) also argue that the literature review should not precede the data analysis as otherwise the researcher runs the risk of being biased due to preconceptions when approaching the data.

Finally, when using a Grounded Theory approach the researcher must undertake a theoretical sampling. When using a different method than Grounded Theory, the researcher will usually implement a purposeful sampling strategy by starting with a number of hypotheses or research questions that determine how and what kind of respondents are recruited. When using Grounded Theory, the process of recruiting interviewees is supposed to be informed by the emerging theory (P. Becker, 1993). Therefore, the researcher starts collecting data by interviewing significant individuals who have certain knowledge of the phenomenon under scrutiny (Morse, 1991).

However, as Cutcliffe (2004) appreciates, it is very unlikely that a researcher would secure any funding for a project when stating in their application that they are unable to clarify the topic or the research sample, or to give detailed information regarding their time schedule. In order to secure funding for the present study it was a requirement to provide a comprehensive research proposal, outlining in detail the topic of the planned project, possible research questions, and potential respondents and their recruitment, as well as how the data were to be collected and analysed. In addition, the researcher was obliged to provide an accurate time schedule containing milestones. Finally, it was necessary to outline the project's value in relation to how the study would contribute to the already existing body of scientific knowledge within the research area. Thus, existing literature in the field had to be studied, analysing and outlining the gaps in existing knowledge that constituted the starting point of the present study and emphasised the potential value of the project.

3.3.2 Use of literature

In the Discovery of Grounded Theory, Glaser and Strauss' (1967) emphasise the generation of theory to be the core element of this methodology. When taking a Grounded Theory approach, the researcher identifies the meaning of social structures and processes for individuals in the form of a hypothesis (Backman & Kyngäs, 1999). At this stage the researcher is not supposed to undertake an extensive literature review as this might compromise the investigator's ability to

truly let the data speak for themselves. Chiovitty (2003) suggests using literature only to demonstrate the transferability of the generated theory, mainly by exemplifying the extent to which the theory can be applied within different contexts.

Following this rule thoroughly presents the researcher with a range of problems. First, how can the researcher determine where and how their research fits into the existing body of knowledge and how far are novel findings being produced? Second, without having read any literature, how is the researcher supposed to have a general understanding of their research subject? Third, there might be a danger of not asking important questions during an interview if the researcher has no knowledge of prior research findings and the questions these findings may raise.

Strauss and Corbin (1998) acknowledge that literature plays a vital part at every stage of the research process so that the researcher is able "to keep up with the field" (Strauss & Corbin, 1998, p. 49). The authors give an extensive list of points why having reviewed literature beforehand might be useful and in some cases vital. However, they too highlight the importance of the researcher using literature to enhance rather than constrain emerging theories. Thus, the researcher needs to be aware of their knowledge and experiences and treat them as a separate set of data during the course of the analysis (Hutchinson, 1993; McCallin, 2003).

In the present study literature was reviewed prior to collecting data. Following McCallin's (2003) recommendation, the literature was used to gain a basic understanding of the research subject and to identify questions that have remained unanswered in previous studies. Literature was not used to develop an understanding of how different concepts could be linked. Thus, the review of the literature was limited to articles concentrating on general aspects of how the criminal justice system works, what agencies become involved under what circumstances, the authority of different criminal justice agencies, communication and collaboration among members of various agencies, and their responsibilities and competencies. In addition, literature was studied that focused on intellectually disabled offenders, the offences that had been committed and the offenders' background. Finally, articles were consulted that discussed the historical social and political discourse surrounding intellectually disabled offenders. This was done in

order to gain a general understanding of the setting that decision-making processes of professionals working within criminal justice are embedded into. In addition, this limited literature review facilitated developing a comprehension of the position that intellectually disabled people occupy in society.

3.3.3   Sample and recruitment of respondents

As mentioned above, Glaser and Strauss (1967) argue for the sampling to be done theoretically. Taking such an approach carries its own risks. Backman and Kyngäs highlight that by using theoretical sampling "the researcher may, however, make conclusions that are too firm, based on his/her preliminary analysis, and this may influence too strongly the further data collection and the emerging theory" (Backman & Kyngäs, 1999, p. 149). In essence, theoretical sampling means that after having identified certain concepts in an interview, the researcher decides who to speak to next and what issues should be addressed in following interviews in order to further explore these concepts. This outlines something of a conflict for the researcher. In Grounded Theory the fieldworker is supposed to remain fairly passive to minimise the risk of forcing a concept upon the data – summarised as emerging vs. forcing (Cutcliffe, 2004). Yet the researcher is involved in generating the data, which led Mills et al. (2006) to argue that especially when using Grounded Theory one should not speak about data collection but data generation, an interactive process that equally involves informant and researcher.

In an attempt that could be interpreted as adapting Grounded Theory to the constraints within which researchers often work, Cutcliffe (2000) suggests dividing the sampling into two stages. At the beginning, the researcher undertakes a purposeful sampling, whereby individuals are recruited based on their competences in relation to the research subject. This stage is followed by a theoretical sampling, whereby interviewees are recruited according to themes that have emerged within previous interviews. Hence, the first interviewees act as gatekeepers (Cutcliffe, 2000). In this stage, it is important to recruit dissimilar groups of respondents in order to come to a more general understanding of how various concepts are linked.

This way the researcher will be able to go beyond merely describing the accounts of research respondents, instead generating substantive theories[6].

In the present study the two sampling strategies were applied as suggested by Cutcliffe (2000). When applying for ethical approval for this study, it had been decided in advance to interview forensic examiners, probation officers, prosecutors, police officers, magistrates and judges.

The decision to interview criminal justice practitioners was made in consideration of the existing knowledge in the field. Previous research projects that have led to changes in legislation such as the Bradley Report (Department of Health, 2009a) or the Reed Report (Department of Health & Home Office, 1992) have concentrated on the views of people with intellectual disabilities themselves. A similar trend emerges if previous research studies are considered more generally where the main focus has been on treatment of people with intellectual disabilities within the criminal justice system (Chappell, 1994; Cockram, 2005; Hall, 2000; Hayes, 2005a, 2007; Hartford et al., 2005; J. Jones, 2007; Lindsay, 2011; Lyall et al., 1995; Talbot, 2008; Vanny, Levy, Greenberg & Hayes, 2009). In addition, with the exception of Talbot (2008) none of these studies paid attention to the overall criminal justice system, following an alleged offender's 'career' through the system. The same conclusion can be drawn when focusing on research that has been concentrating on criminal justice practitioners. Usually, only a specific group of professionals was scrutinised, e.g. lawyers (McGillvray & Waterman, 2003) or police officers (Douglas & Cuskelly, 2012).

Thus, in the present research it was decided to interview practitioners from criminal justice agencies whose decision-making has a significant impact on the course of legal proceedings. It was hoped that this strategy would facilitate gaining a comprehensive picture of how the criminal justice system operates at different stages, and how interdependencies between different agencies may impact on decision-making processes.

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[6] Glaser and Strauss (1967) distinguish two kinds of theories that can be generated by using Grounded Theory. At first the researcher will generate substantive theories. This kind of theory is very specific and thus dependent on time and space. During the final stage of data analyses the researcher will then generalise their substantive theories, making them more broadly applicable and useful for professionals in various fields who concentrate on events and processes that occur in or are impacted by similar theoretical conditions (Kearney, 1998).

With the help of the respondents during the first interviews, specific individuals within the different criminal justice agencies could be identified who had either been directly involved in dealing with intellectually disabled alleged offenders or were specifically trained within this area. It also occurred that in certain matters that happened to be addressed in an interview, respondents identified others within their agencies who had particular knowledge about these issues.

After having purposefully recruited the first interviewees, access to the various institutions that were approached within the context of this study significantly improved. Having gained the trust and support of the different criminal justice agencies, recruiting further respondents became more efficient and less time-consuming. In addition, when themes first began to emerge in the data, theoretical sampling made it possible to test such themes for their explanatory value as well as exploring them in greater detail with every new interview. Thus, every single interview represents a part within a continuing dialogue whereby the individual conversations supplement each other in the themes that were addressed by respondents. In every new interview the questions would evolve around issues that had come up in previous interviews. In other words, theoretical sampling shaped the process of data collection in such a way that all the individual interviews have to be understood as a unitary conversation, despite having involved different representatives from various criminal justice agencies.

In total thirty five interviews could be secured. All data collection took place between June 2008 and March 2009 (cf. Table 2).

Table 2: Breakdown of participants interviewed

	Custody Sergeant	Forensic Medical Examiner	Prosecutor	Magistrate	Judge	Probation Officer
Merseyside	1 female 3 male	2 female	3 female 2 male	2 male		3 female 1 male
Greater Manchester	5 male				1 male	1 female 1 male
Cheshire	1 female 4 male	1 female	1 male		3 male	
Totals	14	3	6	2	4	6

Below, the sample and the recruitment of respondents will be explained in detail, enabling the reader to understand what data could be secured as well as how the conclusive theories were generated (Strauss & Corbin, 1998).

3.3.3.1 Probation Service

When approaching members of the probation services, information accessible on the internet was of great value. This way it was possible to identify team leaders within the probation services in each geographical area. The first contact was made by phone. The purpose of the research was extensively discussed. Special attention was paid to outlining what happens during an interview and how statements would be used in the study. After this telephone conversation, an email was sent to the team leaders with an information sheet attached to it that not only outlined the details of the study, but also included the contact details of the researcher and both supervisors.

The individual team leaders then contacted members of staff who had competencies and experiences with regards to dealing with offenders who had been officially as well as unofficially identified as having intellectual disabilities. The first interviews took place in July 2008 with probation officers from Merseyside. Unfortunately, the Cheshire Probation Trust refused to take part in the study. In total, six interviews with probation officers could be completed, two from the Greater Manchester area and four from Merseyside.

3.3.3.2 Forensic Medical Examiners

It proved to be very difficult to consult forensic medical examiners for interviewing. In total three medical professionals were interviewed who were all involved, though to a varying extent, in assessing alleged offenders in their intellectual functioning. At the beginning of the data collection phase an interview with a learning disability consultant nurse was conducted. This respondent had thirty years of experience in working with people with intellectual disabilities, and over the last fifteen years the interviewee worked with intellectually disabled offenders. In her role, the respondent was responsible for developing and implementing strategies to address individual offenders' needs.

Unfortunately, speaking to one of the police doctors in Greater Manchester turned out to be impossible. When trying to establish contacts through previous respondents from the police, it very quickly became clear that due to their workload police doctors from Greater Manchester were not able to take part in the study. In Merseyside one interview with a general practitioner (GP) could be secured in June 2008. At the time of the interview, the respondent had fifteen years of experience in working as a forensic medical examiner in custody suites for the police in Merseyside.

In February 2009, an interview with a nurse was conducted who at the time of the research was permanently stationed in one of the Merseyside custody suites. The respondent had started her post about six months prior to the interview with the introduction of a new scheme of healthcare provision within the Merseyside constabulary. Before the new scheme was introduced, general practitioners who would be called in if a detainee needed medical attention were responsible for providing healthcare. As part of the new scheme, nurses have been constantly placed in custody suites with doctors taking a supportive role.

3.3.3.3 Crown Prosecution Service

Once ethical approval had been obtained, potential individual respondents were identified by the Crown Prosecution Service research unit. All interviewees had expertise in dealing with intellectually impaired alleged offenders. The group of respondents comprised prosecutors in leading and managerial positions as well as front line prosecutors. This provided insight into policies and strategies with regards to structural and organisational issues within the Crown Prosecution Service. At the same time it was possible to illuminate in depth the practical implementation of such strategies on a daily basis. Hence, the characteristics of the individual respondents supported developing a comprehensive and yet detailed picture of the managerial requirements and day-to-day decision-making processes of prosecutors.

In total six interviews with prosecutors could be completed, most of whom where located in the Merseyside area. In addition, a great amount of written information material was provided by individual prosecutors outlining issues in current legislation.

3.3.3.4 Custody Sergeants

As highlighted above, the time it took to gain permission to interview custody sergeants varied significantly among the constabularies in Cheshire, Greater Manchester and Merseyside. It has to be acknowledged though, that once official approval had been gained, individual respondents were extremely helpful and supportive. The researcher was given access to otherwise strictly confidential data, such as some individual custody records, booking-in procedures, interviews of suspects and internal guidelines. This mix of official material and confidential data combined with the information gained through individual interviews allowed understanding of how official procedures are being influenced by informal cultural beliefs and attitudes shared among members of the police.

The first five interviews with custody sergeants were conducted in Cheshire in October 2008. Between November and December 2008, five interviews with custody sergeants from the Greater Manchester area could be completed. Finally, in January 2009 consent was given by the Merseyside Police to take part in the study and four more interviews could be secured. In total, fourteen interviews were successfully completed whereby interviewees came from different custody suites within the three geographical areas, thus minimising the risk of the data being biased due to specific local conditions.

3.3.3.5 Magistrates

In the original protocol of the study magistrates were not included in the sample. However, it was quickly acknowledged that magistrates occupy an important position within the Criminal Justice System in so far as they deal with cases that involve recordable offences punishable with an absolute maximum of 12 months' imprisonment, which is the bulk of criminal offences. Unfortunately, it was very difficult to speak to magistrates. Contact was made either through previous respondents or the court clerks. Several emails were sent to magistrates' courts in Cheshire, Greater Manchester and Merseyside to recruit interviewees. Despite continuous and repeated efforts it was not possible to interview more than two magistrates, both from Merseyside. Regardless of the seemingly small number of interviewees, extremely valuable information was gained during the interviews with regards to the perception of intellectually disabled defendants and to ways in which

this population is dealt with within the court arena. Of great interest were themes that emerged during the course of the interviews around the way professional identity informs decision-making processes. These themes re-emerged during interviews with judges, hence interviewing magistrates allowed identification of key concepts crucial for forming ideas about how justice, crime and punishment are perceived by decision makers who occupy central positions within the criminal justice system.

3.3.3.6 Judges

In total, four interviews with high court judges could be secured comprising one respondent from the Greater Manchester area and three from Cheshire. Due to the depth and richness of the data generated, these interviews are of the greatest importance within the context of this study. As judges occupy an extremely powerful position at the highest level within the criminal justice system, discussing their views on judicial and legislative issues allowed developing a very comprehensive understanding of complex decision-making processes, not only during court trials but within the criminal justice system in general.

3.3.4 Coding

When using unstructured interviews the generated data is likely to be very heterogeneous in nature. This can make it difficult for the researcher to compare individual interviews or may even result in confusion rather than clarity (Walters, 1961). This effect, however, was minimal as all conversations evolved around the three broad areas listed in section 3.2.

Glaser and Strauss' (1967) Grounded Theory model comprises three analytical stages of coding. First, the data are broken down into general units of meaning and different themes are organised into categories (open coding). Whenever an incident is coded as belonging to a specific category, it is compared with all incidents that have previously been similarly coded, as this will establish the explanatory value of the category. Second, relationships between the categories are explored (axial coding). Particular attention is paid to action strategies and the interventional context, such as factors that support the occurrence of a social phenomenon or those that might oppose it. Coded extracts from the data are put together in new ways to

make connections between the categories and their properties. Third, categories are put in relation to each other to generate formal theories which are independent of specific places and individuals.

During open coding the interviews were grouped in relation to professional background. When studying the transcripts, particular attention was paid to the discourse through which interviewees discussed and expressed their understanding of crime, justice, punishment and due process in the context of vulnerable people. The data were read sentence by sentence to analyse what concepts and thoughts respondents had referenced in their answers. At this stage, first categories could be identified, such as 'construction of truth', 'construction of criminal' or 'construction of punishment'. Incidents in the data were coded according to the different categories. By constantly comparing different incidents of the same category, it was possible to identify properties of the codes as shown in Table 3 below (cf. Appendix B for a more detailed list of codes). The categories were developed in conjunction to each other to allow "capturing much of the significant data" (Dey, 1999, p. 104).

Table 3: Open coding categories and properties

Category	Property
Construction of truth	Construction of justice Construction of crime
Construction of criminal	Reasonable man Capacity
Construction of punishment	Function of punishment Function of justice

During the second stage, axial coding, the analytical focus was changed. Attention was now exclusively paid to how the identified themes were related to each other by comparing different properties in relation to their context specific backgrounds, such as strategic behaviours or action strategies that respondents had revealed. Through this analytical process, a range of substantive theories could be generated. For example, professional identity was identified as the core variable for explaining provision of support for alleged offenders.

In order to document every step of the analysis, memos were written during the open and axial coding (Charmaz, 2003). Almost every time an incident was coded, a short memo was generated outlining what the particular incident explained. The memos were analysed separately, which profoundly supported organising the data and exploring the codes. In addition, it assured that categories were context-bound and not artefacts generated by the analyst. As part of the selective coding, the categories were put into context with each other in order to generate a more general, formal theory which explains the process by which people with intellectual disabilities engage with the criminal justice system.

4. Intellectual disabilities and criminal justice

Social classifications mirror how society is structured at a certain moment in time (cf. section 1.1.2). In this context, classifications and labels reveal common knowledge, attitudes and beliefs of how society should deal with and respond to situations perceived as challenging or even threatening the social order. The terminology that has been used in public discourse to describe people with intellectual impairments reflects how in society perceptions of this group have changed over time, from 'idiots' and 'retards' to learning or intellectually disabled individuals. The changing discourse that surrounds intellectually disabled people demonstrates what has been socially accepted and tolerated at a certain moment in time. The terminology that is currently being used is less excluding and outlines the extent to which intellectually disabled people have become more integrated into mainstream society.

However, when analysing disability movements Herr, Gostin and Hongju Koh (2003) outline a dilemma caused by campaigns promoting equal rights. They argue that trying to achieve equality in social and judicial matters involves focusing on fighting stereotypes, but this neglects the reality of differences; whilst recognising disabled people as being distinct involves the risk of misinterpreting the nature of their inequality, which might result in marginalisation and stigmatisation. This dilemma also appears to be of significance when people with intellectual disabilities engage with the criminal justice system.

During the last decade, an individual's intellectual functioning has received increasing attention by the government (White Paper Valuing People Now 2001; Disability Discrimination Act 2005; Valuing People Now 2009), resulting in improved access to services and support within mainstream society as well as within the criminal justice system. About thirty years ago, the Police and Criminal Evidence Act (1984) (PACE) defined for the first time that a person not able to "understand the significance of what is said, of questions or of their replies […] should be treated as mentally vulnerable and an appropriate adult called" (PACE, Code C, 1G). The Mental Capacity Act (2005) and the Mental Health Act (2007) further clarified what characterises intellectual disability and what safeguards should be put in place recognising the vulnerability of people affected by it. Most

recently, Lord Bradley's Review (Department of Health 2009a) made a substantial number of recommendations regarding the treatment of alleged and convicted offenders when in police custody, court or prison. The report suggests better awareness training of all criminal justice professionals, improved cooperation and exchange of information among intellectual disability services and criminal justice agencies to allow early identification of people with special needs, and more consistency in the treatment of alleged offenders with an intellectual disability throughout different jurisdictions in England.

In previous research, however, it has been stressed that people with intellectual disabilities are still overrepresented at different stages of the criminal justice system (Cockram, 2005; Hayes, 2005a; Lyall et al., 1995; Talbot, 2008). Whatever the reasons that people with intellectual disabilities come to the attention of criminal justice professionals, the disadvantaged position of this population in mainstream society (Barnes, 1991; Hayes, 1995; Stalker, 2009) does not appear to significantly improve within the criminal justice system (Hayes, 2007).

When people with intellectual disabilities come to the attention of criminal justice authorities, responses tend to be extreme with the person being either acquitted or given the maximum punishment with no or little chance for rehabilitation (Cockram, 2005). In addition, Chappell (1994) highlights that defendants with an intellectual disability are at greater risk of being affected by miscarriages of justice, mainly by being wrongly convicted. Furthermore it has been stressed that although legislative changes have demonstrated greater formal and official awareness regarding people with special needs, a great number of them still remain undetected when engaging with the criminal justice system and may be, therefore, denied access to support and appropriate treatment (Talbot, 2008). Moreover, it has been highlighted in previous research that when engaging with the criminal justice system, suspects with a borderline intellectual disability are particularly at risk of remaining unidentified in their special needs (Hayes, 2005a; Jones, 2007; Talbot, 2008); it is argued that this problem arises due to the better adaptability and enhanced social competencies possessed by this particular population (Herrington, 2009).

These findings exemplify a conflict between welfare orientated macro-level policies and disciplinary micro-level actions by criminal justice professionals, a contradiction that has been identified in previous research (Campbell, 2002; NACRO, 2002). Manders (2009), for example, reports that a high number of intellectually disabled offenders have become subject to anti-social behaviour powers. He highlights that this population of offenders might be at greater risk of breaching their orders, and stresses that despite increasing efforts to divert vulnerable groups away from the criminal justice system, by using disciplinary orders against them "the reversal of this process could tend to operate" (Manders, 2009, p. 147).

This conflict is the result of contradicting standards inherent to the concept of criminal justice in western states, e.g. lenience vs. justice; exceptional rules vs. universality of law. The way these conflicts are perceived, especially the way in which they are balanced, depends to a great extent on a person's role within the criminal justice system and their perception of professional identity which manifests itself in certain concepts of fairness and justice. Cant and Standen (2007) stress that the concept of professional identity of criminal justice professionals appears to be linked to their attitudes towards crime and criminals. The authors therefore conclude that the concept of role explains differences in professionals' attitudes. Consequently, when explaining decision-making processes within the criminal justice system, attitudes and opinions have to be discussed in relation to the distinct aims of the different criminal justice agencies.

Although pursuing similar aims, criminal justice institutions like the police, Crown Prosecution Service and probation service, have varying interests and employ diverse strategies to achieve their targets. A person's special needs vary in their meaning for the different criminal justice professionals, depending on their role within the overall criminal justice system.

For example, specialists' advice are not coherently integrated into criminal justice procedures, but are incorporated according to the distinct interests of criminal justice agencies. When interviewing an arrestee, police officers need to assess the suspect's capacity to understand questions as well as the nature of the situation. Only then will evidence that can be secured during an interview be valid in court.

Thus, expert advice will determine what support has to be made accessible to the detainee whilst being interviewed by crime investigating officers. The prosecution, on the other hand, is mainly concerned about an alleged offender's fitness to plead, upon which the concept of 'the guilty mind' is based. Accordingly, depending on the expert's assessment of a defendant's ability to distinguish between right and wrong, a charging decision will be made by the prosecution. Finally, the probation service concentrates on an offender's capacity to comply with their court orders. This involves an individual's ability to keep appointments, to be able to attend supervision meetings and to come to an understanding of their wrongdoing, as well as demonstrating remorse and a willingness to change. Hence, the construction of intellectual disabilities by criminal justice professionals has to be studied within the context of the agency of which the professional is a representative.

When engaging with the criminal justice system, for the great majority of crime suspects their first contact will be with the police. After having been arrested by the police, alleged offenders will be taken to a custody suite where they are seen by a custody sergeant. The role of custody sergeant was created in 1984 within the context of PACE. Custody sergeants are legally responsible for anything involving the welfare and treatment of a detainee. In order to fulfil this role, the custody sergeant on duty speaks to every individual who is brought into custody. The custody sergeant will make a decision whether the nature of the offence disqualifies a defendant from being bailed or cautioned. In this case the suspect will be kept in custody.

Advised by medical experts, custody sergeants will make a decision whether suspects have to be provided with special support whilst being interviewed and detained. The following sections 4.1 and 4.2 will focus on how arrestees with potential intellectual impairments are assessed by medical examiners and treated by custody sergeants. First, it will be analysed how intellectually disabled detainees are identified by custody sergeants and how this knowledge is integrated into custodial proceedings. In this context, custody sergeants' attitudes around fairness and justice will be discussed to gain a better understanding of their decision-making. In section 4.2 attention will be paid to forensic medical examiners' assessments of alleged offenders and how their body of evidence is functionally integrated into a discourse of truth around individual culpability.

4.1 Police: Detection and identification

All alleged offenders who are detained in custody are risk assessed by a custody sergeant at the beginning of their detention. During the risk assessment, which is mainly health related, detainees are asked, for example, whether they are taking medication or if they have addictions. In addition, questions will address the mental health of a person. The intellectual functioning of an individual and their needs are indirectly determined, mainly by the way they present and express themselves when talking to the custody sergeant. It is during the risk assessment that a sergeant will decide whether medical advice needs to be sought in order to determine a detainee's intellectual capacities and to clarify whether they can be detained. In addition, based on the outcome of the medical assessment, a decision will be made as to whether an appropriate adult has to be provided when the investigating officers see the person. This implies that custody sergeants are expected to possess some specialist medical knowledge, in particular if an illness or disability might not be very obvious. This was pointed out by forensic medical examiners as a potential weakness of the current system, leading to inconsistencies in the provision of support:

> *So I think somebody has to have a suspicion that there is a problem and I suppose that may vary a little bit from custody sergeant to custody sergeant, you know, how they approach that.*
>
> (Doctor)

In this context it was also outlined by respondents that there is a greater risk that people's needs remain unidentified when having a borderline and thus less visible disability:

> *Interviewer (IR): So how is an individual's intellectual capacity being assessed?*
> *Interviewee (IE): When it is obvious, I think it is only when it causes a problem. And when you think about it logically, naturally that should be the only time it should be assessed. Because knowing it itself, unless it is causing a problem in the person's environment at the time then why is it an issue?*
>
> (Learning Disability Consultant Nurse)

100

With the exception of one custody sergeant, none of the police respondents had an accurate understanding of intellectual disabilities. The majority of sergeants referred to a person with mental health issues rather than intellectual disabilities, highlighting the medical nature of behavioural problems that might occur:

My understanding of it would be, it would have to necessarily be something that actually impairs somebody's ability to understand or to communicate while they are here. So for instance you have the schizophrenic who is very well controlled on medication and who presents normally politeness.

(Custody Sergeant 1)

On the one hand, the statement above could be interpreted as demonstrating that whilst attention is being paid to people's mental health, intellectual disabilities appear to be far less acknowledged as impairing an individual in their dealings with the criminal justice system. On the other hand, the above officer's statement shows that there is confusion about how a person with an intellectual disability might differ in their needs from someone who has got mental health issues. This misconception of intellectual disabilities can result in custody sergeants overestimating a detainee's abilities whilst potentially ignoring their needs. When asked whether people with intellectual disabilities should be treated differently when engaging with the criminal justice system, a custody officer responded:

People with mental health problems know entirely what they are doing. They know right from wrong. They had issues in their lives which will be hopefully medicated [...] and they can act differently when under the influence of that particular issue but in itself that doesn't mean that they have an excuse for their behaviour, that they can do as they please and explain it with their disorder. I would say that's not a reasonable viewpoint.

(Custody Sergeant 1)

Gendle and Woodhams (2005) argue that this could be because under PACE a person's mental health and intellectual disability are treated as being similar. This suggests that in training for custody sergeants more emphasis has to be put on the needs of people with an intellectual disability.

In addition, respondents often described an intellectually disabled person as someone who has impaired reading and writing skills and in general a poor educational background:

> *It is not a physical disability, so they could be mentally retarded, or they could be dyslexic.*
>
> <div align="right">(Custody Sergeant 2)</div>

As a consequence, custody sergeants may be failing to seek medical advice to properly assess detainees in their capacities and needs. As one sergeant mentioned:

> *I wouldn't ask the doctor to see somebody who was just not bright. I would just say, is there somebody who could come over with you when you are interviewed.*
>
> <div align="right">(Custody Sergeant 12)</div>

Apart from staff being not sufficiently trained, Hayes (2007) points out that identification of alleged offenders with a borderline intellectual disability is compromised further by the absence of institutional indicators that flag up an individual's impairments because most of them have had no previous contact with specialist services. During the interviews with custody sergeants it became clear how heavily authorities rely on such indicators.

Custody sergeants use 'markers' that are attached to people's custody records. These markers highlight potential risks that a person may pose to themselves and others whilst in custody, for example being suicidal, or concealing drugs and weapons. In addition, these markers contain information whether a person had previously needed an appropriate adult because of their level of intellectual functioning:

> *You go through the custody records and you see that they did and they did have an appropriate adult at the time. So unless something has greatly changed or something, they should be having it again now. That usually helps you to determine if they should have an appropriate adult or not.*
>
> <div align="right">(Custody Sergeant 3)</div>

Despite these obvious deficits, respondents had great confidence in the mechanisms that are in place allowing identification of alleged offenders with special needs. Often it was stressed that in the event of the police failing to correctly determine a person's level of intellectual functioning, their solicitor should be taking notice of it:

> *The other thing, of course, is that you have got solicitors in the equation and if I don't do my job and I say, never mind an appropriate adult we will move on without one and the solicitor turns up and he has five minutes consultation and then says, hang on, this fellow doesn't understand what's going on. So there is a bit of a safety net there that a solicitor will flag that up.*
>
> <div align="right">(Custody Sergeant 12)</div>

Chappell (1994) lists a number of cases where solicitors too have failed to identify an intellectual disability. The extent to which defence lawyers can really be seen as a safety net remains doubtful as the frequency and duration of legal consultations available to the defendant is often limited. Some defendants might not even wish to see a lawyer before court as they might not be aware of the seriousness of their situation, or they might fear that requesting a lawyer could significantly delay their release from custody (Phillips & Brown, 1998).

Indeed, previous research has shown receiving legal advice in custody to be the most significant variable related to release times (Bottomley, Coleman, Dixon, Gill & Wall, 1991; Phillips & Brown, 1998). This was even more so when legal advice was required out of office hours during evenings or weekends (Skinns, 2009). In addition, Skinns (2009) stresses that since 2001 solicitors have been paid a fixed rate per visit to a police station, which includes waiting times and travel costs, whereas in the past all these were separately reimbursed. As a consequence, Skinns (2009) points out that consultations in person between lawyer and client have decreased whilst a growing number of times advice is being given over the phone. For less serious offences in particular, custodial legal advice was more likely to be not provided at all or given over the phone, indicating managerial pressures overcoming due process values. This has also been recognised in PACE. An amendment (21/08/2008) of section 6B1 in the Code of Practice in PACE clearly

states that: "Legal advice will be by telephone if a detainee is detained for a non-imprisonable offence." However, this does not apply if a detainee was identified as being in need of assistance from an appropriate adult. Consequently, whether a lawyer functions as a safeguard in identifying an individual's intellectual impairments depends on the nature of the offence of which this individual is suspected, as well as whether a person's needs have already been identified by the police and an appropriate adult has been provided.

When PACE was introduced requests for legal advice immediately significantly increased (Bottomley et al., 1991). In this context, Skinns (2009) expresses concerns about "the wider managerialist climate in which both the police and the lawyers are expected to do more with less" (Skinns, 2009, p. 412). This is not to say that lawyers will never pick up on an individual's intellectual impairments. However, as direct contact and personal interactions between lawyers and their clients are diminishing, so are opportunities for lawyers to identify their clients' incapacities, in particular if such incapacities are less obvious as in the case of borderline intellectually disabled defendants. Consequently, the officers' opinion of lawyers constituting a safety net within the process of assessing a person's intellectual functioning appears highly problematic.

During interviews with police, respondents often stressed they were part of a *system* of various agencies that an alleged offender would come in contact with when engaging with the criminal justice system. To some extent, the answers were a direct response by officers to criticisms about low recognition rates of intellectually disabled defendants in police custody. The emphasis on the police force being just one element within a much bigger system allowed responsibility to be shifted to other agencies. Thus, the failure of the police was presented by interviewed custody sergeants as a collective failure of various agencies. One of the respondents from the police mentioned:

> *I don't know, I mean if they had their solicitors, their solicitors have missed it. They will then go to court, the court may know the individual, and it is, oh, yeah, here he is again. And that includes a lot of the court*

staff. [...] So unless I get 2 doctors that analyse everyone that comes
through the door, I don't know, I might never know.

(Custody Sergeant 6)

Being part of a wider system was also what gave custody sergeants their confidence that defendants' need of support was being detected. In this context, all criminal justice agencies were perceived as a conjoint and elaborate system where members of different institutions are equally concerned about assessing and detecting defendants with special needs. This perception has to raise concern as it demonstrates that custody sergeants appear not to be aware of their own importance and their crucial function within the criminal justice system. The long term consequences of wrong judgements by the police can be devastating and extremely disadvantageous for the individual suffering from an intellectual disability. It has been highlighted in previous research (Gudjonsson, Clare, Rutter & Pearse, 1993; Talbot, 2008) that if not identified within the early stages of the criminal justice system, intellectually disabled crime suspects are likely to remain entirely unidentified.

Identifying an intellectually disabled alleged offender is, however, just one aspect within a complex situation. It appears to rather simplify matters when limiting the debate to processes of detection. Decision-making by criminal justice professionals goes beyond simply dealing with unlawful behaviour, and has to be understood as responses to complex situations revealing attitudes and opinions (Smith & Klein, 1984).

Attitudes are the result of a person's beliefs and values (Baily, Barr & Bunting, 2001). Within criminal justice, attitudes held by professionals towards crime and criminals have been identified as being predictors of behaviour and sentencing decisions (Cant & Standen, 2007). Consequently, explaining decision-making processes requires attention to be paid to beliefs and opinions shared among criminal justice professionals regarding how intellectual disabilities should be considered within the context of criminal justice. Hence, it is important to reveal how the concept of intellectual disability is constructed by custody officers in relation to professional identity, justice and fairness.

4.1.1 Professional identity

According to PACE a person needs to be provided with an appropriate adult when unable to fully appreciate the situation with which they are confronted. "When the officer has any doubt about the mental state or capacity of a detainee, that detainee should be treated as mentally vulnerable and an appropriate adult called" (PACE, Code C, 1D). Consequently, when this form of support is made accessible to an individual, the needs of this person have been identified and acknowledged. This is not a clear cut assessment. The way by which custody sergeants assess situations is related to their professional identity.

In their special role, custody sergeants are not supposed to get involved in any investigative matters but to stay neutral. Most custody sergeants, however, will have had many years of policing experience before being promoted to the role of custody sergeant. Having worked as an officer for many years, and thus having gained comprehensive experience in crime investigating matters is a prerequisite for being promoted to the rank of sergeant. With the exception of two, all fourteen interviewed police had crime investigative responsibilities prior to taking on the role of custody sergeant. Hence, many of them had great expertise in what kind of evidence is needed by the prosecution service to take a suspected offender to court.

With regards to how this knowledge is used, custody sergeants were influenced by two different views of their professional role. One group of sergeants professed to act autonomously from the mainstream police and its aims and targets. Those sergeants perceived their role as being solely about protecting the welfare of a detainee. The concept of fairness that these sergeants expressed was inseparably linked with uncompromisingly applying PACE to the benefit of the arrestee's welfare. The second group of custody sergeants saw their role as being a specialised one within the mainstream force. The following analysis will especially concentrate on the latter group of sergeants, though which of these groups is most influential remains uncertain. This group will be discussed in particular to gain better understanding of why people with intellectual disabilities remain at risk of being disadvantaged within the criminal justice system, despite greater awareness of professionals and improved methods of identification.

For custody sergeants who expressed a strong affiliation with mainstream police, experiences and knowledge gained when being a police officer had a strong influence on their decision-making when dealing with detainees. It impacted on attitudes towards criminals in general and alleged offenders with intellectual impairments in particular. Reality was negotiated by these respondents as a compromise between legal role expectations and informal obligations rooted in police culture. At the core of the latter was a determination to maintain public safety whilst simultaneously facilitating justice:

> *I have a specialised role within the police. I mean foremost I am a police officer. If a riot kicks off I would go out and work on the riot.*
>
> (Custody Sergeant 1)

> *You can't get away from the fact that you are still a police officer and you are, you would be negligent if you didn't, you know, identify certain issues including that whilst you are booking them in they will make unsolicited comments.*
>
> (Custody Sergeant 3)

Both quotes outline two roles that custody sergeants occupy within the police. In particular, the second quote highlights contradictions between these roles and the tensions that can arise. For custody sergeant 3 it appears to be a balancing act whereby the officer tries to manage conflicting demands in their jobs and to make decisions as to the processing of the detainee. This involves equally protecting the rights of an arrestee whilst indirectly supporting crime investigations.

The majority of respondents stated that when alone with suspected offenders, many of the detainees would make comments about their involvement in an offence of which they are suspected. This might be because the custody officer when talking to a suspect will clarify the role of a custody sergeant by emphasising the commitment to protecting a detainee's welfare and that crime investigating responsibilities are not part of a custody officer's remit. Nevertheless, any information that is disclosed by the suspect can potentially be used as evidence. This does not change in the event of a person being later assessed as in need of an appropriate adult during interview. As another sergeant commented:

They might be admitting it, they might be admitting the offence, then we could, from that you could presume they are telling the truth. You may not even know that that person is vulnerable in any way. You know, it could be that the individual understands the situation as it is and admits everything that is reported. 30 minutes after the interview the mom comes in and says he has got this [intellectual disability]. I have got lots of letters from the doctors and everything else. I think we should have been there. I would say, well I am very sorry, it wasn't apparent to me or anybody else. [...] We might make note about this new information that says they may be vulnerable. But I wouldn't, ah welcome down here mom, let's go and ask the questions all again.

(Custody Sergeant 6)

The statement above exemplifies how any information that is disclosed by a person in custody is used in conjunction with evidence supporting this information, and integrated into the discourse of truth regarding the guilt of a person. Therefore, whenever handling a person inside the custody suite, the custody sergeant, and for that matter any member of staff, are provided with an opportunity to potentially bypass measures that protect the rights of a suspect as defined in PACE. In this context, there appears to be a contradiction in PACE between safeguards and actions to be taken by custody officers in a particular situation.

On the one hand, it is clearly recognised in PACE that suspects who might be impaired in their intellectual functioning can give unreliable evidence when being deprived of safeguards during interview or whilst being detained.

> "Although juveniles or people who are mentally disordered or otherwise mentally vulnerable are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating. Special care should always be taken when questioning such a person, and the appropriate adult should be involved if there is any doubt about a person's age, mental state or capacity" (PACE, Code C, Notes for Guidance, 11C).

On the other hand, custody sergeants are obliged to keep a "written record […] of any comments made by a suspect, including unsolicited comments, which are outside the context of an interview but which might be relevant to the offence" (PACE, Code C, 11.13). This applies to any information that a suspect might disclose regarding their arrest (PACE, Code C, 3.4). Neutrality of custody personnel is maintained in PACE by explicitly prohibiting staff from inviting comments, as this might constitute an interview.

This is particularly alarming in the case of intellectually disabled people who are eligible for an appropriate adult, as they might not fully understand the situation they are confronted with as well as being unable to fully comprehend the consequences of their statements. The matter becomes even more concerning as it seems that for the custody sergeant quoted above, a person confessing an offence appears to be more credible than a suspect denying the accusations against them.

It has been highlighted in previous research that people with intellectual disabilities are particularly at risk of being wrongly convicted because of having confessed to a crime that they might not have committed (Chappell, 1994). In his study, Perske (1994) states that if people with intellectual disabilities had committed a crime, a confession could be easily secured. However, when people were not involved in a crime they still confessed. Gudjonsson (1992) argues that whilst underestimating long term consequences of their self-incriminating statements, the suspect might hope that if they confess they might be able to withdraw more quickly from a stressful and intimidating situation. "Suspects may naively believe that somehow the truth will come out later, or their solicitor will be able to rectify their false confession" (Gudjonsson, 1992, p. 228).

In his book, Gudjonsson (1992) describes a number of cases where suspects have made false confessions, identifying low intelligence and high suggestibility as characteristics of people who might be at greater risk of making false confessions. In addition, Gudjonsson (1992) argues that the risk of false admissions of guilt increases when suspects are interviewed in the absence of legal advice. One of Gudjonsson's (1992, p. 250-251) case examples involves a 21 year old man who is described as "mildly mentally handicapped (IQ66) with significantly impaired comprehension and reasoning". In addition, the suspect is extremely suggestible.

The suspect evidently had limited and sometimes no understanding of some of the processes that took place in the police station. Despite his difficulties, when asked questions by the investigating officers, he gave coherent answers. Gudjonsson describes how, when being interviewed without an appropriate adult or solicitor, the suspect confessed to a robbery that had happened a week before. It later turned out that most of the times he had not understood the questions, but answered them anyway as he thought it might be helpful to the police. This example highlights the importance of the safeguards for vulnerable adults set out in PACE.

The statements by custody sergeants 1, 3 and 6 on pages 109 and 110 shed light on the custody suite being an apparatus within the criminal justice system where, apart from detaining people, valuable evidence is secured that supports prosecuting an individual. By using advanced technology, e.g. fingerprint scanners, and drug and Smartwater[7] testing devices, the custody suite serves to produce knowledge on which the discourse of truth regarding a person's guilt is based.

Both sergeants 3 and 6 quoted above do not perceive taking and using unsolicited information given by vulnerable people as compromising the integrity of criminal justice processes. This raises questions about how custody sergeants construct the concepts of both justice and fairness within the context of an intellectually disabled detainee. Although it might appear that the terms justice and fairness address more or less similar issues, respondents constructed them as distinctly different in their symbolic meaning and power.

When referring to fairness, custody officers stressed the rightness and appropriateness of the judicial procedures into which an alleged offender might be incorporated when engaging with the criminal justice system. When used by police, the term justice was outcome related and two dimensional in its meaning. On a macro level, criminal justice was constructed by respondents around securing and maintaining social order by sanctioning behaviours deemed unlawful. On a micro level, the concept of justice was 'broken down' by police officers to a more individual level, referring to the specifics of a crime case, including an element of

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[7] Smartwater is a forensic liquid that can be applied to any kind of valuables. The liquid consists of microscopic particles that generate a unique code. For a number of days it will be virtually impossible to wash off Smartwater when it comes in contact with skin. It is invisible to the eye, but can be detected and decoded by the police using special equipment.

revenge for the victim. As will become clear, a sergeant's decision to provide an appropriate adult or other forms of support to an alleged offender depends on how an intellectual disability might be in conflict with issues around fairness and justice.

4.1.1.1 Construction of the criminal

Justice, when related to an individual incident, was almost exclusively victim-orientated with a focus on severe and immediate punishment of convicted offenders:

> *For every crime they commit there is another victim. And that victim feels vulnerable. And it's wrong.*
>
> <div align="right">(Custody Sergeant 2)</div>

Often intellectual disabilities were perceived to be an illegitimate mitigation of a crime suspect's wrongdoing and a potential defence strategy, allowing the individual suffering from them to avoid legal sanctions (cf. section 4.1.1.3).

A criminal, in this context, was perceived in relation to the judicial definition of *mens rea*; a person's ability to distinguish between right and wrong. In this view, when engaging in an act of criminal behaviour the individual purposefully, deliberately and, most importantly, voluntarily decides not to comply with society's norms and, therefore, deserves to be punished (Scraton & Chadwick, 1991). In general, a criminal was perceived by respondents as a person who expresses in their behaviour their rejection of basic moral values, whilst at the same time knowing about the short and long term consequences that such behaviour might inflict on themselves as well as on their victims:

> *A lot of people who come into the criminal justice system, whether they start and continue throughout their level of life from their childhood, they have got no concerns about you or anybody on the outside. They know the risk that they run.*
>
> <div align="right">(Custody Sergeant 5)</div>

Unsurprisingly, custody sergeants expressed little sympathy for people not obeying the law. However, there were two different groups of detainees that custody sergeants distinguished. This distinction was based on how persistent and

recidivistic a person had been in their previous criminal behaviour. Custody sergeants expressed great frustration about recidivists as, again, it was emphasised that it was within the control of the offender to change and stop their offending:

And it is frustrating because they are causing themselves these problems. All they need to do is do what they are told and not break the law.

(Custody Sergeant 1)

On the other hand, custody sergeants' respect towards detainees appeared to particularly depend on a suspect's acceptance of their wrongdoing and their willingness to show remorse:

You know, quite a few people that come in here know that they have done something stupid and they made a mistake and you know, you do the best you can for them because you know that it is out of character. They have done something they are going to regret and you know that you are never going to see them again. So those are the people we have a lot of respect for. The ones that are in here all the time, then they start to get on your nerves, because nothing happens to them basically.

(Custody Sergeant 7)

This appeared to have a very strong influence on a sergeant's attitude towards a detainee and might to a certain extent even impact on how a detainee is dealt with. This confirms Carlen's (2009) finding whereby police officers categorise people according to their criminological characteristics. As Carlen outlines: "Policemen reduce the diversity of defendants into manageable proportions by categorising them into five main types: the 'villains'; the 'regulars'; the 'nuts'; the 'immigrants and foreigners'; the 'normal ordinary person'" (Carlen, 2009, p. 611). As one sergeant stressed:

Now, if you know what you are here for then deal with it. It is your doing and now do your utmost and don't come back again.
[...]
You know, he [detainee] is a pain in the arse. You know, some of them are, you know, I mean they are so high demanding and, you know, it is all their

own wrongdoing. You know, it has nothing to do with me, it has nothing to
do with the officers.

(Custody Sergeant 6)

Showing remorse is an integral part of western criminal justice systems. In this context, Bibas and Bierschbach (2004) speak about the "individual badness model" whereby remorse and an apologetic attitude of the alleged offender are used as "indicators that individual defendants are less bad and so need less deterrence, incapacitation, or retribution" (Bibas & Bierschbach, 2004, p. 88).

This particularly raises concern within the context of alleged offenders with intellectual disabilities who might not fully understand why they have been arrested or what their offence might have been. As an intellectually disabled female prisoner from Scotland in Talbot's (2008) study said: "I understand I have done something wrong, but I'm still not quite sure as to what it is" (Talbot, 2008, p. 21). In the same research, one fifth of defendants with intellectual disabilities said that they had not understood some of the processes within the criminal justice system and had difficulties comprehending the language used by professionals. These problems might prevent people with intellectual disabilities from complying with role expectations when engaging with criminal justice authorities and further disadvantage this particular group of defendants.

During the interviews in the present study it very quickly became obvious that in their opinion many sergeants were influenced by a myth of equality (cf. Glaser & Deane, 1999, p. 353), whereby intellectually disabled offenders are perceived as essentially rational actors who have failed to comply with social role expectations in society. Derived from a medical understanding of disabilities, an intellectual disability was constructed in terms of symptoms and treatment. In comparison to a non-disabled defendant, the symptoms of an intellectually disabled defendant are their inability to fully comprehend questions and to correspondingly and coherently articulate answers:

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So from a person with learning difficulties[8] point of view, it is down to the appropriate adult to as best as they can make sure that this person understands what is going on, what is being asked and the answer they give is as honest an answer as they wish to give. It is what they wish perhaps to say.

(Custody Sergeant 4)

We would always explain to the person that is responsible [appropriate adult] what they [police] are doing, why they are doing it. And if they [intellectually disabled offender] are choosing to sign something then we feel happy because they [appropriate adult] will read it first on their [intellectually disabled offender] account.

(Custody Sergeant 9)

Therefore, when treatment is made accessible by providing support that addresses the immediate needs of a detainee, it is believed that the person's rational being is laid bare. Consequently, an intellectual disability is constructed by the police in complete isolation of an offence, but only within the immediate context of a specific criminal justice procedure that a person is involved in at a specific time, e.g. a police interview. The decision of what measures of support are needed is made with regards to the specific requirements of a particular criminal justice procedure (cf. section 4.1.1.3). The concept of intellectual disability being detached from offending behaviour also has an important influence on a sergeant's concept of criminal culpability:

If they [intellectually disabled person] have been assessed, if they have committed a crime and they have been assessed if they have been criminally responsible then of course they should be punished. They should go to prison like anyone else. You can't commit a crime and get away with it because you have a learning disability. As long as they know the difference

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[8] The respondent had been informed about the difference between learning difficulties and learning disabilities but kept using the terms interchangeably during the interview. When correcting the respondent numerous times as well as enquiring whether the interviewee was referring to difficulties or disabilities, the officer always emphasised that they were referring to disabilities. Nevertheless, the respondent continued to use the terms interchangeably and the interviewer made the decision not to correct the respondent anymore so as not to interfere with the flow of the interview.

*between right and wrong and they understood the process, and the evidence
has been secured and preserved.*

<div align="right">(Custody Sergeant 2)</div>

The above quote is very complex in its meaning and addresses three different issues. First, the custody sergeant outlines a perception of crime as a voluntary act as has been previously explained. The statement exemplifies how the notion of a rational actor being hidden inside an intellectually disabled person is integrated into the concept of criminals that custody sergeants have in general. Custody sergeants who perceive themselves to be part of the mainstream police did appreciate that detainees whose intellectual functioning is below average might be impaired in their ability to partake in criminal justice proceedings. Police efforts are, therefore, concentrated on facilitating the immediate needs of an intellectually disabled detainee to improve their ability to adapt to the requirements of the various criminal justice procedures, for example being able to make statements during a police interview. Thus, when given appropriate support it is assumed that this group of suspects can justifiably be incorporated into the mainstream criminal justice system.

Second, the custody sergeant expresses a general fear of a crime being committed without the perpetrator being punished. As mentioned before, the label intellectual disability was referred to by many respondents as a loophole within the judicial system, allowing criminals to withdraw themselves from being charged and prosecuted. This was seen as potentially undermining the criminal justice system because it deprived the crime victim of their justice. Therefore the sergeant, albeit implicitly, highlights the importance of the universal character of law which helps to close up such loopholes. Hence: *"They should go to prison like anyone else"* (in this context see also section 4.1.1.3).

Third, the sergeant quoted above mentions evidence that the police were able to secure, demonstrating the guilt of an alleged offender. As will become clear, the quality of evidence against an alleged offender can have an influence on a custody sergeant's decision-making regarding the support that should be made available. On the one hand, the nature of the evidence decides whether a case will be taken to court or not: if it is likely that a court trial will take place, sergeants will uncompromisingly provide all support that is necessary to assure the validity of any

evidence secured in custody. On the other hand, if there is strong evidence proving a person's guilt whilst the offence in question is minor enough for the custody sergeant to deal with, it appears less likely for support to be made available. As two sergeants individually mentioned:

If I gave somebody a form and he is like I can't read, but the whole job, the way I am dealing with them is conversational. And I wouldn't say that an individual is disadvantaged because nothing in our process entails on reading something to understand it. Cause I will talk them through it. Do I need an appropriate adult for someone who can't read? Now depending on the situation I would argue no.

(Custody Sergeant 6)

You know that if you don't get an appropriate adult and it is a serious job [offence], you will lose the job and nobody wants to see that. Nobody wants to have a job thrown out because you didn't do your job. So that's the balance. I think that with experience you get to know which one you can get away with not bothering and which ones you can't.

(Custody Sergeant 12)

An individual's disadvantaged position appears to be negotiated by custody sergeants according to the extent to which a person is likely to engage with the criminal justice system. This indicates that help and assistance are not simply provided in order to help defendants in their understanding of criminal justice procedures. In addition, measures of welfare seem to support a discourse of truth around capacity within the criminal justice system, maintaining and reinforcing central ideologies around culpability and individual guilt.

4.1.1.2 Support and criminal justice

During the interviews it turned out that police provide an appropriate adult mainly to secure valid evidence. Sergeants were determined to assure evidence to be gathered allowing a suspected offender to be successfully prosecuted:

If somebody comes in and has a mental health issue[9] and they don't have an appropriate adult then potentially when the case goes to court the evidence can be thrown out because they weren't treated right. So why running that risk? Have your appropriate adult, do things correctly and then the evidence, the case is watertight.

<div align="right">(Custody Sergeant 1)</div>

The statement above highlights an attitude that was shared by all the interviewed sergeants: facilitating a successful prosecution requires the rights of an individual to be respected. This underlines how custody sergeants facilitate crime investigations to establish the factual guilt of the individual alleged offender – an indicator by which success of criminal justice is measured (Sung, 2006):

They tell us it is your responsibility, and that mental health issues, medical issues and people with learning disabilities etc. that those categories that people are potentially at higher risk not just medically or physically but evidence-wise. If we don't do something we should do in relation to someone with either a disability or they might require an appropriate adult then we can lose evidence and a case can be lost. So it is essential from an investigative point of view that we comply with the law.

<div align="right">(Custody Sergeant 5)</div>

As outlined above, proving the factual guilt of an alleged offender is interwoven with assuring a perpetrator's accountability at every stage of the process in order to potentially produce truth by confession (Foucault 1979a, p. 58/59). Therefore, the role that custody sergeants play in the process of determining the quality of some of the evidence outlines their active involvement in the process of generating a discourse of truth within the criminal justice system demonstrating both *mens rea*

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[9] It needs emphasising that when referring to mental health issues, the respondent was using an umbrella term for any mental or intellectual vulnerabilities which a detainee might expose. Many respondents from the police used the term mental health issues when referring to intellectual disabilities. This might be because a suspect with a mental illness poses the same problems to police officers as a person with an intellectual disability, and triggers the same safeguards to be put in place.

and *actus reus*.[10] This concept of their role has also been internalised by sergeants themselves and impacts on how reality is negotiated:

> *The last thing we need to do is to end up taking this person to court for a criminal allegation and then losing the case at court because they weren't treated properly when they were in custody because they didn't have access to an appropriate adult so they didn't understand what was going on – I only admitted it because I didn't understand it.*
>
> <div align="right">(Custody Sergeant 8)</div>

Consequently, the job of a custody officer requires the law to be interpreted regarding the guilt of a person and their correct handling (cf. Wilson, 1968, cited in Smith & Klein, 1984). Here a question arises: What are the reasons for a significant number of defendants with intellectual disabilities not being provided with an appropriate adult (Cummins, 2007; Leggett, Goodman & Dinany, 2007; Medford & Gudjonsson, 2003; Talbot, 2008)? To a certain extent, an answer to this question can be found by paying attention to the complexity of immediate problems that consulting an appropriate adult can cause for the individual custody sergeant in charge.

All respondents described it as being extremely inconvenient when being obliged to involve an appropriate adult. If the police for whatever reasons are unable to consult a relative or a person that is close and known to the defendant to assist them, then social services or members of the appropriate adult scheme will be contacted.[11] In any case, recruiting an appropriate adult can take up to an entire day. On average it was said by respondents that it would take five to eight hours until an appropriate adult would arrive at the custody suite. Especially during weekends or during the night it was said by sergeants to be virtually impossible to get appropriate adults to assist an alleged offender when being interviewed. This can significantly extend the time a person might spend in detention, which can put additional pressure on custody sergeants:

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[10] *Mens rea* refers to the fact that a person at the time of engaging in an act of criminal behaviour did have the capacity to understand their wrongdoing.
Actus reus refers to the fact that a criminal act has been committed

[11] In the present study, Greater Manchester was the only area where an appropriate adult scheme existed. Its members were mainly retired volunteers with a former professional background in psychology or social work. In Cheshire and Merseyside no such scheme existed at the time this study was conducted. In these areas custody sergeants would contact social services.

I will be honest with you. If you need an appropriate adult it is a pain. It's an extra job to do. You have to get one, you have to find one, you have to get them here. And in the meantime you can't deal with the person you have got in custody. So it's a pain when you recognise that you need an appropriate adult.

(Custody Sergeant 12)

A custody sergeant is not only accountable for the immediate welfare of individual detainees, but also has overall responsibility for the custody suite. This involves 'managerial' tasks such as keeping cells free, reducing the time of an individual in custody to an absolute necessary minimum and expeditiously dealing with people when they are brought into the custody suite:

You are going to make sure that they are being dealt with expeditiously. We have got certain time limits to work towards.

(Custody Sergeant 8)

Yeah, we have to get people through the job, you know this holding area I showed you, where we entered through the double doors. We are supposed to get people in as fast as possible and if it is over 30 minutes then it starts going into the kind of the bad result. And we get fed tables every month about our performance of previous months as to how many we got through straight away, how many were less than 30 minutes.

(Custody Sergeant 12)

Custody sergeants are measured and evaluated in their performance with regards to targets, which can put intense pressure on the individual sergeant:

Someone who for example who has been drinking quite a bit and you would usually give a good eight hour period for them to clear the alcohol from the system. And I get a phone call from the inspector who is managing custody facilities saying, listen up, you have really got to push these people through now and dispose of them somewhere because we have got far more serious offences coming through. And that sergeant might have been pushed to move

people out maybe not with a full assessment of what's going on or what's wrong with them. And then that person is out and we have got the cell free.

<div align="right">(Custody Sergeant 10)</div>

Thus, a setting has been created in which sergeants are under constant pressure to process alleged offenders through the system as quickly as possible:

It is all pressures on you which can make you cut corners or lead you to cut corners if you wanted to and making mistakes.

<div align="right">(Custody Sergeant 10)</div>

The pressure on custody staff appears to be especially intense during weekends, the busiest time for custody officers:

When there is three of you and you have got a queue of people outside, let's say there is five, six, seven people waiting to come in, and that is what we are measured by, we need to get them in. Because the quicker we get people in the quicker the officers that are out there, may it be transport officers or police officers can get on with what they need to get on with.

<div align="right">(Custody Sergeant 4)</div>

The above quote outlines informal guidelines, apparently established by higher police management, that are contradicting PACE. It is formally noticed in PACE that delays in processing arrestees might occur in the event of groups of people being simultaneously taken to a custody suite for detention. In addition it is also recognised that contacting an appropriate adult might cause delays and lengthen the time that a person might spend in detention. These internal and informal guidelines are extremely counterproductive as they potentially cause custody sergeants to ignore a detainee's vulnerable status and the need for safeguards to be put in place.

The situation is complicated further as some of the police performance indicators are contradicting each other or are in conflict with police work taking place outside the custody suite:

They push us on from the Government all the time and the chief constable here just to make arrests, arrests, arrests. Whether we are ready to

interview the person or not, the push is on to arrest them, lodge them in the custody suite and then maybe go and get the rest of the evidence.

(Custody Sergeant 4)

The custody sergeant describes a situation in which different targets cause conflicts among different police units with varying priorities. If a person is kept in custody whilst the evidence is being secured, the time this person is going to spend in custody will correspondingly increase. If, alternatively, the suspect is bailed whilst the evidence is collected it will negatively impact on the sergeant's arrest rate. This puts additional pressure on custody sergeants and forces them to negotiate a compromise between various targets:

We have got a named offender policy saying you have got to arrest people within a certain period of time. But then we are also trying to reduce the time that people spend in custody, that we are doing things expeditiously. Because we don't want to release people. Because there is a target on our, even if there is no target there, there is a target on this, this is our disposal for people who have been arrested. 175 of the prisoners who come through the door have been refused charges, so we have to ensure that we have a positive disposal. So we have got to try and improve the refused charges. Now, if somebody comes in without, if you come in and there is no evidence we have to refuse charge. So then we have to make a decision, well, are we going to bail them or are we going to make a decision that, you know, we can't pursue this matter. So, do we then increase the number of people who are on bail because we do have a target on how many people we have on bail at any one time.

(Custody Inspector)

In particular, custody sergeants appear to be under pressure when insisting on working autonomously from the mainstream police. It was outlined by custody officers that firmly applying PACE in order to protect a detainee's welfare often causes conflicts with officers who are making arrests, as well as with officers who are involved in conducting the crime investigations.

I think sometimes officers are bit sort of taken aback when you perhaps take the prisoner's side. But it is not that you are taking any sides it is just the

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duty you have to look after them. Sometimes that means that you have to
make sure that you have to forget about the criminal investigation for a
second to ensure they are safe and well as it were.

<div align="right">(Custody Sergeant 11)</div>

The conflicts with which custody sergeants are confronted seem to result from their isolated position within the criminal justice system. To some extent, their remit will at times demand that they make decisions that can hinder investigations. Moreover, custody officers are officially part of the police, and they are measured in their performance in relation to targets that are closely affiliated with crime investigative objectives, e.g. assuring the value of evidence by guaranteeing correct handling of detainees during interview, and allowing detainees to be moved quickly through the various criminal justice procedures. Thus, their official role and professional identity appear to be in conflict with unofficial and informal demands and expectations by members of other police units. As one respondent mentioned:

There is a, I think there is a push on custody officers from senior officers
who are investigating offences maybe to try and short-circuit things and
become more involved. And we are trying really to remain impartial and
independent.

<div align="right">(Custody Sergeant 10)</div>

These demands cause a tension between the welfare aspect of making support available when required and the need to quickly process detainees through and out of the custody suite to comply with management targets. This might make detainees more likely to be subjected to disciplining procedures.

Hence, to a certain extent the inconsistent provision of support can be explained by focusing on contradictions embedded in institutional structures that organise the police as an agency. However, this approach fails to address how structural constraints generate a police culture which on an ideological level impacts on a custody sergeant's decision as to whether support in the form of an appropriate adult is needed.

Although the immediate impact of an appropriate adult during the various custody procedures might be little (D. Brown, 1997; Leggett et al., 2007), their provision is

nevertheless of great importance. Appropriate adults are often "gateway safeguards" leading to other kinds of support (Olubokun, 2008).

Within the context of the present study, provision of an appropriate adult was of particular interest. It obviously indicated that a person had been identified as having special needs. Furthermore, as decision-making is linked to attitudes, the request by custody sergeants for an appropriate adult to be present whilst a person is taken through the various custody procedures revealed the custody officer's concept of professional identity, as well as their attitudes towards intellectually disabled offenders.

Finding an answer to why sometimes appropriate adults might deliberately not be provided requires attention to be paid to the way custody sergeants construct intellectual disabilities within the context of fairness. In many interviews it was argued that a system that takes individual circumstances into account too extensively allows intellectual disabilities to be illegitimately used as a defence strategy:

> IR: Do you think that people with learning disabilities should be treated differently within the criminal justice system?
> IE: No. We shouldn't really because we can't fall into the trap where people can use I have got a learning disability as a defence to a crime that they know is a crime.

<div align="right">(Custody Sergeant 8)</div>

4.1.1.3 Support and the construction of intellectual disability, guilt and fairness

It has been noticed previously (Gudjonsson, 1992; Jones & Talbot, 2010) that appropriate adults are recruited by police officers rather inconsistently and only when it appears to be certain that the suspect has severe intellectual impairments. One might suggest that officers are reluctant to provide an appropriate adult as it means allowing special treatment of a detainee. When Cant and Standen (2007) interviewed criminal justice professionals with regards to how intellectually disabled suspects should be dealt with, many of their respondents strictly rejected the idea of changing the law or any essential processes because this would compromise the fairness of the system as it undermines its universal character. In

the present study it was emphasised by many respondents that having exceptional rules would potentially give offenders the chance 'to get away with it':

> *My view on this would be if you open it up it would be amazing how many people, how many criminals all of a sudden developed, have mental health problems. So it would get completely abused. So I am quite happy that it is not open season at the moment.*

<div align="right">(Custody Sergeant 1)</div>

This conflict reveals the symbolic character of a custody sergeant's acting. Their decision as to whether support should be provided, or medical advice needs to be sought, appeared to be mainly about symbolically demonstrating the integrity of the criminal justice system. Morgan (1996) stresses that part of this integrity is the system's ability to demonstrate that guilty offenders are unable to withdraw themselves from legal sanctioning. At the same time, integrity of the system is maintained through a discourse that disapproves of miscarriages of justice or mistreatment of alleged offenders when they are engaging with the criminal justice system.

For custody sergeants, the conflict between a detainee's welfare and police investigations appears to be particularly strong when there is little doubt about an offender's guilt:

> *If somebody knows it is wrong to steal, has not had a good education at school but still knows that you go into shops and you buy things but stole something, they have been witnessed stealing something, having an adult won't really sort of change that situation. So they are interviewed with an adult they admit the offence they are interviewed without an adult they admit the offence. There is not a lot of a difference in that.*

<div align="right">(Custody Sergeant 6)</div>

Interestingly, the respondent not only refers to the evidence proving an alleged offender's guilt, but also highlights the individual's accountability. Thus, dismissing the recruitment of an appropriate adult seems not unfair towards the perpetrator, even if the person might be eligible for one.

This suggests two areas of concern. First, as Ainsworth (2000) highlights, interviewing officers have a high tendency to assume a person's guilt as otherwise they would not have been picked up by the police in the first place. Hence, there is a risk of a sergeant's objectivity being compromised regarding a suspect's involvement in an offence, as well as what support should be made available. It becomes clear that indeed "police attitudes to people with intellectual disabilities are essential in meeting the police code of ethics, which stresses impartiality and respect for human dignity" (Baily et al., 2001, p. 344). Second, if a custody sergeant fails to record that an alleged offender's incapacities required an appropriate adult to be provided in custody, there is a greater risk of no support being put into place if the same person comes to the attention of the police again.

In general, it appeared that for custody sergeants, the decision as to whether support should be made available to an alleged offender constitutes a conflict between justice and fairness or, as Skinns (2009) puts it, a conflict between crime control and due process values. For custody sergeants who saw their role to be not entirely autonomous from the police force, the concept of fairness appears to be integrated into the concept of justice; the process is justified by the outcome. In this context, the theory of Bottomley et al. (1991) gains weight, that whether support is provided for an alleged offender in the form of an appropriate adult and/or custodial legal advice, depends on whether it will be beneficial to the sergeant rather than the detainee. This would also explain why the extent to which an alleged offender is likely to engage with the criminal justice system has an impact on how potential needs are constructed.

4.1.1.4 Construction of punishment

During the interviews, custody sergeants portrayed offenders as dangerous people who pose great risks to themselves and others. During conversations with respondents from the police, it became apparent that the term truth was not limited to the ideological discourse that takes place on a macro level. Custody sergeants seemed to organise their strategic decision-making based on a conceptual negotiation of reality that contains a specific truth about a detainee. For example, if a person has been in custody before, the previously recorded information and

especially the markers that might have been attached to their custody record enable the officer to construct a character of individual suspects:

> *They [custody sergeants] never believe anything they are told, and things like that. I think that's probably true actually, and it doesn't matter where you are and whether you are working or not. You tend to believe perhaps half of what people are saying. And then if it has been proved then that's fine. But you will take nobody on their first appearance.*
>
> (Custody Sergeant 4)

Thus, under the umbrella of identifying and documenting needs that a person may have, markers are used to construct a particular character of a criminal based upon untrustworthiness and the potential danger that they might pose to custody staff:

> *There are warnings on there that they might hide weapons about them, they may be violent, they may use firearms, they may take drugs. It is not an endless list but there are lots and lots of warning markers. So it is likely that I might be asking you the questions and then looking at the markers knowing that you are lying.*
>
> (Custody Sergeant 8)

This discourse, on the one hand, diverts attention away from the dehumanising processes in custody suites and prisons, and the intimidating and daunting environment that custody suites and prisons are. On the other hand, the discourse provides the ideological justification regarding the handling of an individual, which is characterised by using measures of control and restraint. For example, on the grounds of a person's behaviour during the risk assessment, a custody sergeant can decide to deprive an individual of their own clothing or to put a person under constant observation.

Pemberton's (2008) analyses of what he calls "state talk" gives a useful insight into how the integrity of state institutions and state agents is defended and maintained through a particular discourse of truth. Pemberton concentrates on a form of discourse in which facts about people dying in police custody are deliberately distorted in order to cover up institutionalised state violence. Although Pemberton (2008) concentrates in particular on death in police custody, the most severe and

upsetting result of police failure, his analyses also help to understand less severe informal strategic behaviour. Pemberton points out that state talk often portrays criminals in the form of an underclass, "a distinct social group characterised by their rejection of the work ethic, high illegitimacy levels, involvement in persistent crime (particularly violent crime) and reliance upon state benefits" (Pemberton, 2008, p. 251). Respondents when expressing general views about causes of crime shared this discourse:

> *People are breaking the law all the way through the 20s until at some point they have got something to lose, either a girlfriend, or children, or a house, or a job and at the point they have got something to lose. They will then think about their actions and they won't want to keep on coming into custody. But as long as they see more benefits to them then the costs they will keep on stealing or keep on assaulting people because it is what they do and they haven't got anything to lose.*
>
> <div align="right">(Custody Sergeant 1)</div>

The sergeant's argument outlines a discourse that is based on seemingly common knowledge which is easy to understand and to adopt. The discursive truth that is being generated in this context portrays state agencies and their members as uncompromisingly protecting and defending order in society and, thus, social life from dangerous criminals. In particular, the danger of criminals is increased by depicting them as striking at random, posing a threat not only to a special target group but to society in general. It is what Foucault (1979b) called the "The rule of common truth" (Foucault 1979b, p. 96), which characterises modern justice. This discourse that equally addresses causes of crime and the dangerousness of criminals legitimises a particular course of actions that should be taken as a response to criminals. Sim (2004) identifies this form of discourse as the basis of state power.

> "The production and reproduction of an inequitable social order requires a state form that is capable both of serious repression while actively engaging in constructing a popular, common sense, interpellated consciousness around the myriad range of issues, activities and events that are part of the everyday world in which human beings live and work" (Sim, 2004, p. 116).

Based on such knowledge about offenders, which appeared to be especially popular among members of the police, custody sergeants shared an ideology of criminal justice favouring severe punishment with little or no room for rehabilitation. Many police respondents saw punishing a criminal as an inherent part of justice. To some extent, interviewees perceived punishment as a chance for society to be compensated by the offender:

> *I do think things should be harder, I think they should have to work whilst they in there, they shouldn't be sat watching television, having pool tables and those sort of things, those should be things that are earned because they work harder, doing work that gives back to society, you know.*
>
> (Custody Sergeant 3)

To a much greater extent though, punishment was perceived as an effective action against crime, coercively preventing people from engaging in forms of unlawful behaviour:

> *The only way you can actually stop somebody breaking law is by telling them that there is a punishment.*
>
> (Custody Sergeant 1)

In particular, officers highlighted the symbolic purpose of justice when an offender is punished for their wrongdoing. In this context, punishment was interpreted almost in complete isolation of any rehabilitative meaning. Sanctions were constructed mainly around their deterring characteristics, and to most respondents deterring currently convicted offenders appeared to be of greater importance than deterring potential future offenders. In some cases, this led to drastic and shocking analogies when interviewees expressed their frustration about lenient sentencing decisions that were interpreted as the result of a criminal justice system which has become soft on crime:

> *Arabia and other countries, if you commit a crime you are going to lose your arm or get the death penalty, so there is not going to be… I am not for that, but it is a deterrent there, this is what prevents them from committing crime. You know we need to be a bit more, we need to use prison.*
>
> (Custody Sergeant 2)

This statement is particularly concerning as it reveals attitudes that reject fundamental democratic values that are inherent to western criminal justice. It is especially worrying that this statement was made by a member of the police, a frontline agency whose members are supposed to enforce, maintain and defend such democratic values in and through their work. As the above statement also exemplifies, punishment was seen by sergeants as a powerful tool in order to reduce crime, conceptually linking the severity of sentencing with decreasing crime rates. Thus, the perceived leniency which offenders are seemingly dealt with in the criminal justice system was seen by many officers as the main reason for offending in society:

> *I mean I know that my view is a little more hard line than others and I don't apologise for that but it is because of the experience that I have had, you know, dealing with people who have committed very serious offences over long periods of time going to prison for very short periods of time. And you think what kind of punishment is that? They go to prison, and they get their play station and they get the TV in the cell and, you know, it's like a holiday.*
>
> (Custody Sergeant 1)

In this context, officers felt sabotaged in their profession, especially in their function of enforcing the law:

> *And we tend to get the stories that people end up out on the streets again and they don't feel like they are punished. But it is quite demoralising sometimes.*
>
> (Custody Sergeant 12)

Great frustration about too lenient sentences was often explained by outlining the time-consuming bureaucratic tasks that the police are required to attend to when putting a case together for the prosecution. In the event that a sentence was perceived as too lenient, any work and time that had been invested by police officers in investigating and securing evidence was seen as having been devalued by the court. Thus, the severity with which the criminal justice system operates has an impact on how custody sergeants construct the meaning of their work within a judicial and social context.

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Officers appeared to feel undermined in their professional status by a paradigm of criminal justice considering the welfare of an offender:

> *Society has not broken down but there is no fear of the police anymore.*
>
> (Custody Sergeant 8)

The above quote demonstrates an attitude of securing and maintaining the social order by deterrence. The police, as an agency, appears to be predominantly constructed by respondents through the use of oppressive measures of social control. In this context, respondents often voiced great frustration about having been stripped of many powers that allowed the police to take a more active role in charging an alleged offender:

> *A lot of the decision taking that we used to make is now gone to our prosecution service. So our role is more basically looking after them than making decisions, my decision-making is pretty much gone.*
>
> (Custody Sergeant 7)

The loss of power was sometimes perceived by sergeants as restricting them in their work and, therefore, undermining their role in relation to enforcing the law:

> *The way it works is, the CPS [Crown Prosecution Service] wants to, and again this is a personal opinion this is not the police, they want to prosecute cases that they have a very, very good chance of winning. If they don't have a very, very good chance of winning it they don't want to run it, so they will say we are not running it. Now, historically we would charge people on sometimes on quite flimsy evidence, quite, you know, minimal amount of evidence. They would then turn up at court and they plead guilty. Now, all that discretion has been taken away.*
>
> (Custody Sergeant 8)

Prison sentences were the course of action most favoured by the majority of the respondents. All interviewees very strongly believed in prisons as an efficient measure to address issues of public safety:

If you are in prison you cannot go out and assault people or stealing from
them and cause them misery. You absolutely can't.

(Custody Sergeant 1)

Yeah, I do believe in prison. As a punishment, yeah, I do believe it is a
punishment, as a deterrent, yeah and as to prevent crime being committed,
yeah.

(Custody Sergeant 5)

Once again, the function of prisons was constructed excluding any intention to
successfully rehabilitate an offender. To some extent this might be due to how
custody sergeants perceived criminals. As has been mentioned before, the concept
of crime as an act that is deliberate and voluntary in nature and performed out of
free choice clearly dominated among police officers. Thus, especially with regards
to recidivistic perpetrators, it seemed unlikely to custody sergeants that
rehabilitation or any form of restorative justice would be an appropriate response
towards crime that is likely to be crowned by success:

There is no deterrent to committing crimes. If you had the choice between
stealing several thousand pounds of electrical equipment from a house and
when you get caught you get told to cut somebody's lawn [as community
order]? How can that…
It doesn't make any sense. Unfortunately, it is quite sad, but at least I know
that someone in prison, they can't break the law and that is indisputable
whereas I don't see the actual evidence of the other options working.

(Custody Sergeant 1)

As a consequence, any form of criminal justice that might go beyond simply
punishing an offender was clearly rejected by police respondents. The rejection by
sergeants of sentences including an element of rehabilitation was very strong, as
this form of justice was perceived to be counterproductive not only in terms of
decreasing crime rates, but also in terms of the effect on all involved parties:

I think within this country the crime, these criminals getting away with
murder if you like, because if you went to prison and you get sentenced then
it should be a deterrent. And we see people coming into custody who have

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50, 60, a hundred previous convictions and at what point do you learn not to commit crimes? And the reason that this country is becoming, the reason people are in fear of the criminals and the gangs is because the sentences are not long enough. And it shouldn't be an excuse there is no room in the prisons, this is a government problem. If there is no room in the prisons then we build more prisons and we incarcerate more people because we can't have a farcical situation where we have got people coming in for serious offences and be out on the streets within a year [...]. If you were a victim of a crime, if someone breaks into your house and steals your car then for me they should go to prison. And as a member of the public that's something that you expect and you deserve.

(Custody Sergeant 2)

The sergeant quoted above expresses a concept of criminal justice in its symbolic function with custodial punishment at its core. By excluding an offender from society and depriving them of their liberty, as well as limiting their access to socio-economic resources through the use of custodial sentences, these symbolic functions of criminal justice can be addressed. First, long if not indeterminate prison sentences are seen to be an effective deterrent for a repeat offender. Second, harsh sentences satisfy the victim's and society's thirst for revenge whilst guaranteeing a seemingly civilised way of solving disputes within the realm of the court. Third, prisons serve to label the convicted offender and allow them to be distinguished from the law-obeying citizens of society:

We should be protected. People who chose to break a law, not as much as punishing them, not the punishment side of things, but should be kept away from the rest of us [...] I think the protection issue for the general public is addressed. If somebody is doing bad stuff I don't want them rubbing shoulders with me and my children. I don't want them out, I want them away from the rest of us being the law-obeying.

(Custody Sergeant 12)

It appears that to custody sergeants only a high conviction rate combined with a very punitive sentencing policy can demonstrate to the public that the system works. The two respondents above stress in particular that using punishment in a

symbolic manner will increase public confidence in the criminal justice system and strengthen affirmation of the social order that the criminal justice system symbolises.

The perceived leniency of the system was suspected by respondents to be the result of a lack of resources. In this context, interviewees often doubted that potential alternatives to custodial sentences were implemented because of their prospective positive impact on breaking the cycle of a person's offending, but assumed such alternative options were introduced in order to cover up the lack of facilities and the insufficient financial resources from which the prison service is suffering. This was seen as seriously compromising protection of the public:

> *I don't see the actual evidence of the other options working. Just that they are cheaper and because they are cheaper that is why the government pushes them.*
>
> (Custody Sergeant 1)

> *So the prisons are full, we have got 82000 prison places in the country. I would be very much happy to see a 180000 prison places in the country and to see the judicial system send people to prison for longer periods of time because they would not commit further crimes.*
>
> (Custody Sergeant 11)

However, sergeants were also critical about the effects of the prison environment on inmates. There was agreement among respondents that opportunities that are currently open to prisoners around gaining qualifications, training and education are entirely insufficient. Sergeants had often highlighted during interviews that in most cases convicted offenders were simply locked away:

> *Just get people in like cattle. Do whatever, you know, you are there for a day, you are there for a week, you are there for 10 years. So herd them in and herd them out as opposed to doing something with them. And I think sometimes, you know, have we gone down that road, of just herding people in and herd them out again and say, well we have done our bit now. And then all of a sudden they are back in here.*
>
> (Custody Sergeant 11)

In addition, some sergeants expressed concern that incarceration does not evoke positive behavioural changes in convicted offenders, but may have the opposite effect. Custody sergeants argued that there is a risk of inmates educating each other in preventing their criminal activities from being detected by the police. This knowledge, it was emphasised, has an impact on the cost/benefit balance of committing an offence. Considering an offender to be a rational individual who strategically chooses their behaviour, a person might be more prone to 'choose' a life of crime after having been released from prison:

> *Well, they won't come out better. You know, you see someone going into prison for an offence, and I mean I made that experience with people in the past who had no previous convictions but have done something which is particularly nasty and as the result they are going to prison and you speak to that person 3 years later, who has now been educated in the prison system and will go down the line to be a criminal. I don't think prison rehabilitates offenders, I think what it does it needs to be used as a deterrent. Because we don't use the prisons enough.*
>
> (Custody Sergeant 2)

In the above statement the respondent, on the one hand, outlines how prisons fail in their rehabilitative purpose. On the other hand, the interviewee maintains the functionality of prisons by making reference to them being used as deterrence. This was an explanation given by many custody sergeants to defend incarceration as a means to sanction criminal behaviour. In addition, respondents stressed that currently no alternative exists which could adequately replace prisons in their function within the criminal justice system:

> *You can't say that prison is right or wrong because you have nothing really to compare it against and say yeah, that one is better so you get a broader spectrum of ways of dealing with people and ways of performing or giving people opportunities and taking them away from the offence that is causing concern for the public.*
>
> (Custody Sergeant 9)

> *For the majority of offences, people get chances, if they don't take those chances and they continue to be a problem to society – what are you going*

to do with them? What's the alternative? There is no alternative, is there?
We can't cope with trying to keep them out of prison system, can we?

<div align="right">(Custody Sergeant 5)</div>

Hence, although there was some agreement among respondents that using incarceration might not evoke a positive change in an offender's behaviour in the long term, in the short term it was stressed that incarceration helps to protect the public by simply incapacitating an offender:

I am not saying that prison works in itself, but at least they are not breaking the law while they are in prison and all the time they get older, and older, and older and at some point they will have enough.

<div align="right">(Custody Sergeant 1)</div>

It was recognised by respondents that incapacitating an offender would in most cases be limited in its effect, due to being a short term measure. Incapacitation was, however, used as a strong justification of prisons.

Obviously, you are not going to change these people. My experience is you will not change them. They, you know, the punishment fits the crime. And a lot of them deserve to go to prison and that is where they need to be.

<div align="right">(Custody Sergeant 7)</div>

By creating a certain type of offender that is said to be unchangeable, issues of crime control outweigh more welfare orientated programmes in order to maintain public protection. Taken to the extreme, incarceration, especially when indeterminate, was seen as an appropriate substitute for physically eliminating criminals:

For some people basically, I would really say that they shouldn't be allowed to exist in the everyday world, because they are just such a big hazard. They are a risk to you and me and my children and your children, future generations. Those people are a risk, their children will probably be a risk. You know if they are being brought up in the same way, if they have got the same make-up and the same beliefs they are a risk. And as long as they exist we are at danger.

<div align="right">(Custody Sergeant 5)</div>

These general attitudes towards how criminals should be treated and punished are important insofar as they also have an impact on how police officers think intellectually impaired people who have offended should be dealt with. General concepts of crime based on free will and rational decision-making still hold sway and influence custody sergeants when engaging with this population.

> *If he has done it and just because he is not bright enough to have an intelligent argument about whether he is guilty or not. Does it matter? If he is guilty and he has done it and he couldn't defend himself cause he wasn't bright enough to. OK you did it, go to prison. While the next person might be able to argue their way out of it because they were brighter. I haven't got much sympathy really. As opposed to people who are very bright and dream up all sorts of excuses, defences that are fictional and then get away with things.*

<div align="right">(Custody Sergeant 12)</div>

The above quote describes a situation in which a suspect might not be able to fully understand the consequences of their statements. Nevertheless, the officer legitimises denying support for the suspect, even though such a decision is a violation of PACE. In the above statement, the custody sergeant expresses a conflict of interest, whereby addressing a suspect's welfare might potentially compromise the investigating officers in their work, especially in their attempts "to win the psychological war over the suspects" (Chappell, 1994, p. 28).

It emerged that general attitudes which respondents expressed in relation to culpability, reasoning, intention and, ultimately, guilt seem to prevail when custody sergeants deal with intellectual impaired detainees. This appears to have a significant impact on the sergeants' decision-making in relation to providing support and assistance when processing suspects with intellectual disabilities.

4.1.2 Summary

When engaging with the police, disadvantages for people with intellectual disabilities appeared to result from officers having little understanding of what an intellectual disability is. For many respondents, an intellectual disability seemed to be a mental health problem. In addition, some respondents linked a person's

intellectual impairment to poor education, whereby educational deficits were seen as an individual failure of the person concerned.

A further area of concern is that police sergeants appeared to be influenced in their view of individual suspects by the detainee's level of remorse and admission of guilt. This has the potential to significantly disadvantage people with intellectual disabilities who may lack understanding of their offence. In addition, many respondents from the police saw intellectual disabilities as a potential loophole rather than a serious vulnerability within the criminal justice system, allowing offenders to withdraw themselves from being sanctioned for their criminal behaviour.

Various problems, which often led to delays in custodial proceedings, made it difficult for custody sergeants to provide sufficient support to people with intellectual impairments. It appeared that provision of sufficient help and assistance was complicated further by contradictory performance targets, such as putting time consuming safeguards in place whilst also requiring expeditious processing of suspects. In addition, there seemed to be demands from crime investigating officers, but also from line managers, for custody sergeants to utilise and apply their expertise in matters around collection of evidence within the setting of custody suites, and to become, therefore, more actively and directly involved in crime investigations. It emerged that such pressures significantly increase the conflict which custody sergeants experienced between issues in relation to a detainee's welfare and measures of discipline and control.

In this context, guidelines in PACE are ambiguous. Vulnerabilities of persons with impaired intellectual functioning are recognised by prescribing safeguards such as appropriate adults (PACE, Code C, Notes for Guidance, 11c). Yet, the guidelines in PACE also oblige custody sergeants to consider and record unsolicited comments by detainees (PACE, Code C, 11.13), rendering such comments proper evidence. Consequently, detainees might be given a false impression by custody sergeants who emphasise their neutral role and their main concern being the detainee's welfare.

Custody suites are the place where a disjointed discourse based on a medical model of disabilities is both used and created. This is done by constructing a person's

mental and intellectual capacities in consideration of only the immediate context of a specific procedure to which a person is subjected at a specific stage of the criminal justice system. Within the police station this is done in the form of an appropriate adult being provided in custody, allowing for the rational actor inside the intellectually disabled person to be laid bare, and legitimising the alleged offender being processed as a person with sufficient understanding of the procedures.

This process is supported by custody sergeants' tendency to negotiate support for vulnerable offenders in relation to the seriousness of the offence and the conclusiveness of evidence. In this context, an individual's proven guilt based on conclusive evidence seems to impact on how seriously custody sergeants balance measures of welfare and support and measures of control and discipline

The discourse around culpability and, ultimately, guilt supports the system in its integrity, which is based on sanctioning people who have been proven guilty of their alleged offence (Morgan, 1996) whilst, at the same time publicly disapproving of any kind of miscarriage of justice in the form of trialling individuals who are unfit to stand trial.

4.2 *Forensic medical examiners*

Only three interviews with medical examiners could be completed. Hence, data is limited in relation to medical examiners' perceptions of intellectually disabled alleged offenders, and some caution is required when discussing statements given by these respondents. Nevertheless, as the respondents had very diverse professional backgrounds, the interviews provide an insight into various aspects of the role that medical experts have in the criminal justice system.

The custody nurse, for example, gave an account of the dynamics in police custody suites from the perspective of a healthcare professional, which significantly complements the findings that were discussed in the previous sections. The interviewed doctor concentrated on how a suspect's vulnerability may be addressed within the context of securing evidence for crime investigations. Finally, the learning disability consultant nurse discussed general issues around how intellectually disabled alleged offenders are currently treated within the criminal

justice system, particularly within the court system, questioning prominent views in relation to identifying and testing a defendant's level of intellectual functioning.

4.2.1   Provision of healthcare

According to PACE, police services are obliged to provide appropriate health service to arrestees during their time of detention. "The custody officer must make sure a detainee receives appropriate clinical attention as soon as reasonably practicable if the person […] appears to suffer from a mental disorder…" (PACE, Code C, 9.5c).

In their role for the police, the prosecution service and the jury, medical forensic examiners have very complex responsibilities. On the one hand, medical examiners have to care for patients whilst, on the other hand, securing evidence and giving expert testimony on anatomy and tissue, as well as assessing a person's psychological state (Canaff, 2009).

> *When I am working in a general forensic context then I might be asked to see an alleged offender and that I would be to assess his ability to be detained, sometimes to assess his suitability to be interviewed, to record any injuries that he might have and to take intimate sample swaps from both the genitals and skin, fingernails, those kind of things.*
>
> (Doctor)

Thus, whilst being a welfare providing agent within the criminal justice system, forensic medical experts assist in defining the nature of the crime that has been committed, for example by determining if or what weapons may have been involved in an offence, or whether a crime was committed by a group or by a single perpetrator (Barendregt, Muller, Nijman & de Beurs, 2008).

Providing care in a custody environment, therefore, presents healthcare professionals with a range of problems. Providing healthcare lies, like the provision of any form of support, at the heart of a conflict between issues of discipline and control and protecting the welfare of a detainee. More often than not, this conflict is decided in favour of ensuring and maintaining a safe environment, which can limit the support that is provided for an arrestee. "It's a widely held assumption that the

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dual roles of caring and custody are adversarial rather than collaborative, and that custody must rule" (Maroney, 2005, p. 159).

Consequently, the medical examination of a detainee is not happening in a social vacuum, but is subject to the conditions of the custodial environment. The custodial setting, which is created by a non-healthcare based social institution of control, constitutes a range of difficulties as well as constraints that potentially threaten the professional identity of forensic medical examiners. In general, these conflicts highlight on a structural level the same tensions between issues around a detainee's welfare and crime control targets that were experienced by individual custody sergeants. For example, confidentiality might be compromised during medical examinations in custody as detainees are often examined with a police officer being present, not only to prevent the medical examiner from being attacked by a detainee, but also to ensure transparency of the examination, demonstrating that potential evidence had been correctly secured:

> *So there would be somebody in the room with the person and the Doctor, normally. Some people ask for the Custody Assistant to go out. And if we judge it safe because, obviously, sometimes that's for our protection in terms of both assault but also in terms of allegations about what we do to people. So normally there is somebody in the room.*

> (Doctor)

In an attempt to give more emphasis to the independent role of forensic physicians, the terminology used in PACE is "healthcare professionals", which allows medical professionals other than police surgeons to administer healthcare in police custody. However, the more general terminology has also been used by police services to outsource healthcare to private providers in order to cut costs. Payne-James, Green, McLachlan and Moore (2010) highlight that, especially during the last decade, healthcare in police custody has been subject to extensive austerity measures. This has resulted in various schemes of healthcare provision within different constabularies. In many constabularies doctors have been replaced by nurses. Payne-James, Anderson, Green and Johnson (2009) discovered that around half the police services in England and Wales employ both nurses and doctors. The same study revealed that the majority (twenty three out of forty one) of police services

have outsourced healthcare to private providers, despite average costs being 10% higher than in non-outsourced schemes.

At the time of the present study, Cheshire police ran a doctor/nurse scheme, whereby nurses provided the majority of medical care in custody suites with doctors taking on a supportive role. A doctor was only called in the event that a detainee's condition or state necessitated treatment that went beyond a nurse's specialist knowledge or legal responsibility. This scheme was criticised by custody sergeants because the nurse teams were understaffed and nurses had to commute between the three custody suites across Cheshire. This, at times, could cause significant delays in the processing of detainees. The following quote highlights how efficiency of healthcare provision in custody suites might be compromised due to the long waiting times that can occur when the advice of a forensic medical examiner is needed:

> *Generally, what we are having is only one nurse on duty and one doctor. And that's what happened today we have got one nurse who is at Runcorn, there should be a nurse here but she is not on or he is not on. And so we have got only one nurse and one doctor between the police suites and the whole force. So we had a bit of an issue this morning where we have had somebody who is an alcoholic who needed to go to court but hadn't been seen whilst he has been in custody by any of the medical staff and we had to call the doctor in and he has got here, unfortunately, after the bus had left here taking that prisoner to court. So he is now seeing that prisoner. Ideally we should have one [forensic nurse] in each suite and that was going to be the plan but it never came off.*
>
> <div align="right">(Custody Sergeant 3)</div>

The above quote outlines that at the time of the study the doctor/nurse scheme had not been adequately implemented in Chester. Hence, police officers did not benefit from the greatest advantage of this particular scheme – easy and fast access to medical examiners in custody suites at all times.

Greater Manchester police exclusively employed police surgeons to provide all healthcare in custody. During the interviews with custody sergeants from the

Greater Manchester area, this scheme appeared to be the least practical as police surgeons like GPs had to negotiate their custodial responsibilities around their general (police) work. During interviews with police it became evident that in contrast to GPs, police surgeons are far less flexible in organising their work, which can cause even longer waiting times for detainees compared to when being seen by GPs.

When interviews were conducted with forensic medical examiners in 2008, Merseyside police force was in the process of changing the provision of healthcare from a doctor-only scheme to a doctor/nurse scheme.

The general disparity in healthcare provision among the constabularies in England and Wales caused Payne-James et al. (2009) to express concerns in relation to inconsistencies among different constabularies regarding availability and recording of health information. Consequently, the level and quality of support for arrestees might vary, depending on where a person has been arrested, attaching a "postcode element" (Payne-James et al., 2009, p. 194) to the provision of healthcare in police custody.

Allowing nurses to provide some of the healthcare in custody suites has, nevertheless, resulted in significant improvements. In contrast to doctors, nurses are usually located onsite and are, therefore, more easily approachable by custody sergeants. This was recognised by both the doctor and the nurse who were interviewed in this study:

> *I think now that we are here, and we are here 24/7, if they have got any concerns about them they send them right through to us to see if they need an appropriate adult.*
>
> (Nurse)

> *One other thing that I think is good is that there will actually be, especially in the busiest times, a nurse there the entire time of the shift whereas we often are trying to fit this work around other work.*
>
> (Doctor)

This study has demonstrated that for a sergeant to have quick access to a forensic medical examiner might be decisive in relation to appropriate recording of individuals in their needs, as well as to whether necessary support will be provided to a person, not only whilst being detained in custody but also during court proceedings and thereafter. In previous research it has transpired that better approachability of healthcare professionals can result in a higher frequency of times that medical advice is sought (Evans & McGilvray, 1997).

In this context, healthcare in custody provided by nurses may help overcome what custody sergeants experienced as a conflict between triggering safeguards correspondingly to PACE and expeditiously processing detainees through the custody system. Quick and easy access to forensic medical examiners in custody suites at any time significantly improves the situation for all parties involved. First, detainees are at a lower risk of having to accept significant delays in their release from custody when requiring medical attention. Second, having to seek medical advice does not compromise a custody sergeant's duty to speedily process arrestees. Third, for the medical examiner the situation will improve as it appears to be less likely that they are confronted with a group of people waiting to be examined and cared for. This was also expressed by one of the custody sergeants from a custody suite where in the past nurses used to be temporarily based in custody suites:

> *So by the time we phone them they have a certain response time. They must respond within 90 minutes, i.e. they must come here within 90 minutes. But they are not always coming in here in 90 minutes because they are busy, you know. So sometimes it can be delayed for a number of hours. And if it is the middle of the night, you know, and the doctor has been out 5 times already he is not going to come out 4 o'clock in the morning, unless it's serious.[…]Now the doctor can quite often come here and see six or seven people, one after another. And that's very, very frequent.*
>
> (Custody Sergeant 8)

Good and close cooperation between medical examiners and police officers is crucial if the wellbeing of detainees is to be guaranteed throughout the time which an arrestee might spend in police custody. This can be difficult to establish

considering the different agendas and interests that both parties pursue in their profession.

In order to treat people correctly and to prevent them from harm, to a certain extent custody sergeants need to know about health issues that a person might have. Only then will a sergeant be able to take necessary precautions, such as ordering a detainee to be more frequently checked. During the interviews, medical examiners outlined that exchanging information with police officers is a particular area in need of improvement. It was stressed that due to unclear regulations or insufficient training, health professionals are sometimes uncertain about what information to disclose to custody sergeants:

> *I know that a lot of the time what the police get when they contact our services is not very much. And if I was a police officer and I would constantly hit a brick wall then I would give up. I would just think, well we will carry on doing what we have always done. We will tell some people off and send them on their way and we will lock some people up.*
>
> (Learning Disability Consultant Nurse)

Forensic medical examiners are required to negotiate a compromise between passing on information to police officers to assure an arrestee's health and safety during their detention, whilst at the same time complying with legal obligations of maintaining medical confidentiality:

> *Yeah, we do pass quite a bit on but not everything. If they want to know something they have to actually appeal to that, to see the notes, the officer can't just come in and say, let's have a look at that. They can't do that. They have to actually request it and go through the right channels to actually see the assessment form.*
>
> (Nurse)

In order to successfully negotiate this compromise, apart from having guidelines, medical examiners need to have a profound understanding of the duties and responsibilities of custody sergeants. In this context, Stark's (2001) recommendation to introduce joint training for forensic medical examiners and police officers seems to be a valuable proposal as this will significantly increase

understanding of the specific role and duties of each profession. Therefore, Stark (2001) emphasises that both custody sergeants and medical examiners need to be recognised in their specialism. This requires a central body which organises and delivers training to professionals, promoting collaboration between custody sergeants and forensic medical examiners.

Poor cooperation between different agencies over a long period of time will worsen exchange of information, and decrease the knowledge and understanding that members of different criminal justice agencies have of each other's varying agendas. As the learning disability consultant nurse warns, this could eventually undermine any future attempt to improve partnership working among criminal justice professionals.

As a result, there is a risk that decisions are made by the police not in an informed but rather in an arbitrary way, with potentially dire consequences in relation to the support and care with which a detainee is provided, again, not only while in police custody but also after their release:

> *If you don't get in there and try and make some sense out of everything that's happening, there are two things that tend to happen. One is that nothing happens. Everybody worries but nothing happens. You know, people get told off and off you go. Or right at the other end of the spectrum, when people do things that are more serious, quite often having been doing things that are less serious for years and years and years, you could see it coming like a steam train or something that's going to happen, ah, they will do nothing or they will do everything.*

<div align="right">(Learning Disability Consultant Nurse)</div>

Within the criminal justice system medical care is not provided in isolation. Whenever a detainee or suspect is in need of medical care, this will have an impact on how they will be treated by criminal justice professionals. In the extreme, the nature of care a person might require can have implications in relation to their fitness to plead, which may result in their case being diverted away from the criminal justice system. Consequently, the matter of collaboration between welfare and crime control orientated agencies not only addresses the wellbeing of people within the custodial environment, but also the fairness of the system. Despite being

very obvious, this dimension of a forensic medical examiner's work seems to be underemphasised in their training:

My view is that the deficits are around skills for cross-boundary, cross-agency working. I think when you ask people what they think they need to know to do this job, well, they will tell you that they need to know about therapy, or treatment, or… But what they don't say is that they need to be able to work effectively with other agencies who have very different perspectives.

(Learning Disability Consultant Nurse)

The fact that nurses are constantly based in custody suites seems to have a very positive impact on the working relationship between nurses and police officers. This was outlined in particular by the nurse interviewed for this study:

There has never been any disagreements between us and the custody staff or the sergeants ever. No, it works really well.

(Nurse)

Particularly, sharing the same working environment with police officers was stressed as having a positive impact on increasing trust in each other's competencies and abilities. It was highlighted that there was also great trust in each other's determination to expeditiously and effectively deal with any arising matters in correspondence with PACE:

They [custody sergeants] have all been very good at it. I think they all trust our opinion. Sometimes you do if they say, look we want them to get interviewed, then you say well, he is not fit for it at the moment you have to leave them a few hours. And they all have been really, really good. [...] They certainly do trust us and we certainly trust them as well.

(Nurse)

The above statement outlines that a good working relationship also had a very positive effect on how the interviewed nurse felt about their competencies and the value of their work.

4.2.2 Identification

It was surprising that, at the time when interviews were conducted in 2008, forensic examiners apparently used no standardised tools to make an initial assessment of a person's intellectual functioning:

There is no standardised tool that I currently use

(Doctor)

Surprisingly, doctors seem to determine an individual's intellectual capacities similarly to custody sergeants in a rather implicit way, mainly by focusing on how coherent a person is during a conversation whilst being medically examined:

IR: Do you assess the intellectual capability of an offender?
IE: Certainly not formally. It's much more in terms of their responses to the conversation, do they seem to make sense, do they appear to understand what I am asking them, and what they give me back, is that a good answer to that question.

(Doctor)

The general practitioner who was interviewed in this study outlined that, due to a lack of standardised procedures, it is unlikely for a health professional to become suspicious about the level of understanding that a person might have if they are not severely impaired in their intellectual capacities:

I am sure we must miss people who are borderline because people can function in society and be quite borderline and commit offences. You know, it is difficult to know where that, when somebody is below that threshold, if they are, as you say borderline. I am sure some slip through.

(Doctor)

In general, it appeared that in order to be identified, an intellectual disability had to be either known to the responsible custody sergeant or it had to be very obvious that a detainee was intellectually impaired:

Some come with a diagnosis of learning disability. So the police either from previous contact or because of the circumstances of where they were

arrested or what is known about them, they may know that this person has a
significant learning disability.

<p style="text-align: right;">(Doctor)</p>

Detecting an intellectual disability 'by accident' seems unlikely due to the short time that is given for medical examination of detainees who often might be intoxicated or under the influence of drugs, which further complicates accurate assessment. It appears that because of the way healthcare is integrated into the custodial system with its emphasis on management targets, medical examiners are exposed to similar constraints in their work as custody sergeants. This indicates the complexity of providing healthcare in custody in relation to the structural and also the social setting. Examining and assessing detainees who are in police custody poses a range of risks as well as challenges to medical examiners:

> *Quite often the assessments are not particularly lengthy, I mean they might*
> *be 20 minutes, half an hour maybe, if somebody was… Because quite often*
> *when people come in they may be intoxicated, sometimes they have to be re-*
> *assessed after a period of rest or whatever. Again, sometimes if their*
> *medication hasn't been taken, again, they might need to be re-assessed once*
> *they have had medication. Sometimes these assessments are serial or you*
> *have to wait until somebody is in a fit state.*

<p style="text-align: right;">(Doctor)</p>

At this point it is important to stress that if doctors are asked by custody sergeants to assess a particular detainee, this is done within a specific context, e.g. an injury. Thus, a forensic examiner will approach an arrestee focusing on certain issues in particular. It appears to be more likely for an examiner to concentrate on the issues which may have had an impact on a sergeant's decision to seek the advice of a health professional. Consequently, if a forensic medical examiner is not specifically consulted within the context of assessing a person's intellectual capacities, then it seems to be less likely for the examiner to particularly concentrate on a person's level of understanding.

The situation was similar for the custody nurse who was interviewed within this study. There was no standardised process allowing an assessment of a detainee's

intellectual capacities. Again, the needs of an arrestee were determined by simply communicating with them:

Well, the assessment that we do on them really, you know, if somebody is giving you appropriate answers, you know that they are alright to be interviewed.

(Nurse)

In contrast, the mental health of a detainee is well recognised within the criminal justice system as an important issue that needs to be clarified at an early stage. Hence, nurses who are located in custody suites will routinely ask arrestees a range of specific questions about their mental health as part of their medical examination. Unfortunately, there is no comparable and standardised procedure in relation to a detainee's intellectual functioning. It is concerning that a person's capacity to deal with the complex situation of a police interview is measured on the basis of simple and mainly health related questions.

IR: Do you measure a person's IQ?
IE: No. We do that assessment with them [paper form]. And as I said, if they are displaying behaviour which isn't normal then, you know, we will need the doctor out or get mental health teams to see them in the morning.

(Nurse)

It was mentioned that sometimes detainees might identify themselves in their needs either directly by mentioning that they have an intellectual disability, or indirectly by giving cues during examination. A detainee might, for example, reveal having attended a special school in the past. However, it was stressed by forensic medical examiners that detainees often give false information and hide their intellectual impairment. Due to the custodial setting it is often impossible to check information that might be disclosed by an arrestee:

[It] can be quite difficult when they are in custody because you are not really in a position to do a full assessment of somebody in the sense of that you are very dependent on what they tell you. And you very rarely have the opportunity to check that out, say with for example GPs or the psychiatric

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nurses. You can if it is in the daytime but a lot of these issues occur at night
or at weekends where that is quite difficult.

<div align="right">(Doctor)</div>

For nurses who provide healthcare in custody suites there is no clear process
guiding their assessment either. To be identified, a detainee would have to display
obvious signs of having special needs.

The lack of standardised procedures poses the risk of significant discrepancies in
quality and focus among forensic medical examiners in relation to identifying
intellectually disabled detainees. This might, indeed, result in discrepancies in the
recording of an arrestee's special needs among examiners with similar professional
backgrounds, but even more so when their qualification and therefore training and
experience differ. In particular, doctors' assessments appeared to be the least
regulated. Nurses in custody suites are following a guideline of questions that serve
as medical assessment. Doctors, on the contrary, seemed to be completely free in
their focus during their medical assessments:

> *I personally haven't used a format by which I would ask a set series of*
> *questions. So I think it is, our assessment of somebody probably varies from*
> *forensic examiner to forensic examiner and our pressures are going to be*
> *different, I think.*

<div align="right">(Doctor)</div>

Interestingly, being less regimented in their approach to medical assessments was
perceived by the interviewee to be part of a doctor's status. To some extent,
enjoying this greater power in their professional role appeared to characterise the
professional identity of this respondent, distinctively distinguishing a doctor from a
nurse:

> *Some of the assessments may be better by nurses because they are better at*
> *following a chart of what you ask and what you do next. Doctors tend to be*
> *more cavalier.*

<div align="right">(Doctor)</div>

The potential discrepancies in assessing a detainee and identifying and recording
their special needs have to raise concern as medical examiners, like police officers,

outlined the importance of previously recorded information about an alleged offender:

> *From what I have seen, I think a lot of the people who have got such a need have been identified by the staff when they are actually getting booked in, and they are revolving doors, it is a lot of the same people coming in.*
>
> (Nurse)

The above findings suggest that the current system, by which safeguards might be triggered in accordance with a person's needs, appears to be subjective in so far as it consists of informal measures and diagnostic procedures that medical examiners choose from, depending on their training and professional expertise. The data presented above also highlight that this informality is habitual, and does not cease to characterise practices in relation to the professional background of the person who is involved in the processing of detainees.

Obviously, a checklist or other more standardised measures to assess a person in their intellectual functioning will not guarantee the identification of every individual with special needs who might engage with the criminal justice system. Nevertheless, as Bruce-Chwatt (2009) argues "it will at least prevent most errors of commission and omission" (Bruce-Chwatt, 2009, p. 178). The tool developed by Bruce-Chwatt (2009) for example, could provide some initial guidance to forensic medical examiners when assessing detainees in their level of understanding. The template has one item that in particular concentrates on a person's cognitive abilities, memory and thought, as well as addressing the detainee's overall level of intellectual functioning (cf. Bruce-Chwatt, 2009, p. 180). This template or similar tools could help to significantly increase the number of formal assessments in custody suites, ensuring that support is made available to those in need of it right from the beginning. This might result in lowering the number of people with special needs who are processed through various stages of the criminal justice system before being assessed, identified and supported in their needs.

> *Some people get as far as court. And at that point the judge will make a decision that an assessment has to be made because of how the person comes over in that setting. But that would require a formal assessment.*
>
> (Doctor)

The absence of standardised measures allowing a forensic medical examiner to sufficiently assess detainees in their intellectual functioning exemplifies that within the criminal justice system, people with intellectual disabilities have not yet been sufficiently recognised in their needs. During recent years, there have been substantial changes in legislation regarding a person's mental health. This has led to greater awareness by criminal justice professionals, which also became evident in the present study. However, there seems to be a significant deficit in knowledge with regards to intellectually disabled people.

> *There is no particular screening for learning disabilities to the extent where people aren't even asked, do you have a learning disability? Has anybody ever said that you have a learning disability? They ask about mental health, they ask about self-harm and they do literacy.*

> (Learning Disability Consultant Nurse)

In a recent study that focused on the London Metropolitan Police, McKinnon and Grubin (2010) found that many more individuals were identified as being "mentally vulnerable"[12] by forensic examiners than by custody sergeants. This finding indicates that police are lacking competencies in this area. Equally, the finding outlines the significance of having medical professionals' expertise available in custody suites. However, the study also revealed that in relation to the sample, which consisted of six hundred and thirty detainees, neither forensic examiners nor custody sergeants reported one single case of intellectual disability. This means that potentially no appropriate adults or any other form of support was provided for arrestees with an intellectual disability. The authors conclude that the 1.75% of detainees who were in need of an appropriate adult because of mental health problems and none because of intellectual disabilities seem to understate the real need. Consequently, McKinnon and Grubin (2010) emphasise the problem of many intellectually disabled detainees not getting the service and support they need because they remain undetected.

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[12] The authors define mental vulnerability as a state that is being caused by mental disorders, "including learning or cognitive disabilities" (McKinnon & Grubin, 2010: 209).

4.2.3 Training

Besides allowing professionals other than police surgeons to become involved in providing healthcare in custody, the change of terminology in PACE has caused confusion as to what an appropriate health professional is, or what training they should undergo before being permitted to function as a forensic examiner in custody suites. In PACE it is merely stated:

> "A health care professional means a clinically qualified person working within the scope of practice as determined by their relevant professional body. Whether a health care professional is appropriate depends on the circumstances of the duties they carry out at the time." (PACE, Code C, 9a).

This definition recognises the specialist nature of the duties that a forensic medical examiner is carrying out within the custody environment. Yet the definition does not specify in detail what constitutes this special nature. Although the Home Office has set up a range of standards for health professionals working in custody suites or prisons, such as sufficient numbers to provide timely response, it has been criticised that often these standards are not even partially met (Payne-James et al., 2010). This might severely compromise the quality of assessment received by arrestees, often those with multiple health needs, increasing health risks for those detained in police custody.

Neither the custody nurse nor the general practitioner who were interviewed in this study had undergone any particular training which would prepare them to assess and diagnose people with an intellectual disability. Both stressed that such an assessment was outside their own as well as their colleagues' professional expertise:

> *In terms of being able to judge somebody's level of functioning, that would I think be quite difficult in that setting, both of time and skills.*

> (Doctor)

This confirms previous research findings, which stress forensic medical examiners to be often not sufficiently trained either for making assessments or for providing healthcare in a custodial setting (Bond, Kingston & Nevill, 2007). Confirming findings of previous research (Bond et al., 2007), the training of medical examiners emphasises legal issues and issues around safety in custody:

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IR: Just out of personal interest, did you have to undergo any personal
training?

IE: Yeah, we have six weeks' initial training, which was quite heavy going
really. And then we have training to do forensic sampling, like swabs. And,
it is ongoing, we are going to have ongoing training to be able to do other
things as well. So six weeks' initial and then, the way to learn is on the job,
isn't it? So we were kind of thrown in and that's the way we have learned
really.

IR: Those 6 weeks, what did that cover?

IE: An awful lot about the police, about PACE, you know, about guidelines,
cause we do need to know an awful lot about their job, don't we? We did
like self-defence training.

(Nurse)

Consequently, there is a real risk of medical examiners being trained to rate
measures of control and discipline higher than welfare measures.

> "Knowledge of legal standards is obviously necessary in conducting a
> forensic assessment but it is not sufficient. The forensic practitioner must
> also have expertise in the clinical disorder(s) of the subject, skill in
> interpretation of traditional and specialised tests, as well as an
> understanding of various forms of bias and deception inherent in forensic
> evaluations" (Schlesinger, 2003, p. 381).

Wall (2008) approached 806 members of the Association of Forensic Physicians in
the United Kingdom via a semi-structured postal questionnaire. The questionnaire,
which consisted of three parts, focused on training that examiners had undergone
before doing assessments of detainees in custody. Furthermore, examiners were
asked about problems that they might have experienced in the past regarding a
detainee's health and safety. Of the 449 respondents who replied, about one third
stated that they had not been trained for forensic medicine. Wall (2008) highlights
that these doctors in particular claimed never to have experienced adverse situations
in relation to a detainee's safety. The author interprets this finding as demonstrating
a direct link between insufficient training of forensic examiners and their failing to

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identify situations that might be compromising a detainee's welfare: "You don't know what you don't know" (Wall, 2008, p. 380).

Especially when facilitating ongoing investigations, medical examiners take an active role in generating a discourse of truth around a person's guilt. This happens on two levels. First, by securing evidence medical examiners help to establish the factual guilt of a person. Second, by determining a person's level of functioning, medical examiners come to conclusions about a person's fitness to deal with the various complex criminal justice procedures.

Therefore, the following section will concentrate on how medical assessments are integrated into the discourse of truth within criminal justice. In particular, attention will be paid to the interplay between the professional ethos of forensic medical examiners and the dynamics of criminal justice processes in custody suites. This will help in gaining an understanding of how the discourse of truth around individual guilt and responsibility is upheld within the context of intellectually disabled alleged offenders.

4.2.4 *The functional interplay between forensic medical examiners and police*

When the discourse of truth starts to be generated in criminal justice inside police stations following a person's arrest, forensic medical examiners play a crucial part in constituting this discourse by providing scientific underpinning for individualising social behaviours.

Whilst police officers will concentrate on securing physical evidence as well as verbal statements that could link an alleged offender to the crime of which they are suspected, medical examiners provide the discursive justification for a person to be held accountable for their behaviour. In previous research it has transpired that the majority of a forensic medical examiner's work is around assessing an alleged offender's fitness to be interviewed and detained in police custody. Bond et al. (2007), for example, found that this work takes up to 70% of a forensic medical examiner's time. In particular, it is the extremely functional interplay between police and forensic medical examiners, which generates the basis of the disjointed discourse of disability, which in itself is the main functional element of the discourse of truth within criminal justice.

It is basically, you know, what we ask them as to whether they are fit or not,

if they need an appropriate adult, is that they are fit for interview or, you

know, if they need any medication if they are withdrawing, you know.

(Nurse)

Through their focus on establishing an arrestee's fitness to be detained and interviewed by the police, medical examiners and police are functionally integrated as complementary units into the criminal justice system. In this functional interplay between police and medical examiners, the latter risk being marginalising in their approach to the complex needs of intellectually disabled people, especially as attention is being predominantly paid to issues around mental health. Consequently, medical examiners like other criminal justice professionals tend mainly to concentrate on enabling the accused to deal with the immediate conditions and challenges of the situation with which they are confronted. To a great extent, this is the result of the disjointed discourse of disability that is immanent to the criminal justice discourse. This is also reflected in assessments by forensic medical examiners when determining whether a person is culpable. In this context, the forensic medical examiners will identify whether a suspect's understanding is sufficient for them to be interviewed by the police:

If they can't answer the assessment that we are doing they are not going to

manage to answer questions in an interview, are they? So that is how we

decide really.

(Nurse)

It is important to understand that in their interplay, police officers and forensic medical examiners are not equal partners. In their work, medical examiners are dependent on the police in various ways. First, it is the police's decision as to whether recruiting a medical examiner is necessary. Second, depending on what scheme of healthcare is used by the different constabularies, medical examiners are directly employed and paid by the police, particularly if healthcare is provided through a nurse-only scheme. As Gannon (2002) highlights, nurses in custody suites are often employed by private healthcare providers, which have been contracted by the police. This financial dependency puts additional pressure on medical examiners in negotiating their two conflicting roles when working in police custody suites.

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In their function as providers of healthcare, medical examiners should enjoy autonomy and independence in their work to satisfy legal obligations around confidentiality and to offer best possible care of detainees. Medical examiners are, however, contracted service providers, which involves certain employee obligations. For example, in Gannon's (2002) study it transpired that nurses thought that all health related information that they were able to gather about a detainee would automatically be the property of the police.

Consequently, the autonomy that medical examiners have or create for themselves in their role is decisive for how medical care is administered in custody suites. This issue has been at the centre of previous research. In Simon's (2005) study, for example, it transpired that interviewed medical examiners were lacking knowledge regarding not only their responsibilities, but also their professional status and independent role.

During the interviews with forensic medical examiners it arose that structural imbalances of power differ in their effect on interactions that examiners have with police in accordance with the medical examiners' professional background. Although the data which were generated through interviewing health professionals is limited, statements that addressed interactions between police and medical examiners went beyond personal and individual opinions, and revealed general concepts of professional identity that medical examiners held. In particular, their professional background appears to have an important impact on how autonomous medical examiners negotiate their roles within the criminal justice system. Consequently, differences could be identified between the interviewed doctor and the custody nurse in relation to how they balance the functional interplay between supporting police investigations and providing medical care for arrestees.

As part of their professional identity, the interviewed doctor emphasised being able to make an assessment regarding best possible care and treatment in correspondence to the needs that detainee might have:

> *We still are independent and our duty of care is to the person not to the police.*

> (Doctor)

For doctors this required having the confidence and the autonomy to make quick decisions within a legal justice context in relation to how individual detainees should be treated:

> *I think doctors vary in their approach and sometimes that's good and sometimes that is not so good. And I think we are used to making a judgement about things and I think nurses, and I don't mean this as a criticism, I think nurses are actually better at following a routine of questioning.*

> <div align="right">(Doctor)</div>

This professional ethos was expressed particularly strongly in the context of structural changes regarding the organisation and provision of healthcare in custody in the Merseyside area. Threatening doctors' monopoly in administering healthcare within the criminal justice system, these changes were perceived by the interviewee as potentially resulting in a loss of specialist competencies and a decline of the overall quality of healthcare provision:

> *One of the deficits is the fact that locally there is going to be this huge change in how forensic care is administered. And I have worries about that both in terms of who takes responsibility for medical safety and mental health assessments and those kinds of things. That's one issue. I think the shift to nurses may well mean that doctors who have a particular forensic interest, some of whom have actually specialised, will be less inclined to this work. I think there may be problems further down the road, for example when these cases come to court.[…] I think there are quite a lot of concerns about how forensic practice is going and it's obviously all to do with maintaining standards.*

> <div align="right">(Doctor)</div>

In particular, the doctor appeared to be very aware of how a medical examination might be utilised by police. Hence, the problem of confidentiality within forensic medical examinations raises issues around the potential quality of forensic evidence as well as health related information. The respondent, therefore, stressed making conscious decisions with regards to what information has to and should be forwarded to the police:

I have to be objective in what I am looking for, what I record.

<div align="right">(Doctor)</div>

A similar cautious approach was expressed by the interviewed learning disability consultant nurse who, like the general practitioner, was much more independent in her position. Securing and defending this autonomy was central to the learning disability consultant nurse's professional identity:

> *The people who do that well [working with intellectually disabled alleged offenders] are the people who have leadership abilities, can lead teams, can harness what's available. You know, can harness what the police can bring in, and what the probation service can bring in and what the courts can do.*
>
> <div align="right">(Learning Disability Consultant Nurse)</div>

This particular respondent was also involved to a great extent in court decision-making processes, for example by assessing alleged offenders in their intellectual capacities and making sentencing and treatment recommendations to the court. Consequently, and again in accordance with the interviewed general practitioner, the consultant nurse had a much broader and more comprehensive understanding of her position and her impact within the criminal justice system. In particular, there was an awareness of how information is presented to the court can influence decisions:

> *And people really do struggle to work out what they should do in those circumstances. It is how you provide the information. I feel quite confident about that aspect of my job. So I am quite happy to provide reports to the CPS, to the police, the probation service. I will do that because I understand the rules of engagement. I understand what their purpose is in the world. I understand what my purpose is in the world.*
>
> <div align="right">(Learning Disability Consultant Nurse)</div>

Therefore, the respondent put great emphasis on assessing the meaning of any information generated within the context of investigations by the police. This assessment was done in consideration of the suspected offender's personal circumstances and the context of the alleged offence. In particular, the respondent

voiced great concern about the often extreme responses to intellectually disabled offenders, including a higher risk of indeterminate sentencing:

> *If you were learning disabled but actually you had worked very hard to or you would be able to develop some skills that allowed you to be invisible and then you happen to get in trouble because of your behaviour. The learning disability thing might not be particularly relevant to that. Because people get into trouble, especially when you are young you are at higher risk and all that stuff. Would you thank me for coming along and doing an assessment which then puts you at risk of you being pulled out into this other system, which is about disability, dependence, people assuming that they have got a right to know absolutely everything about you, people assuming that they have got the right to keep an eye on you, people assuming that they have got the right to potentially section you if you misbehave?*
>
> (Learning Disability Consultant Nurse)

Being directly employed by the police as well as the dynamics of working closely together with officers might expose nurses to a much greater pressure in their work, which might result in nurses favouring measures of control and discipline over welfare. Indeed, the literature suggests that such biases are prone to occur "where the structures of relationships leave the clinician particularly vulnerable to such (non-conscious) infection" (Schlesinger, 2003, p. 385). Maroney (2005), for example, discovered that nurses who are permanently based in a custodial setting appear to be strongly influenced in their understanding of care by opinions held by custody staff. In Maroney's (2005) study it appeared that more care was provided when custody staff agreed that support and care might be beneficial for a detainee.

Confirming such tensions, the interviewed custody nurse gave the impression that nurses might be questioned more often in their authority and professional assessment:

> *Me personally, I don't have that. I know that some of my colleagues were questioned, like why do you want the man to be on constant observation or why do you think they don't need to be on constant observation.*
>
> (Nurse)

As a consequence of such pressure, medical examiners could feel obliged to visibly prove their objectivity and impartiality to police officers. Previous research has shown that if questioned in their professional integrity, forensic examiners tend to demonstrate neutrality by distancing themselves from alleged offenders who they examine. In this context, by focusing on healthcare provision in American prisons Rees' (2010) study showed that forensic medical examiners were actually harsher in their dealing with prisoners than the police staff. In confirmation, Maroney (2005) also observed that personnel permanently based in custody to provide healthcare seemed to be more detached from their patients to avoid compromising their professional integrity and, thus, their role and position within the criminal justice system.

There are obvious advantages of clinicians being permanently based in custody suites. There are three main benefits of nurses' permanent presence. First, it substantially increases the availability of forensic medical examiners to custody sergeants, making it less inconvenient for custody sergeants to recruit a medical examiner and reducing waiting times for detainees to get medical attention. Second, with nurses constantly on site, medical care can be provided much more comprehensively. Third, if staff are trained properly and provided with reliable assessment tools, medical care could be provided more consistently. A clinician who is permanently based in a custody suite will administer and monitor the healthcare of a detainee throughout their shift, passing information about the health of individual detainees along to their colleagues during shift handover. This was also recognised and acknowledged by the interviewed general practitioner:

> *Nurses are good at looking after people, probably better than doctors who come in, do something and then have to go.*

<div align="right">(Doctor)</div>

Consequently, permanently custody-based examiners can and currently do provide a high quality service to detainees, a service that in certain aspects might also be better than the healthcare provided by external medical examiners. However, the issues highlighted above outline the importance of measures being put in place ensuring the autonomy and independence of forensic medical examiners in their work. If examiners are influenced in their assessments, indirectly or unconsciously,

there is a risk that the fairness of criminal justice procedures will be compromised. In particular, there is a risk that forensic medical examiners will become more and more immersed in the functional interplay with police, potentially biasing clinicians to favour law enforcement over the welfare of a detainee.

4.2.5   Summary

Similar to custody sergeants, medical examiners perform two conflicting roles revolving around a detainee's welfare and securing forensic evidence for the police. As employees of the police and because of the resulting financial dependency, examiners are not independent in negotiating these roles. This can put pressure on medical examiners and restrict their autonomy when making assessments. Whilst close cooperation is important, being directly employed by the police might compromise the autonomy of medical examiners.

Good cooperation between forensic medical examiners and custody sergeants is important in order to secure the welfare of detainees. There seems to be, however, some confusion about what information can, should or has to be shared with custody sergeants, complicating collaboration between members of either agency.

The assessment of intellectual disabilities in custody appears to be compromised by the lack of standardised tools. Identification takes place mainly by observing obvious signs in a person's behaviour, which increases the risk that borderline intellectually disabled people will remain undetected. Current training of medical examiners appears to emphasise collecting evidence. None of the interviewees mentioned having been trained to assess a person's level of intellectual functioning, confirming findings of previous research (Schlesinger, 2003; Wall, 2008).

It emerged that for medical examiners to become aware of a detainee's intellectual impairment, a person would have to display obvious signs of their disability or be already known in their needs by the police. Therefore, if an examiner is not recruited specifically to assess a person's level of intellectual functioning, it appears unlikely that the detainee's intellectual capacities will be part of the assessment at all. This means that the process by which safeguards are triggered is very subjective in nature, which has to raise concerns considering the different schemes of healthcare provision involving professionals with varying degrees of experience.

This might explain previously identified significant inconsistencies in detection rates among different constabularies.

4.3 The courts

If a person with intellectual impairments is trialled in court, criminal justice professionals are challenged in their work in a variety of ways. In particular, intellectually disabled defendants potentially undermine the criminal justice system in the three core 'standards' by which it operates: deterrence, retribution and correction. These standards are upheld and communicated through the discourse of truth generated within the criminal justice system. However, a person who might have difficulties in understanding the principles of punishment will not be deterred by potential sanctions. Equally, a person who might have difficulties in fully understanding society's values and norms cannot feel remorse on the basis of such values. This poses great challenges, especially to probation officers, whose main task is to support a convicted offender in understanding their wrongdoing and showing remorse, the latter being an unwritten part of probation orders.

Hence, in the following sections it will be of particular interest to scrutinise how a defendant's potential impairments are incorporated into traditional criminal justice procedures. The criminal justice system mainly prevails in its core elements by gaining its power from the traditional way of how justice is constructed in courts, through the use of symbols and the highly functional discursive interplay of various criminal justice agents. The discourse of truth is generated on two dimensions. On the one hand, it is the nature of the evidence itself, which as mentioned before is introduced by court agents as being factual and objective in nature. On the other hand, the discourse of truth gains its persuasive power through the court structures that functionally integrate all interactions into an apparently balanced contest between exculpatory and accusatory accounts of what happened and how an offence took place:

> *The trial process in England and Wales is a contest, that's why it is called the Queen against X. It is not necessarily a search for the truth, although we hope that the truth emerges.*

> (Prosecutor 3)

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This implies a certain fairness of all proceedings that take place. As a result, Birgden and Thompson (1999) argue, all knowledge that is produced during these proceedings appears to be true and reliable, legitimising any form of sanctions that might be decided on the basis of such knowledge. It appears unlikely that the criminal justice system would continue enjoying its legitimacy in society if it was publicly perceived as the theatrical spectacle it is. "In general, courts enjoy a high symbolic status as pragmatic places comparable to theatres, cathedrals or museums. They are traversed by ideas, rituals, and artefacts […]" (Scheffer, Hanken-Illjes & Kozin, 2009, p. 184).

For example, Rock (2009) claims that rules of politeness are one important aspect of court procedures as they portray courts as a civilised way of solving conflicts and disputes. However, by limiting his argument to the obvious, Rock (2009) fails to link his observation to the more implicit function of discursive politeness: the generation of the discourse of truth. In this context, Garfinkel (2009) argues that courts as a social institution mainly function by shaming and destroying the person in a ritualised manner. "Unlike shame, which does not bind persons together, moral indignation may reinforce solidarity" (Garfinkel, 2009, p. 604).

The individual as a social object is destroyed through court processes, which are supposed to reveal the true character of a person through the discourse of truth. This is based on a positivist notion that "[t]here is such a thing as an objective reality which can be discovered and which exists independently of human knowledge […]. Truth is defined as knowledge which corresponds to this objective reality […]" (Nicolson, 1994, p. 727). Hence, witnesses of a court trial are persuaded that the defendant's former persona was a mere perception, adding to the deceiving delinquent character of a defendant. The prosecution develops the defendant's character by referencing little 'facts', which cover the majority of a person's life.

> *The Criminal Justice Act 2003, the government enacted parts for that statute to enable the court to have before it in the trial details, in certain, in specific circumstances, a person's character. In other word previous convictions or even if they are not criminal convictions a history of misbehaviour, say.*
> *[…]*

A person who has previously committed dwelling house burglaries may be more likely to do so because they show a propensity to do so.

<div align="right">(Prosecutor 4)</div>

These 'facts' are not necessarily only previous convictions, but also comprise other behavioural 'abnormalities' such as aggressive or otherwise offensive behaviour, which might not necessarily constitute a criminal offence.

So it is that character bit that we need to establish, the whole of the person really.

<div align="right">(Prosecutor 5)</div>

The following two quotes from two different prosecutors give a good example of the process by which jury and public alike are persuaded about the delinquent persona of a defendant. Read as one, the quotes demonstrate how prosecutors interact with juries when giving their account of a defendant's criminal career and how these interactions are embedded in the theatrical contest-like structures of the court.

No doubts, there is this aspect of theatre in, still in what we do and you know, what makes a good barrister? Well, it's not necessarily the best intellect, but someone that perhaps has the best kind of establish a rapport with a jury, can know what they are thinking and how to influence them, you know.

<div align="right">(Prosecutor 3)</div>

There will also be such things as his list of previous convictions if he or she has any, unused material applications for bad character
[...]
It is about passing information backwards and forwards. Every piece of information you get helps to build a better picture, doesn't it?

<div align="right">(Prosecutor 4)</div>

Consequently, by obeying rules of politeness during their interactions, all court actors become functionally integrated into the discourse of truth. The concept of politeness is just one of a whole range of normative rules inside courts that structure and organise interactions of court actors, for example by prescribing how witnesses

have to be questioned, or how the communication between the court and the defendant has to take place. Hence, these rules coordinate not only criminal justice professionals but all court actors including defendant, jury and witnesses in their functional interplay. How this happens is outlined in the statement below by a judge who is making a reference to how and why rules of politeness have to be maintained in court.

> *I have a strict rule in court and that is I will not allow anyone to refer to the defendant by surname or her surname alone. It will always have to be Mr. Smith, Mrs. Jones, Ms. Brown. I won't have Smith, Jones or Brown. And I am very strict about it. Because, I mean, I will tell you in the moment the reason why.*
>
> *[…]*
>
> *The reason why I won't have defendants referred to by their surname alone is because you will find the prosecution always refer to the complainants by their first names and particularly in sex cases, and I trial a lot of them, you know, and what happened next Mary?, This happened Mary. And then when it comes to the interview, Smith was interviewed and Smith said this, and Smith said that. And there we go from nice Mary to ogre Smith. And I say why do you do that. The answer is you want to create hostility against him, and I am not having that. So it's my quirk, quirk in favour of fairness.*
>
> <div align="right">(Judge 4)</div>

Thus, the concept of politeness becomes an enforced rule that is utilised in courts to govern actors in their discursive interactions with each other. As in the above event, interactions among court agents are controlled to assure balanced proceedings where victim and alleged offender are both located in a framework of being human. As Rock (2009) argues, this has allowed courts to establish themselves as a social space where conflicts and disputes can be solved in a civilised way. Furthermore, through rules of politeness all interactions of court agents are organised in a specific way, which emphasises the court's objective and unbiased decision-making.

In order to generate the discourse of truth, extensive and seemingly all-encompassing evidence is presented by criminal justice agents – prosecution, probation and defence alike – which seemingly allows a comprehensive picture to

emerge that appears to be balanced in its accusing and exculpating elements. However, this discourse of truth has to be partial in nature due to the structures in which it is generated. Trials are always simplifications of reality as the discourse is limited to "the facts at issue" (Rock, 2009), which are usually seen as being clearly linked with the offence that is trialled.

Hence, when it comes to the verdict, to some extent the social background of a person is neglected as it is not the background of the alleged offender that is of major interest, but whether they 'did it' or not. However, if a person's background is considered, then it is often to the disadvantage of the defendant.

> "Justice requires equality; the law discriminates against the homeless, the jobless, the disreputable. Justice requires each case to be judged on its own facts, the law makes previous convictions grounds for defining behaviour as an offence and evidence against the accused" (McBarnet, 2009, p. 619).

By linking causes to behaviours, the discourse of truth that is generated serves to confirm and maintain the legitimacy of the criminal justice system as an enshrinement of the social order.

The discourse of truth that is generated within the court arena concentrates on two core elements: a defendant's fitness to stand trial and their culpability. The latter has to be proven by the prosecution beyond reasonable doubt, to establish the *mens rea*. Hence, a defendant's ability to form intent is at the core of the discourse that is generated by the accusing parties.

Probably nowhere else during court proceedings is the functional interplay of different criminal justice agents more apparent than when the prosecution tries to prove an individual's accountability and fitness to stand trial. Hence, it is not surprising that this is also the moment when medical experts such as psychiatrists and psychologists claim explanatory authority as specialists in assessing an individual's psycho-social functioning. Doctors, in this context, are utilised as scientific gatekeepers to the traditional criminal justice system as their evidence is used by the prosecution to potentially incorporate an alleged offender into the mainstream criminal justice system.

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For the prosecution, a defendant's level of intellectual functioning is not only important with regards to their fitness to stand trial, but also in relation to their culpability. Medical evidence, in this context, is just one of many details that are functionally merged in order to generate a specific truth of an offence and the alleged offender:

> *Well, we also have to look at the other surrounding circumstances as well. So we will look at the incident as an absolute whole. What led up to the incident, what happened after it? So we are not just relying on the medical experts in terms of that, in terms of, yeah, it should carry on as a murder charge and we are not going to accept a plea for manslaughter charge at this time because our own expert is saying, no he wasn't suffering from diminished responsibility at the time. We say, well yeah and also you have got this fact he did that and he did that, and did this. Yeah as a whole there is sufficient evidence for ringing the prospects of a conviction on murder.*
>
> (Prosecutor 1)

Thus, consisting of various evidential details and facts, the discourse of truth that surrounds a person's intellectual capacities in terms of culpability and fitness to stand trial lies at the heart of demonstrating due process, fairness and justice inside the court arena.

4.3.1   Prosecution service

4.3.1.1 Public interest test

As public presenters of evidence, prosecutors appeared to be much closer linked to central themes of the discourse of truth in their professional identity, emphasising the efficient use of power and the preventative function of criminal justice. Efficient use of power is assured through the public interest test. During the public interest test prosecutors make a decision whether a person can be trialled or, due to a defendant's below average level of intellectual functioning, a successful prosecution appears unlikely, potentially undermining the system in its efficiency.

This way, prosecutors are obliged by their own guidelines to take into consideration the welfare of a defendant:

Sometimes the public interest test is used for the welfare of the individual. You know, the old lady who shoplifts for the first time in her life. OK, we are satisfied with the evidence that is there, but do we really want to, you know, bring the whole weight of the state against this lady who for the first time in her life for whatever reason has committed this crime?

(Prosecutor 5)

At the same time, however, the public interest test also emphasises the victim's interests, which in a more general context represents the wider society's interests. A disability in its potential impact on trial proceedings and outcomes is balanced against the impact that the alleged offence has had on the victim as well as the wider society:

Firstly prove the disability because I am not going to take it at face value because I can't. Secondly, how has that disability impacted upon firstly the actions of the defendant, the formulation of the necessary intent, the charge and how does it then impact on the public interest? Because the victims have interests as well.

(Prosecutor 3)

The above quote exemplifies how issues around fairness, transparency and balanced proceedings, which are essential elements of the discourse of truth in criminal justice, have been internalised by prosecutors who have integrated these issues into their professional identity. However, the above interviewee's account also demonstrates how in accordance with the severity of a crime, the evidential and public interest tests might be channelled towards emphasising the victim's role and the impact a crime might have had on the victim's life.

New measures that have become available to the prosecution, such as the Victim's Impact Statement, further emphasise the victim's role in a court trial and might also increase the perceived severity of a crime:

We were not allowed to have contact with victims and witnesses until recently you know, and we just look at a pile of paper and written statements. And that is why we moved to things like victim personal

statements. You know, tell us how you felt after this crime. Now that is
another key area.

 […]

You don't have to be the victim of the crime yourself but I think what we
need to do is people to express how they felt about it.

<div align="right">(Prosecutor 2)</div>

It is the victim who allows for a criminal act to become an objective social fact. Hence, the greater emphasis on the role of victims in court proceedings manifests their importance within the criminal justice system.

During the public interest test, a prosecutor will also consider the impact and meaning of an offence with regards to the wider public. In this context, the decision to charge a defendant and also the decision as to the nature of the charges, which is made during the public interest test, can be very political. When charging a person, prosecutors objectify both the crime and the alleged offender (cf. section 4.3.1.2):

Well we are not only talking about the victim, we are talking about the
community as a whole because we have also got to look at the public safety
with an issue. But we have the victim, we have the general public, we have
the premise that an offence, a serious offence has been committed and
therefore it must be in the public interest. So yes, an offence is there and the
public interest would primarily say, yes it should be prosecuted.

<div align="right">(Prosecutor 1)</div>

This allows the particular case to be related in its meaning to the abstract and general nature of law. At the same, this process gives clues about the extent to which criminal justice is politically driven:

You know, violence towards a child, abuse of a child, a racial element in a
case, domestic violence, are all recognised as what is called aggravating
features when you are considering the public interest in prosecution. And
they weigh more heavily in favour of prosecution than if it was a, for
example, an assault without racial overtones.
[…]

*I think there is no doubt pressure in certain categories of a trial to be
pursued. Those are for example cases that fall within race, hate crime in
other words, sexual orientation, racial grouping, and so on and so forth,
domestic violence, child abuse and so on and so forth.*

(Prosecutor 4)

Racist and knife crimes, or offences in general involving severe bodily harm, were
often given as examples by interviewed prosecutors when explaining aggravating
factors in favour of prosecution. This outlines how criminal justice professionals
particularly pay attention to these kinds of criminal behaviour, which has had an
effect on the overall criminal justice system. For example, harsher sentences were
introduced in 2008 to tackle knife crime. In a decision made by the Court of
Appeal, magistrates were advised to use the maximum sentence for those convicted
of carrying a knife in public. The same year, the magistrates' sentencing guidelines
were changed accordingly, resulting in an immediate increase of custodial sentences
(Ministry of Justice, 2011b). These developments outline how, in response to public
pressure, measures have been put in place that maintain the criminal justice system
in its focus on public safety by widening its grasp:

*I think the public outcry about those sort of cases did mean that the
legislators and practitioners begun to look again, well, what can we do to
prevent people going down the line where they commit great murders,
whatever? Is there anything we can do to assist them?*

(Prosecutor 5)

Within the context of people with intellectual disabilities this has led to a range of
proactive and preventative actions that can be suggested to the court by prosecutors.
Such developments stand in sharp contrast to the changes that took place during the
late twentieth century when many of the big institutions were closed, more rights
and autonomy were given to people with an intellectual disability, and care was
increasingly organised in community settings. This development, as Szmukler and
Holloway (2000) argue, was curtailed by another political shift that took place
during the 1990s as a result of which more measures of control were put in place to
assure public safety.

Especially within the context of public pressure and in reference to relatively recent high profile criminal cases, new proactive measures, such as the preventive detention of people with an impaired intellectual functioning, were perceived by prosecutors as positive achievements:

> *It used to be that everybody knew that this guy was developing into something but you couldn't do anything until he had actually committed a serious offence, whereas now you can put him in front of a magistrates' court you can get a Sexual Offence Prevention Order and then when he breaches that you can get him before the crown court. And if you can explain to a judge, this guy is a potential rapist you can then get him detained until somebody thinks he is no longer a risk.*

(Prosecutor 5)

4.3.1.2 Fitness to stand trial

The prosecution does not have an obligation to test or assess a defendant in their intellectual functioning in order to determine whether they are fit to stand trial. Instead, a defendant is perceived as able and fit until the opposite has been proven. If an alleged offender is identified as having special needs, the court will ask for an assessment to be made of whether the accused is fit to stand trial. In general terms, fitness to stand trial is defined in relation to an alleged offender's capacity to understand the procedures in court. In accordance with Section 4 of the Insanity Act 1964 this encompasses an alleged offender's ability to "understand the charges; enter a plea; challenge jurors; instruct his legal advisors; follow the course of proceedings; give evidence in his own defence" (Home Office, 2010, p. 2).

In the majority of cases the issue will be raised by the defence team on the balance of probabilities, but it can also be addressed by the prosecution services. In the event that the defence team disagrees with the prosecution services that an accused person is unfit to stand trial, the prosecution have to prove their claim on the standard of "beyond reasonable doubt" that the accused is, indeed, unfit to stand trial. This is realised by utilising medical evidence. The procedures that are prescribed by the Insanity Act 1964, Section 4(6) oblige the court to consider "written or oral evidence from at least two registered practitioners, at least one of whom must have been approved by the Secretary of State as having special

experience in the diagnosis and treatment of mental disorder." Both prosecution and defence will have their individual medical expert or group of experts, which functionally embeds the medical examinations and assessments into the seemingly balanced contest-like presentation of evidence.

Many respondents from the Crown Prosecution Service voiced that demonstrating a defendant's capacity to engage in court proceedings is understood in criminal law as being fundamental to demonstrating fairness:

> *I would say it is important that they understand and the public in court can see that the trial has been conducted fairly. I think the defendant needs to understand his criminal conduct and why it is that he has been convicted of that offence and why it is that he has got that particular sentence.*
>
> (Prosecutor 6)

Establishing a defendant's intellectual ability to plead appeared to be directly linked with a prosecutor's professional identity – the need to maintain fairness of court proceedings whilst achieving justice for the victim. Consequently, a defendant who may be potentially impaired in their intellectual capacities poses a dilemma to the prosecutor. Measures of retaliation might be compromised if an offender is being diverted away from the criminal justice system. This may undermine public trust in the criminal justice system as a place where conflicts are solved in a satisfactory manner:

> *Well, we are officers of the court. So if it was brought to our attention or if we thought that there was an issue it would be our duty to look at it. You know, we are here to see justice done and appropriately. And that's where you can have issues, you know, if a court, particularly someone with some real mental or learning disability of some issue and you have got a victim on hand, you know, maybe a person sort of damaged their property. But there is such a background to that person, you know, and you might not want to prosecute and the victim will say, and I had cases like that, why isn't this person brought before the court. That's again where you have got this balancing exercise.*
>
> (Prosecutor 2)

In addition, the prosecution needs to verify whether the court procedures as well as the potential trial outcome could have a negative impact on the defendant, which may outweigh any expected effects of possible sanctions:

> *If an offender comes to us and there is reliable evidence that prosecuting*
> *him or her would either exacerbate or precipitate mental health[13] issues*
> *then we would take that into account, probably more likely under the public*
> *interest assessment. For example our elderly shoplifter, you know, if we are*
> *going to take her to court is this going to have a disproportionate effect on*
> *her, to the effect that she might even contemplate suicide?*
>
> (Prosecutor 3)

McBarnet (2009) has argued that this dilemma depicts an ideological gap between the rhetoric of law and the substance of law. The former focuses on due process whereas the latter relates to sanctions in the form of oppressive means of social control. McBarnet (2009) argues this to be the result of law operating on two different levels at the same time, by being equally abstract and specific.

The above statements demonstrate how closely a prosecutor's concept of fairness appears to be linked with a defendant's ability to engage with the court. Therefore, a person's intellectual level of functioning is constructed in the context of engagement.

According to Zapf, Hubbard, Cooper, Wheeles and Ronan (2004), this way of thinking is actively supported and encouraged by medical experts, who during assessments in a similar fashion focus on an individual's ability to follow proceedings whilst much less attention is paid to a person's capacity to reason when making decisions.

It has been demonstrated in previous research (Glaser & Deane, 1999) that people with an intellectual disability are more likely to pretend to understand court language and proceedings as well as to make a confession, sometimes in relation to

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[13] Similar to respondents from the police, prosecutors were informed before and also during the interview that the present study exclusively concentrates on alleged offenders with intellectual disabilities. Respondents, nevertheless, continued to refer to mental health when discussing issues in relation to intellectually disabled defendants, indicating that intellectual functioning is perceived as a mental health issue which poses the same difficulties to prosecutors as a defendant with a mental illness.

crimes they may not have committed (Gudjonsson, 1992). These factors have been identified as increasing the risk that intellectually disabled defendants will receive longer and more punitive sentences.

If a defendant has been identified as having special needs, the prosecution will apply to the court for 'enabling' measures to be put in place supporting an accused person in all following court proceedings:

> *What you do is, if you have got a case involving a young child or someone who has a difficulty concentrating you do it in short stages. You might do half an hour, present the evidence, have a break, come back, you know. It will lengthen it in due course but you have got to ensure that that person can partake in the proceedings.*

<div align="right">(Prosecutor 2)</div>

This way, a process is put in motion whereby an identified vulnerability, whether that might be a defendant's intellectual abilities, mental health, age or physical disability, becomes a manageable object within the court arena. In relation to a person's intellectual abilities, this managerial process can be found at every stage of the criminal justice system. This is reminiscent of William Battie who in 1758, in support of people with an impaired mind, asserted that madness is as manageable as many other distempers.

In this context, measures of support were perceived by respondents from the prosecution service as having an enabling function, supporting the discourse of truth around criminals being people who are culpable and rational. Similar to the way in which appropriate adults are utilised by police in custody suites, it is assumed by prosecutors that by implementing mechanisms that support engagement, intellectually impaired individuals will also be supported in their reasoning. To some extent, this demonstrates another similarity between custody sergeants and prosecutors, whereby members of both professional groups assume a rational actor being hidden inside an intellectually disabled person. Consequently, it is assumed that if the correct measures of support are made available, this rational actor will be laid bare and can be dealt with like a fully able person.

The marginalising disjointed discourse simplifies intellectually disabled people's needs and significantly disadvantages this population when engaging with the criminal justice system. Talbot (2008), for example, points out that despite a range of support measures that can be utilised in court, intellectually impaired defendants often do not understand the proceedings taking place in front of them. In addition, Hayes (2005b) points out that people with intellectual disabilities face more problems than struggling with understanding the charges: attending the court on time or understanding the sentence and its conditions can prove difficult for people who are impaired in their intellectual functioning. Furthermore, Howard and Tyrer (1998) highlight that this particular group is more likely not to understand their rights or to choose between different defence strategies, and to accordingly instruct their lawyer. All these issues severely disadvantage intellectually disabled alleged offenders, which might explain why this population is more likely to be imprisoned than their non-disabled counterparts (Glaser & Deane, 1999).

Hence there has been criticism that the help that is being made available is still insufficient (Talbot & Jacobson, 2010). Support appears to be organised in a rather general manner, whereby it is not taken into consideration what capacities a defendant possesses in relation to the specifics and particular complexities of their trial. As Roesch, Zapf, Golding and Skeem (1999) outline, an intellectually impaired defendant might have capacity to understand certain court procedures whilst not understanding others. Therefore, Parton, Day and White (2004) suggest: "Mental health professionals should not only provide evidence of limited intellectual abilities and/or mental illness, but also make comment of limitations specifically in regard to the functional abilities required for an accused person's case" (Parton et al., 2004, p. 99). In this context, Talbot and Jacobson (2010) also stress the disparity in rights and support between intellectually disabled defendants and witnesses who give evidence in a trial, which clearly puts the accused at a disadvantage. Willner (2011), for example, lists a range of developments that are supposed to allow witnesses or victims with an intellectual disability to give evidence in court, such as using screens or specific interviewing techniques. None of these measures are available to intellectually impaired defendants. Inside courts, witnesses and victims have a higher status than defendants, with the latter being clearly disadvantaged in relation to support and assistance.

Similarly to custody sergeants, interviewees from the Crown Prosecution Service voiced concerns that special measures would not only undermine the overall fairness of the system, but might also be abused by offenders in order to withdraw themselves from being sanctioned:

> *I mean you have got to be careful that it is not abused by someone, you know they are basically trying to get out of their criminal responsibility by blaming their disability – I am depressed so I can go out and kill someone.*
>
> (Prosecutor 2)

The above analysis reveals that there is a higher propensity of people with intellectual disabilities to become incorporated into the mainstream criminal justice system when the issue of fitness to stand trial is addressed by the Crown Prosecution Service. This appears to be the result of a disjointed discourse whereby a person's disability is detached from the individual.

Prosecutors objectify defendants whereby an alleged offender becomes a social object with certain characteristics that can be dealt with independently. Such a process of objectification entails knowledge about causes of human behaviour in the form of an absolute truth, which is utilised in interactions between court agents and defendants. Nicolson (1994) argues that this process of objectification demonstrates practitioners' positivist approach, which appears to be inherent to evidence discourse. "It is characterised by the hard-nosed, practical and unreflective practitioner whose overwhelming concern is the winning of cases, rather than the search of such a fickle mistress as truth or anything as prosaic as justice" (Nicolson, 1994, p. 728). As a result, intellectually disabled defendants are perceived as criminals who can form intent on the basis of rational decision-making. Such a concept was explicitly voiced by one of the interviewees:

> *There are people with learning disabilities, there are people with mental health issues, personality disorders who commit a crime not because they are suffering from the illness, or the disability, or acting under a disability, it is basically they are criminals as well. Their behaviour is criminal.*
>
> (Prosecutor 4)

The disjointed discourse around alleged offenders with an intellectual disability allows a suspected offender and their disability to be separately addressed in criminal justice procedures. For prosecutors it is important to 'enable' a defendant not only whilst interviewing them in court. In order to trial an alleged offender, demonstrating a defendant's present capacities and mental state would be insufficient for the prosecution. Within the context of defining the charges against a person, it is of even greater importance for the prosecution to prove a person's past mental state at the time of the crime. This is to present to the public that whilst allegedly committing a criminal act, the defendant was in control of their actions, and can thus be held responsible and punished for their crime.

4.3.1.3 Culpability and responsibility

As mentioned before, *mens rea* or the guilty mind, is one of the necessary elements that constitute a crime and that have to be proven beyond reasonable doubt by the prosecution service. Consequently, for the prosecution it is of vital importance to demonstrate that when committing the alleged offence, the defendant had the necessary capacities to form intent:

> *Your mental capacities are part of your intent. I mean criminal law, a lot of it is about criminal intent.*

<div align="right">(Prosecutor 6)</div>

Like when proving an alleged offender's fitness to stand trial, the prosecution will utilise medical evidence given by forensic medical experts to assess a defendant's mental state and decision-making capacities at the time of the alleged offence:

> *I would outline to the bench the information I had in my possession about this person's mental capacity and the facts of the case. And the fact that we say that he is criminal, he is responsible, that he has the intent despite his mental disorder, based on the medical reports that we have and the psychiatric reports that we have.*

<div align="right">(Prosecutor 6)</div>

Although prosecution and defence lawyers might present a medical expert's evidence as being based on hard science and, therefore, as being objective, there are a range of biases that appear to be inherent to the subjective assessment of a

person's capacities in relation to socially constructed characteristics of a normally functioning mind (cf. section 4.2.2)

In the philosophical literature, the very concept of free will has been discussed throughout the history of mankind. Walter (2001) identified three main themes. First, in order to act freely one must be able to choose from different actions. Without alternative behaviour(s) to opt for, one cannot be said to act on the basis of free will. Second, the notion of free will implies that all behaviours are performed for a reason. Third, one is the creator of one's own actions. Culpability, in this context, is based on a person's ability to assess a situation, on the basis of which they are able to foresee the consequences of their actions to themselves and others.

Within the criminal justice system, culpability is translated into the charges that the prosecutors will put against a defendant. The charges, in this context, define the exact offence for which an alleged offender is trialled. While interviewing members of the Crown Prosecution Service it transpired that there are mainly four impact factors that determine whether a person will be charged and what the charges will be. Those impact factors are: conclusiveness of gathered evidence, the (political) meaning of the charges, potential trial outcome, and the status of the victim. All the factors are interwoven: for example, in their political meaning, charges are often constructed in relation to the victim who represents society as a whole. Furthermore, charging a defendant serves to catalogue facts around their past offending behaviour. This will be used by the prosecution to develop a character of a person in relation to their propensity to engage in acts of crime.

This also applies in relation to people with intellectual disabilities. In one particular interview it appeared that this was a strategy on which prosecutors might embark in situations where traditional means of punishment cannot be utilised:

> *The sentence is a feature, or potential sentence is a feature. But then again, for example when I was saying to you about incidents and violence carried out in a hospital environment or care environment, people acting under disabilities. Sometimes very little will happen by way of sentence but it is absolutely essential to get a record of the misbehaviour complained of, for maybe future conduct.*

(Prosecutor 4)

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Consequently, for prosecutors to put charges against a person constitutes a form of symbolic power, especially in cases that might be beyond the grasp of the mainstream criminal justice system. In those cases, the symbolic use of power achieves the form of an equally symbolic justice for the victim and society in general. The same respondent addressed this very issue again a little later during the interview, explicitly outlining how symbolic power is used to maintain the integrity of criminal justice in situations that have the potential to publically demonstrate the limits of the system. Such situations involve in particular people with disabilities:

> *There is a need to prosecute people with disabilities for many reasons, not least of all the fact that you are saying within that environment it isn't OK to, for example, assault nurses in, you know, Broad Oak Unit or wherever. If you are not careful, the fact that they are in there, people who are within the criminal justice system who are charged with a responsibility of ensuring that proper cases go through may in fact miss cases that ought to be prosecuted on the basis, well it is Ashworth, nothing is going to happen to them so there is no point in prosecuting them. What message does that give to people who then continue to assault the nurses at Ashworth?*
> *[...]*
> *It teaches the bigger group and it says to those members of staff who are working it is important that, you know, if you are victimised that that is recognised.*
>
> (Prosecutor 4)

The nature of the charges is determined through the public interest and the evidence test in close collaboration with police and other criminal justice agencies. Prosecutors will balance aggravating and mediating factors in order to categorise the defendant and their crime. In correspondence to this categorisation, prosecutors define the particular charge(s) which they will bring against a defendant:

> *You would look at the past behaviour. You would look if they had previous convictions for violence as well. You know, but I would say we would just, I would look in the custody record as well. I would look to see what they said to the custody sergeant. You would look at other factors like alcohol for example. So the record, the custody record, if there are any other*

convictions because of that, and the medical psychiatric report, that's what I would rely on in deciding whether to proceed.

<div align="right">(Prosecutor 6)</div>

This joined-up work of the prosecution services with various other agencies creates a very efficient economy of power within the criminal justice system. In correspondence to Allen's (2003) distinction between strong and weak joined-up working of different social institutions, the collaboration between the prosecution service and other agencies is strong, as it is based on a fusion of different bodies of knowledge and various approaches into one holistic practice. When providing evidence to the prosecution, the joint efforts by members of different criminal justice institutions, such as forensic medical examiners, or members of the police or probation services, generate a disjointed discourse of disability. This allows the prosecution service to demonstrate an individual's culpability by using a range of information comprising details of a defendant's life prior to the alleged offence, as well as information regarding a defendant's psycho-social constitution immediately before and at the time of the alleged offence.

Consequently, the disjointed discourse which was already utilised by the prosecution to determine a person's fitness to stand trial is continued to prove their culpability and justify the charges against them.

It used to be, you are mad so, you know, end of conversation. Now it is more, let's see, and just because you are mad it doesn't mean you are not bad. Just because you have problems whatever it is, it doesn't mean that you can raise your temper and assault somebody.

<div align="right">(Prosecutor 5)</div>

The above discussion indicates how the prosecution service appears to be at least partially influenced by political developments and public pressures, especially during the public interest test. In particular, when prosecutors balance factors for and against pursuing a court trial, political ideologies around control and deterrence infiltrate decision-making processes in criminal justice. Such political influences were also apparent in respondents' attitudes towards punishment.

The interviews with prosecutors helped to demonstrate that the criminal justice system does not operate through procedures that discover the truth about a person's social behaviour. Instead, court proceedings appear to revolve around producing truth, or more specifically a discourse of truth, which manifests and reproduces the strategic targets and values by which the system operates.

During the initial stages, the process of truth generation begins with an objectification during which a crime suspect is categorised in relation to the particulars of their case. This is achieved through bureaucratic and administrative procedures whereby seemingly factual and bias-free knowledge is produced by investigative agencies, stating incriminating evidence as well as listing incidents of past delinquent decision-making by the suspect. All individual incidents are then correlated with observable situational factors that have accompanied the suspect's decision-making. Knowledge which is produced in this way appears to explain in an indisputable way the causes of human criminal behaviour. Punishment, in this context, is reconstructed into a welfare-orientated measure that is supposed to assist the criminal in their efforts to stop their offending, and to re-integrate themselves into society as a productive, functional and law-obeying citizen.

The discourse of truth that is generated this way reinforces the system in its core values. First, it legitimises the way in which the system operates by producing a discourse of truth around an offender's capacity to form intent, portraying crime as a process of voluntary, deliberate decision-making. Second, it justifies the sentencing policies which are perceived as a measured and well informed response to criminal behaviour, in that they promote change in an offender's behaviour whilst protecting the public.

This discourse provides a functional paradigm of criminal justice as infallible: if a conviction does not achieve the expected behavioural changes in a person, it must not be understood as a failure of the system but, instead, as a failure of the offender who, by their rejection of all offered assistance, reveals themselves in their persistent and prolific delinquent character, requiring either the sentence to be reapplied or necessitating a more punitive alternative punishment to be executed (Foucault, 1979b).

Recently, the role of victims in court proceedings has become more emphasised, which appears to increase the risk of people with intellectual disabilities becoming incorporated into the criminal justice system rather than being diverted, as prosecutors might be more prone to decide in favour of prosecuting during the public interest test.

The public interest test, during which prosecutors determine whether a case should be taken to court, is based on a disjointed discourse of truth. In this context, most attention is paid to a person's ability to engage and less emphasis is put on a person's capacity to understand and reason. Potentially, this might seriously disadvantage people with intellectual disabilities. Previous research (Talbot, 2008) has shown that defendants with intellectual disabilities often do not understand central issues of court processes, such as the nature of charges against them, attending the court on time, conditions of their sentence etc. As a result, this population appears at serious risk of breaching court orders and receiving more punitive sentences.

During a court trial, prosecutors objectify both the offender and the offence, resulting in individual defendants and their disabilities being constructed as two separate social objects which can be addressed individually. This objectification allows for a disability to become a manageable object within court processes. By providing support to an individual to assist them in their interactions with the court, it is assumed that in this way defendants are also supported in their reasoning. The disjointed discourse of truth, therefore, marginalises intellectually disabled people in their needs and capacities, making it more likely for this population to become incorporated into the criminal justice system.

A defendant's culpability is constructed in relation to their ability to assess a situation and to foresee the consequences of their actions to themselves and others. As a result, criminal behaviour is presented by prosecutors in court as a pathological but, nevertheless, deliberate act of decision-making, justifying more punitive sanctions being imposed. During the analysis it transpired that the nature of the charges is determined by mainly four factors: the strength of evidence, the

nature of the offence, the likelihood of a guilty verdict and the social group which the victim represents.

Charges are a form of symbolic power that is used by prosecutors. This power results from charges determining a person's culpability and the seriousness of the committed crime. Particularly in cases that could potentially reveal the limits of the criminal justice system, for example offences that are committed by people who are indeterminately imprisoned or institutionalised, criminal charges allow for victims to be recognised and, therefore, achieve a form of symbolic justice.

4.3.2 Magistrates and judges

The following section will concentrate on decision-making by judges and magistrates. The analysis will be undertaken by constantly comparing both professional groups to identify distinct differences in relation to the structural constraints in which actors from either profession negotiate their decision-making.

Some of the variations between the two groups were expected due to the dissimilar training, social position, and preoccupation that judges and magistrates have within the criminal justice system. Judges are criminal justice professionals. All of them are qualified lawyers who will have had many years of court experience before becoming a crown court judge. In contrast, magistrates are volunteers: lay members of the public who most often do not have a legal background. In order to prepare them for their role, magistrates are required to undergo continuing training, starting with an induction and core training of eighteen hours. After a year serving as a member of the bench, magistrates are required to undergo a further consolidation training of twelve hours. Additional requirements comprise a minimum of three court observations as well as familiarising themselves with the three different institutionalised sanctions which they are likely to utilise most. Therefore, the training of a magistrate always includes visiting a probation service unit and a prison, as well as a young offender's institution (cf. Department for Constitutional Affairs, 2011).

Magistrates deal with the majority of all cases that are prosecuted as all prosecutions start in the magistrates' court. In only 3% of magistrate hearings, the severity of the crime requires the case to be referred to a more senior court.

Consequently, there is a significant difference in the number of cases being dealt with by magistrates and crown court judges. This is an important issue to keep in mind as it explains some of the dissimilar structural constraints in which judges and magistrates negotiate their decisions. In this context, the organisation of proceedings in magistrates' courts, for example, represented to a greater extent signs of the mere bureaucratic nature of punishment, and most of the pressure appeared to result from targets around speed of proceedings. In contrast, concerns expressed by crown court judges were much more related to issues around due process.

4.3.2.1 Political and structural context of decisions

During interviews with both magistrates and judges it became clear that, due to increasing intervention by the government, there is growing pressure on both groups apparently resulting in more rigorous proceedings:

> *I think in that regard there is a greater pressure from the government at the moment than there has ever been.*
>
> (Judge 4)

As mentioned above, there appeared to be distinct kinds of pressure on magistrates' and crown courts in relation to the various functions of both systems. Magistrates were particularly concerned about the increasing speed of procedures:

> *The other bit that I found most intimidating, particularly initially, was the speed at which things went on.*
>
> (Magistrate 1)

It became evident that magistrates' courts are largely measured in their performance with regards to how quickly alleged offenders are processed. Thus, magistrates' courts are at risk of becoming institutions of bureaucratic punishment, whereby less attention is paid to individual circumstances and more emphasis is put on sanctioning:

> *If we are not sure, we can say, no hang on a minute, I want to know about this. I would like to know a bit more about… You know, let's get this chap sentenced and sorted and out of door again, and I am saying no, actually I*

am wondering about this chap's mental capacity, can I ask a few more
questions about this and slow things down, we certainly would reserve the
right to do that. The problem is that the court almost certainly will have
targets to meet, all sorts of targets about, you know, how many people they
have seen, how long from accusation to first appearance in court, from first
appearance in court to verdict.

<div align="right">(Magistrate 1)</div>

Such quick trialling of offenders increases the risk of intellectual disabilities being overlooked or not sufficiently taken into account. In addition, performance targets around speed of procedures force magistrates to concentrate primarily on sentencing. As one of the interviewees outlined, such performance targets might also undermine standards of due process:

Somebody gets picked up in the street for whatever sort of crime and they
are banged away in police cells and then they are brought into the courts
and they are kept in the cells down here and then they are brought into the
courts, they won't have undergone a psychiatric assessment.

<div align="right">(Magistrate 2)</div>

The above statement outlines that the current focus on speed of proceedings may increase the risk of people with special needs remaining undetected. As a result, an interviewee stressed, people with intellectual disabilities might not receive proper support and assistance, which may leave them incapable of making an informed decision in relation to their defence strategy:

I sometimes think that the pace of the court depending on what it is I think
an example might be that somebody with a mild learning disability goes into
a shop, steals something, is seen in court. The shop say, right, we are
definitely prosecuting, they will come to court fairly quickly and they will be
in through the door, the accusation will be put to them, will you plead guilty
or not guilty. Guilty, right, that's it, sign, gone. And they can be out of the
door again within 15 minutes with a criminal record. And the extent to
which they would understand that is debatable. Justice is being done very
rapidly. That can be a problem I think sometimes.

<div align="right">(Magistrate 1)</div>

Judges were particularly critical of the current government's unprecedented interference, as they felt it undermined their independent position and, therefore, function within the criminal justice system:

> *The government is actually, politicians setting the sentences and the judges are only doing what the politicians say. Their judicial independence is being gradually watered down and we will have to see what happens.*
>
> (Judge 1)

Respondents identified two main areas within criminal justice, where there has been increasing political intrusion. These areas were 'hotspot crimes' and 'sentencing'. 'Hotspot crimes' are crimes which have become the centre of attention by the government, for example knife or racist crime, or traffic offences. Criminal justice agencies are expected to mobilise all their resources to pursue these offences and to guarantee their successful prosecution (cf. section 4.3.1.1.). In the following quote a judge describes a true case that was dealt with much more severely than it would have been in previous years. The quote outlines how the government has redefined specific offences to require them to be dealt with in a more punitive way:

> *Do you remember quite recently there was a case of, was it a Polish driver? Who was driving on the motorway and he hit a car and wiped the family out. And he was convicted of causing death by careless driving and he was sent to prison, I think, for 3 years. People were saying it wasn't a heavy enough sentence. And I think it has been appealed by the prosecution. But to think that a couple of years ago that would not have been an offence for which he could have been prosecuted. He would have been prosecuted for careless driving for which the maximum penalty was a fine. And so we have suddenly got this offence of causing death by dangerous driving, by careless driving resulting in quite a long prison sentence and that has been as a result of political pressure rather than anything else.*
>
> (Judge 4)

The above quote also outlines how public pressure has had an implicit but nevertheless decisive impact on how justice is exercised. This has to raise concern particularly considering the government's increasing attempts to unify sentencing, which will ultimately further limit judges in their discretionary powers and

potentially result in a criminal justice system that is both extremely rigorous and punitive. Consequently, there might be less or no room at all for judges to take into consideration the individual circumstances surrounding both the defendant and the crime for which they are trialled. In such conditions it could be virtually impossible to take account of issues around vulnerability and diminished responsibility. As the above respondent continues:

> *And what will happen, what inevitably will happen, we have a case of a little old lady who is tottering along the road and she knocks down some child on a zebra crossing and kills it because she just didn't look at the sign, just missed it. Careless driving. What will happen if she gets 2 years imprisonment? Will the general public be screaming that's not enough or will they be screaming this is outrageous, this little old lady being sent to prison?*
>
> (Judge 4)

There has been a growing fear in society of becoming the victim of a crime, which, as Kort-Butler and Sittner Hartshorn (2011) in their recently conducted study demonstrate, might partly be due to media coverage of crime. The authors argue that such media coverage is reflected in public attitudes towards criminal justice, and that "the public audience appeared to negatively evaluate the criminal justice system while simultaneously supporting more punitive policies" (Kort-Butler & Sittner Hartshorn, 2011, p. 48). This creates the social setting in which judges make their decision:

> *It's really when you come to the sentencing that the general public, everyone, has a view of what sentencing should be. Whether it's informed or whether it's a gut reaction or whether it's pure sensational response, whether it's blood-curdling approach to life. I mean I sometimes think that if we had public hanging on television on Saturday night it would overcome any of the "Strictly Come Dancing" or "Dancing on Ice" [programmes]. The general public would probably like that, or a percentage would do and it would probably get tremendous crowds.*
>
> (Judge 4)

The public's lack of knowledge in relation to the interplay of crime and reactions by the criminal justice system has resulted in confusion about how the system works and what current responses to offending behaviour entail:

> *Well, I think that when the judges are saying that people beating up each other at midnight outside the Cross in C. are going to go in prison and we are not going to put up with it, I think the people in C. ought to know. But that's what the judges are saying and we are doing our bit to provide some disincentive so that drunks stop behaving in that way. Otherwise they don't actually know that many of these prosecutions are actually taking place because they don't come here, the general public.*
> *[...]*
> *It's a position that requires the sort of two way trust of publicity. And if there is nobody, nobody knows what we are doing in here, it's difficult to get the message across.*
>
> (Judge 3)

Thus, based on the gap between the perceived risk of becoming victimised and real crime figures, the government was able to establish a range of novel measures of social control, by using technology such as CCTV (Coleman, 2004) and by increasingly criminalising behaviour (Maruna & King, 2005). It was pointed out by judges that these developments have also resulted in a range of preventative measures:

> *2003 they introduced even imprisonment for public protection. And if you have got dangerous offences then you start talking in terms of a minimum term, indeterminate, or a life sentence. I think we were sending persons to prison long enough under the existing regime, but the government wanted to be tough.*
>
> (Judge 2)

Interviewees were concerned that these developments could potentially threaten the democratic structures in Britain as some of these measures might be abused as oppressive measure of social control:

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That is one of the things, I mean in jocular moments we are surprised that the government hasn't introduced a law where you can be sentenced for looking as if you could cause trouble. You look a bit dodgy, your hair is a bit long, you have got a ponytail, we don't like people with ponytails, you know, and that almost has that feeling.

[...]

I mean the only complaint we have is that we don't want people just to be treated differently just because they may not be like everybody else. You know, people should have committed a criminal offence in the end. You don't want to see people being locked away because they happen to be slightly strange if they are in the end no risk to anybody. But then that's just being a soppy liberal, isn't it?

(Judge 1)

Furthermore, judges felt undermined and questioned in their social function within the criminal justice system, as they were more and more reduced to being executors rather than decision-makers:

We have been picked out and trusted to do it. And the rules actually support what we do unless we go badly wrong, in which case we can be appealed and it is a black mark in our book. But generally speaking, we are picked because it is thought that we can do the job.

(Judge 3)

This addresses another issue within sentencing, which respondents identified as an area where the government has been trying to exert influence. Interviewees stressed that attempts have been made to unify sentencing in order to achieve greater consistency in decision-making processes. Judges considered their autonomy compromised by such developments, acknowledging that there was a need for consistency yet fearful of the system becoming increasingly punitive with demands for sentences to be the same nationwide:

At the moment, I don't know how much you know of it but last year Lord Justice Gage conducted an inquiry as to a matrix form of sentencing based on American grid system.

[...]

But that is very much a straitjacket because at the moment we don't have to,
we have to have to regard the guidelines but they are not to be followed
slavishly. And so we have a very much wider discretion to balance factors in
a case. Whereas under the present proposal that discretion would be very,
very severely curtailed. And I can tell you that it is something which the
judiciary very widely are hostile to.

<div align="right">(Judge 4)</div>

Despite not having comparable autonomy in sentencing decisions to judges, magistrates voiced to experience similar pressures:

So you can get, depending on what the circumstances are, quite a difference
in the actual sentence that is given for what would appear to be the same
offence. It is that sort of what gets publicity, cause sometimes it's the press
that says, magistrates are bloody inconsistent, you know, why don't you give
the same sentence to people?

<div align="right">(Magistrate 2)</div>

The latter quote implies that such pressure might result from limited insight into court proceedings, and insufficient and partial information that is passed on by court journalists to the public.

The truth generated in criminal justice becomes a commodity within public discourse, which can be measured in its power and economic value. Newspapers, for example, often sell their copies by giving a partial and sensationalised account of court proceedings and trial outcomes. Politicians, in return, utilise this fragmented discourse to increase social control. Judges, in particular, perceived this as undermining the truth that is produced through criminal justice proceedings in its central function of comprehensively conveying how criminal justice is executed:

In an ordinary local case it is a long time since I have had a court reporter
listening to the evidence throughout. They might stay for five minutes at the
beginning to hear the prosecution's opening because from that they get an
idea of what the case is all about. They might just come back to hear the

defendant if they have got nothing better to do and they will probably ask
somebody at the court to phone through the result.

<div align="right">(Judge 3)</div>

The fact that judges in particular expressed great concern about this incomplete and/ or insufficient reporting about court processes might be the result of their greater exposure to the public due to the often high profile nature of cases that are trialled in crown courts. In addition, judges might be more critical as a result of their position within the criminal justice system. Judges explicitly outlined their expert knowledge due to the position that they hold within the system, which enables them to link all the evidence with procedural law, on the basis of which they will make an informed decision how to apply substantive law in individual cases:

I think it is 'cause you have a very good understanding of what makes
people operate. I mean people think, you know, judges live in ivory towers,
what we would say is in fact it is the general population who are out of
touch. I mean every day we are dealing with people who have drink
problems or drug problems, or nasty sexual offences, or violence, [...], and
the route what's causing problems for a lot of young people. And you get a
greater appreciation than anybody else does because in fact you live it each
and every day of your career, either when you are a lawyer, as a barrister
representing people or prosecuting people and of course after year in and
year out sitting on the bench you have heard pretty horrific tales.

<div align="right">(Judge 1)</div>

This confirms a trend that has become clear during interviews with criminal justice agents from various agencies. The position that an actor holds in the hierarchical order not only within their own agency, but more importantly within the criminal justice system, determines the kind and breadth of information to which this actor will have access. This information constitutes the basis on which individual actors negotiate their reality. Thus, the higher the position which an actor holds, the greater will be the access to information. Therefore, custody sergeants' access to information, particularly in relation to court proceedings and the determining effects on trial outcomes, is significantly limited in comparison to prosecutors or judges. Hence, custody sergeants had a much more punitive understanding of criminal

justice, favouring measures around discipline and control whilst being more hostile towards alternative measures to be put in place for people with intellectual disabilities. In contrast, magistrates and judges emphasised defining appropriate assistance and support to defendants as a main function of court trials. As one of the respondents outlined:

> *The more things a court can do by way of sentence the better. The more*
> *ways you can deal with people the better.*

> (Judge 2)

The above discussion demonstrates that judges were very concerned in relation to recent changes initiated by different governments in an attempt to exceed each other in their punitive methods to tackle criminal behaviour in society. Implicitly, judges were worried that the extent to which consecutive governments have been interfering in criminal justice matters potentially threatens the *trias politica* principle, in that the separation between legislative and judiciary powers is increasingly undermined.

In particular, this group of interviewees highlighted that the criminal justice system has been restructured based on an epistemological transformation of its core objectives. Respondents expressed the view that reforming offenders by supporting and assisting them in their lives has become less of a target to which the government aspires. Instead, more emphasis has been put on deterring potential future offending through measures of retribution and punishment. This contradicts criminal justice agents in their perception of delivering justice, whereby a symbiosis of measures around control and discipline with more welfare orientated methods is suggested as the most fruitful response to offending behaviour. Such a concept of justice clearly challenges opinions voiced by custody sergeants who apparently felt betrayed in their law enforcement efforts by a criminal justice system which they perceived to be dysfunctional due to its leniency. Thus, there appears to be a conflict among professionals from different criminal justice agencies in relation to their roles, which seems to be increased by insufficient 'top down' communication and information.

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You have probably noticed that judges are very critical of government,
extremely critical of government. I wouldn't want penal policy to be decided
by a custody sergeant.

<div align="right">(Judge 1)</div>

Despite being critical of the government's response to criminal behaviour, ultimately judges might be forced into submission as their actions and decisions are functionally integrated into legislative structures. Being too lenient in their sentencing decision will result in an appeal by the prosecution service, potentially resulting in an overruling of the original conviction by the Court of Appeal. As Judge 3 in their earlier statement highlights, *"we can be appealed and it is a black mark in our book."* This is more than just a casual remark, as a high number of appeals will have a damaging effect on a judge's career.

Appeals have a particular damaging effect on judges as well as magistrates as it undermines their status of being the independent guardian of truth, a truth that has been 'discovered' through a fair and balanced process, in which all involved parties were able to explain their view:

You have a role in relation to the conduct of the trial to ensure that that's
conducted according to the law, working alongside the jury who are going
to decide issues of facts at the end of a case, to make the appropriate
sentence if there is a conviction and consequential orders, which are
increasingly important.

<div align="right">(Judge 4)</div>

All court interactions that take place, the order in which they happen, the communicative techniques that are used by court agents ultimately fall under the responsibility of a judge or magistrate. The judge or magistrate are the guarantors that interactions and communications proceed in a highly standardised way in order to generate an '"interaction ritual chain' […which] signifies equal chance and transparency for both [defence/prosecution] sides" (Scheffer et al., 2009, p. 195). This concept of fairness and truth finding has been internalised by judges and magistrates who have integrated it into their professional identity:

IR: What do you think characterises a good judge?

IE: Somebody who has an ability to listen patiently, not to suffer fools gladly, not to allow the case to be derailed or attention to wander from what the real issue in the case is. To maintain scrupulous fairness, [...] and to do what we think at the end of the day is right, even though other people may not think it is. That's why we are independent.

(Judge 3)

And again, it is just to make sure that you have got people, basically, who you can be pretty certain aren't going to be biased. At the end of the day, that's really what you are looking for, you know, that they are actually be really open minded in coming to decisions.

(Magistrate 2)

Thus, court proceedings are truth generating processes which, chaired by a judge or a magistrate, translate (criminal) behaviour into quasi-objective theories allowing sentences to be communicated as object lessons (Scheffer et al., 2009). Therefore, the appeal system appears to concentrate on judges' and magistrates' performance, stressing the truth finding process to be their sole responsibility. Again, this has been internalised by judges and has become part of their professional identity:

I think most unlike most other jobs, when I am actually operating as a judge every word that I utter, is uttered in the public domain. There may not be any reporters here but it is all public, it is all on the court record and I can't get away from it afterwards. That's why, you know, it's so vital to think carefully about what you say before you say it. Everybody from time to time says stupid things. Nobody is immune from it. Our problem is that if we ever do it, it is on the front page of the Daily Mail and you can be crucified by the press. So it is just terribly important to think very carefully before you start saying anything.

(Judge 2)

The truth generating procedures within the criminal justice system are based on an assumption of an offender with the capacity to form intent (cf. section 4.3.1.2). In this context, it needs to be analysed how judges and magistrates integrate defendants with intellectual impairments into the truth finding procedures. Special

attention needs to be paid to the construction of crime, criminals and punishment by judges and magistrates in relation to intellectually disabled defendants.

4.3.2.2 *Construction of crime and the criminal*

It was possible to identify a range of distinct differences between magistrates and judges in relation to their concept of crime. There are a range of factors that have an influence on magistrates' and judges' attitudes and opinions, such as the different nature of the offences that are trialled in the two court systems, or the different levels of authority and autonomy that magistrates and judges enjoy in their decision-making. Whilst magistrates seemed to be predominantly guided by a free choice model of crime, judges made their decisions in relation to their symbolic function as guardians of truth within the criminal justice system. For the latter group, their understanding of their role led to a more differentiated concept of crime, criminals, and actions that might be required to tackle offending behaviour.

When analysing magistrates' concepts of crime, particular attention was paid to how respondents recognised and acknowledged intellectually impaired defendants. In accordance with the code which is used by the prosecution service, magistrates appeared to assume a defendant to have full capacity unless proven otherwise. In addition, magistrates saw it as being mainly the responsibility of the defence lawyer to bring a defendant's impairments to the court's attention.

> *We would then perhaps seek via the legal advisor, you know, you might well seek sort of an adjournment so that the person could be assessed by the, our court, I think most courts these days have a community psychiatric nurse attached to them and the means whereby they could reasonably speedily be addressed, sorry assessed I should say.*
>
> (Magistrate 1)

The above quote is of particular value as it addresses a range of issues that arise when potentially impaired defendants engage with a court. The respondent sees the matter as mainly lying with the defence team. This implies the judicial function that an intellectual impairment has when being used as a defence strategy. However, the respondent implicitly outlines how the disjointed discourse of truth, which is being started by crime investigating agencies after a suspect has been arrested, is

continued inside the court arena. Although the respondent quickly corrects himself and probably meant to say 'assessed' rather than 'addressed', it became clear at various points of the interview that the main occupation of a community psychiatric nurse in magistrates' courts may be addressing a defendant's needs. It is an assessment of what 'enabling' support is required allowing for the defendant to be processed through the different stages of the criminal justice system, whilst implementing the same procedures of truth finding and truth presenting which are used for non-disabled defendants.

Similarly to custody sergeants, magistrates appeared to perform a subjective threshold test, whereby the decisive variable was not necessarily a defendant's level of intellectual functioning, but the seriousness of their alleged offence:

> *IR: Did actually anything happen with this chap that you talked about before who seemed to have some impairment there, in the way that he answered and his perception?*
> *IE: In fact no. It was a relatively minor offence. I think, if I recall the legal advisor, the man himself wasn't represented.*
> *IR: He defended himself?*
> *IE: Yeah, he didn't have a lawyer and he in fact pleaded guilty. The legal advisor just slowed things down and made very clear that he understood what the implications were of admitting to this offence. And it was a relatively minor offence.*
>
> (Magistrate 1)

The quoted conversation between interviewer and interviewee describes a particular trial where a defendant had been identified by the magistrate as being impaired in their understanding of the situation. In this particular context, the interviewee had a professional background in psychology and claimed to possess expert knowledge within the area of intellectual disabilities. There seems to have been a combination of two factors which resulted in no support being made available in this instance. First, the offence was assessed as minor and, second, the defendant had already made a confession. Accordingly, it was perceived as justifiable that it was not necessary for any kind of support to be given, as well as tolerable that a potentially vulnerable person was not provided with a professional defence lawyer.

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During the interview it became apparent that assistance for defendants was functionally integrated into the truth finding court proceedings. Depending on the likely outcome of a potential court trial and the impact an appropriate adult might have on the investigations, magistrates constructed providing assistance not in relation to a defendant's welfare, but rather with respect to how any form of support might strengthen the court in its generation of a discourse of truth. As the same respondent continues:

> *If there had been a serious concern that he was unable to understand then we would probably have said right, let's adjourn the case, let's get the duty solicitor to see him and represent him. It might actually not have changed the outcome but would have had at least, the process of justice would have been, just would have been seen to be done, would have been properly served.*
>
> (Magistrate 1)

The above quote implies that a defendant's potential impairments are not constructed in relation to their impact on the individual defendant, but instead to the extent to which they might compromise the criminal justice system in its symbolic powers, mainly its capacity and legitimacy to solve conflicts in a fair and civilised manner. This, in particular, involves the trialling of an offender who fulfils the criteria of *mens rea* and therefore deserves to be punished.

This was also the context in which magistrates constructed criminals. Accordingly, offenders were perceived in their deliberate decision-making to engage in an act of criminal behaviour. Intellectual disabilities were not perceived to necessarily compromise the requirements of *mens rea*.

> *I don't think learning disability per se prevents people from having the capacity to know right from wrong.*
>
> (Magistrate 1)

Interestingly, magistrates appeared to have a concept of crime in relation to its effect on the victim and society and, therefore, did not consider an offence in relation to an offender's level of intellectual functioning:

If I had a learning disability but I have the capacity to drive a car and I would have driven too fast, it would have been the same thing. And I could have turned around and say actually I have a learning disability so I don't know what the speed is. So no, I don't think that somebody with learning disability should have different consideration in terms of the law and in terms of justice.

(Magistrate 1)

It was argued that criminals are free in their choices. In addition, the model of free choice was extended into 'learning their lesson':

And it's amazing, you know people, I have to take the view generally speaking that people are just dopy a lot of the times. They are very impoverished, they get themselves into a life of crime and then they do something stupid. They go out, they have just, literally, a month or so ago we had somebody before the court who had previously been before the court a month before, must literally have stepped outside the court after having been fined for some crime or other and committed yet another crime. It was the same day. And you think, have you learned nothing?

(Magistrate 1)

This appears to serve two functions. First, it diverts attention away from potential shortcomings within the criminal justice system, particularly in relation to programmes that ought to re-socialise and reintegrate offenders. The respondent perceives people who re-offend after having attended such programmes as prolific and deliberate recidivists. Second, it ultimately leaves responsibility with offenders as to how to lead their lives.

Similar to magistrates, judges constructed criminals in relation to *mens rea*. In contrast to magistrates, however, the question whether the suspect had the intellectual capacity to be suspected of having acted intentionally when committing the alleged offence was seen not so much as an essential requirement for a trial to begin as it was perceived to be an issue that is decisive for the outcome of a trial. Intent appears to be perceived by judges within the context of deciding the sentence:

The jury then have to decide, have the prosecution proved the primary facts that they need to secure murder, namely an intention to kill, a deliberate use of violence with the intention to kill or to cause really serious injury? If they are not sure of that, then it is subject to manslaughter by reason of diminished responsibility or subject to manslaughter by reason of provocation.

(Judge 2)

For judges it seemed to be of much more importance to assure a defendant's fitness to plead:

In terms of the trial the one question is, do they understand the nature of what's going on? And if they are able to understand the nature of what's going on then that's it. Fine, on we go.

(Judge 1)

This indicates the professional identity of judges as guardians of the truth, a truth that is generated through fair and balanced court proceedings. To fulfil this role, judges saw it as essential that defendants were able to give instructions to and understand advice from their defence lawyers, to comprehend the charges against them and, eventually, to apprehend the sentence if they were convicted of an offence:

If they got to the stage of not understanding the charge, then of course you are not going to be able to trial them for the offence, or you have another mechanism to say whether they are fit to plead.

(Judge 1)

If a defendant on evidence is simply incapable of giving instructions properly, of understanding the nature of evidence, of being able to give instructions to his barrister or solicitor to challenge what is being said about what he has done, then he would probably be regarded as unfit to plead at all.

(Judge 3)

During interviews with judges it emerged that out of all respondents in this study they appeared to be most critical of the current criminal justice system. Their

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concerns were not limited to the previously mentioned increasing interference by the government and recent changes in how criminal justice is executed. In addition, judges questioned some of the central concepts by which the court system operates. In particular, it was doubted whether it was at all possible to objectively establish one of the key elements of a fair trial: a defendant's capacity to follow and understand the proceedings.

> *You try to make sure that they do [understand what is going on] to some extent, but there is no doubt that at times they may not fully appreciate the nature of it just as much as when they are being questioned they are out there on their own.*
>
> (Judge 1)

This is an interesting finding considering that establishing a defendant's capacity to partake in their trial was perceived by all interviewed court agents as one of the most important requirements for a court trial to take place. In this context, it transpired that by paying attention exclusively to the law breaking behaviour of an offender, the criminal justice system is allowed to operate and to come to its condemning conclusions in almost complete ignorance of motives and potential incapacities of defendants:

> *Well, you can take it [intellectual disability] into account, but it isn't an excuse, is it? It might mitigate, but it doesn't excuse.*
>
> (Judge 2)

A defendant's intention might be considered within the mitigation bargaining. Otherwise, it is an individual's action itself that becomes the legitimising force to put in motion the various operations and processes within the criminal justice system, which generate the discourse of truth around a criminal's responsibility and the response that is needed to stop the trialled criminal in their behaviour.

An offender's reasoning whilst committing an offence is only considered in justifying the system's response, which itself has been determined through the truth producing proceedings that have taken place prior to announcing the sentence. Whether the utilised proceedings are adequate in relation to the individual characteristics of an offender remains unaddressed. It was mentioned by

respondents that the criminal justice system is ill equipped to deal with intellectually disabled offenders in particular:

> *I think the problem we have is that intellectual disability or mental illness or whatever you choose to call it is something that, I suppose, has only been properly recognised comparatively recently. The system wasn't really designed to deal with it. There is no other system outside the court process and so a system that isn't designed to deal with it has to do the best it can.*
>
> (Judge 3)

Hence, simplifying capacity and reasoning, as well as marginalising intellectually disabled people by concentrating on their crime rather than their motive, has a legitimising effect whenever the criminal justice system is used for solving the many conflicts that appear incompatible with the system's central epistemology around free will and free choice:

> *A lot of the people who we deal with are fairly inadequate people. Whether they are inadequate because of the way they have been brought up or whether they are inadequate because of low intelligence or even born with a mental illness is another matter.*
>
> (Judge 2)

This also explains why the level of an offender's intellectual functioning would have to be extremely impaired before being taken into account, indicating that people with a borderline intellectual disability are unlikely to be sufficiently recognised in their needs. As one respondent mentioned:

> *You would have to be operating at quite a poor level, wouldn't you, for that [intellectual disability] to come out. The person who may have a mild learning disability, perhaps their IQ is in the say 70s or something such as that, probably within the system they would be treated as if they are pretty normal I think.*
>
> (Judge 1)

4.3.2.3 Summary

Judges and magistrates act as guardians of a truth that has been generated through processes taking place prior to a court trial. In this role, both groups have to assure fairness of all proceedings in court. To some extent, this fairness is achieved by providing support to defendants, which is supposed to demonstrate a balance between accusatory and exculpatory measures as well as presenting the accused as fit to stand trial. Nevertheless, there is an imbalance between support that is accessible to defendants and to witnesses and victims, disadvantaging the former and emphasising the importance of the latter. Victims have access to a much wider range of help, such as intermediaries and giving evidence behind a curtain or in front of a camera. None of these measures are open to defendants, who once in court are "on their own" as a respondent put it.

Greater pressure on judges and magistrates by politicians, particularly in relation to sentencing decisions, has resulted in a harsher and more rigorous criminal justice system. Consequently, there is much less room to take into consideration individual circumstances such as a person's intellectual functioning. In magistrates' courts it appears that the greatest pressure currently results from the speed of procedures, often forcing magistrates to concentrate primarily on sentencing. This may increase the risk of a person's intellectual disabilities being overlooked or not sufficiently taken into account during the sentencing decision.

Judges expressed great concern about being increasingly constricted in their discretionary powers. Respondents perceived this as undermining their independent role within criminal justice. Particularly in cases of 'hotspot crimes', judges are under pressure to pass specific and more punitive compulsory sentences.

Consequently, attempts by the government to unify the criminal justice system in the way it operates, but also in relation to outcomes, have made the system more rigorous, leaving less room for individual characteristics of cases to be sufficiently discussed and negotiated. This has changed professionals in their work, who have ceased to be decision-makers and are increasingly forced to take on the role of mere executors, passing sentences as dictated by the government.

4.4 Probation service

The purpose of undertaking this study has been to gain understanding of how intellectually disabled persons are transferred through the different stages of the criminal justice system. So far, the focus of the study has been on analysing the decision-making by professionals who are involved in investigating offences or trialling defendants. It was possible to identify a disjointed discourse of truth that is generated by criminal justice professionals at every stage of the system, a discourse that concentrates on guilt and responsibility based on intellectual capacity. It has been demonstrated that under the potentially watchful eye of the public, alleged offenders are presented in court as able actors who in their intellectual functioning satisfy the condition of *mens rea* and can, therefore, be legitimately considered culpable.

In the following section, proceedings will be analysed that take place during the sanctioning of a convicted offender. The resources of this PhD, particularly constraints around time, made it impossible to access prisons and speak with members of prison staff. It was, however, possible to conduct interviews with probation officers who at the time of the interviews were supervising and case-managing defendants under a community order.

It is acknowledged that the role of the probation service is complex in its tasks, and is not limited to enforcing a probation order which a convicted offender has been given by the court. Supervising convicted offenders under community orders, or offenders who have been released early from prison and are on licence, is just one of many occupations of probation officers. Despite significant changes that have taken place during the last twenty years, which increasingly converted the probation service into an agency with a much more enforcement-guided focus, it is proposed in this study that there is still an element of social work inherent to probationary supervision and management of offenders.

Nevertheless, the work of the probation service concentrates mainly on two areas: (a) the assessment and reduction of an offender's risk of harming others through (b) effective risk management. In this context, probation officers play an important role in the sentencing of an offender. If the court asks for a pre-sentencing report to be done by the probation services as defined in the Criminal Justice Act 2003, a

probation officer will provide the trialling judge or magistrate with information about the defendant who has either pleaded guilty or has been found guilty by the court. To fulfil their role, probation officers work closely together with the police and the Crown Prosecution Service.

The probation pre-sentencing report informs the court about the charged person's educational background and qualifications, their dangerousness and their risk of re-offending. In addition, the report will contain a full risk assessment and details about the nature of the offence (Ministry of Justice, 2010a). The probation staff will also make a suggestion as to the appropriate sentence and possible additional requirements, so that potential needs that a defendant may be displaying will be taken into account during the sentencing decision. Such needs may be around accommodation, employment, education, addictions, or welfare issues. Probation orders can, for example, entail unpaid work in the community or monetary penalties. Additional requirements can comprise regular supervision meetings with a probation officer, education and training, prohibited activities, mental health treatment, drug rehabilitation or alcohol treatment (European Organisation for Probation, 2009).

The following section will examine the structures of the probation service in which decisions are made. This section will be followed by an investigation of proceedings by which offenders are assessed and managed by probation officers. Finally, the analysis will focus on how probation officers evaluate defendants in their dangerousness and risk of reoffending in relation to intellectual capacity.

4.4.1   Bureaucracy of punishment

The probation service probably demonstrates like no other agency how the criminal justice system in general has been changing in its focus, becoming more punitive and rigorous in the way it operates. These changes have been characterised by a loss of autonomy and independence of individual criminal justice agencies, and a monopolisation of governmental power over targets and processes within these institutions.

During the last ten to twenty years, probation dramatically changed in its organisation and ethos. Forbes (2010) suggests that these changes were determined

by three phases: 'nothing works', 'prison works' and 'what works'. Whereas in the past social work used to be an inherent part of probation – demonstrated, for example, in the joint training of social workers and probation officers until 1998 – probation has recently become reduced to enforcing national standards (Kendall, 2004).

The "value for money" discourse during the early 1990s has created the circumstances for a *gleichschaltung* of probation with government targets for transparency, accountability and consistency. The very establishing of a National Probation Service through the Criminal Justice and Court Service Act (2001) can be perceived as demonstrating the government's intent to increase the consistency and efficiency of different probation trusts whilst monopolising control over the organisation's focus. This was also acknowledged by respondents:

> *I think many years ago probation was more about welfare, befriending type role. People often referred to probation officers as a type of social worker. And I think over a period of time the role has changed more to enforcement. And latterly, most recently it is very target driven as a service. We are aiming at targets all the time.*

(Probation Officer 2)

The standards by which the probation service operates are: enforcing court sentences, protection of the public, and punishing as well as reforming and rehabilitating the offender (Ministry of Justice, 2010a). Court sentences are enforced through probationary management. The supervising officer will generate a management plan which refers the probationer to specialist partnership agencies who address an offender's criminogenic needs. Such needs are deficits that have been identified in past research as being linked with offending behaviour. Ongoing risk assessments are, in this context, the core activity of probation officers.

The assessments are carried out using the Offender Assessment System (OASys). Offenders are scored in their risk and dangerousness in relation to their responses to questions determined by OASys. The tool consists of static measures, such as age or gender, and dynamic factors, for example family status or drug addictions. Hence, the OASys form is dynamic in nature, and can be revised and modified throughout the supervision and management of an offender. In this context, it allows

acknowledging and measuring progress in relation to an offender's risk of re-offending and reconviction.

Before OASys was introduced by the government, every probation trust had their own, and therefore often different, assessment tools. This inconsistency among local trusts, Mair, Burke and Taylor (2006) argue, had already been identified by the probation service and mechanisms were about to be developed to improve the situation. When the Home Office took control over these developments it resulted in a monopolisation of power within the government.

> "OASys, then, is not a neutral systematic assessment instrument; it is burdened by links to the centralisation of the probation service, the What Works initiative, the erosion of PO [probation officer] autonomy and clinical judgement, and integration with the Prison Service to form a National Offender Management Service" (Mair et al., 2006, p. 11).

It has been argued that there is a risk that OASys might even have a reverse effect.

> "The use of top-down initiatives alone, combined with an emphasis on risk management and containment, may serve to undermine ownership of the aspiration to risk reduction and, in the long term, threatens the loss of skills necessary for effective assessment and management of risk" (Crawford, 2007, p. 157).

Nevertheless, officers are now somewhat more coherent in their evaluating and planning of management. In addition, the tool helps officers to address all issues that have been identified as being linked with risk. Finally, OASys allows for individual probation officers to be evaluated and compared in their performances. To some extent, supervision might be even more thorough in its managerial nature because of OASys, as it obliges the probation officer to assess and re-assess an offender at specific times. This was pointed out by one of the respondents.

> *I believe it is meant to be one of the most comprehensive documents you get. I find it very helpful. It does focus your mind on reviewing things. But I couldn't tell you how reliable it is because I don't involve myself in that kind of thing. I am sure there is a research unit somewhere that can tell you more about it. Yeah, but it does focus your mind and if you have to review that*

every 16 weeks, so every 16 weeks it forces you to sit down and to look at all
those issues and what has changed in that 16 weeks, more frequently if it is
a higher risk.

<div align="right">(Probation Officer 3)</div>

The introduction of OASys has, however, provoked a lot of criticism. It has been stressed that officers have lost the discretionary power in their decision-making necessary to take into account the personal circumstances of individual offenders (Mair et al., 2006). Whereas in the past a probation officer's autonomy allowed for quick and effective responses to be made to the spontaneous aspects of social life, the prescriptive nature of OASys dictates in a rigorous manner what actions have to be taken in particular circumstances (Clarke & Newman, 1997). Thus, professional knowledge has been devalued.

In particular, the prescriptive nature of OASys, it has been argued, has made assessment procedures a 'ticking boxes' exercise which has dehumanised assessment procedures. Again, this was stressed by respondents as undermining their professional identity, which regardless of government targets was still influenced by a social work ethos:

I quite like interacting with people. Although I thought I would do more of
that than I do here to be honest. 'Cause a lot of the time you spend sort of
doing those assessments and sitting at the computer. I thought it was more
the human side of it.

<div align="right">(Probation Officer 3)</div>

More attention is paid to processing offenders and to completing assessments in the required time than to analysing an offender's narration (Mehta, 2008). This is especially the case as probation officers are measured in their performance mainly in relation to quantitative targets, such as the number of times a probationer has been seen or whether reports were generated on time. In a long term, there is a risk that OASys could deskill probation staff who are forced to concentrate increasingly on detailing facts without interpreting and analysing how those facts might be linked to offending behaviour (Fitzgibbon, 2008).

A similar development has been identified in this study within the context of decision-making by judges, who vigorously criticised recent plans by the government to significantly limit the discretion of judges and thus undermine their professional independence. In the case of the probation service, such plans have been put into practice through the introduction of OASys, irreversibly changing the role of probation officers from being innovators and contributors to becoming mere executors.

It appears plausible that in the future it might be decided that due to the mechanical nature of OASys assessments it does not necessarily require qualified probation officers to evaluate offenders in their risk to society. In order to save costs, future risk assessments might be conducted by less qualified individuals or even outsourced to private service providers.

OASys did not only change the way probation staff assess probationers. The tool also had an impact on the focus and professional ethos of probation officers. Lancaster and Lumb (2006), for example, argue that OASys limits assessments to the risks an offender might pose to society, but does not allow an assessment of the rights to which a person should be entitled whilst being supervised.

> "In respect of work with offenders within the statutory constraints of the National Probation Service of England and Wales (NPS) risk assessment is concerned not primarily with the harm that might befall an offender, but rather the harm the offender might cause other people" (Lancaster & Lumb, 2006, p. 276).

The needs of an offender have been replaced by issues around public protection. This can be very disadvantaging for offenders with intellectual disabilities who are assessed in their needs, mainly in relation to their employability. It is not part of the OASys system to inquire whether the probationer is able to internalise some of the values that are supposed to be conveyed through probationary supervision:

> *We will help them to gain qualifications and employment skills. So we do do that kind of stuff. So we cover that side of things. But I think when it gets into the question of can they understand the work that we are doing, when*

you have to adapt in the way that you work with them, that is where I think

the problems come in.

(Probation Officer 3)

Offenders are measured using quantitative targets that fail to reflect social dynamics during group interventions (Lancaster & Lumb, 2006). An offender's intellectual functioning, for example, might constitute a decisive factor in causing or contributing to a person's offending behaviour. In this context, the rigorous nature of the OASys assessment might be its greatest weakness as an offender's individual characteristics are not considered.

> "Closer attention to detail is evidenced where the subject focuses on the specific level of risk and the measures necessary for containment. Information relating to factors which might facilitate an understanding of the causes of such risks and how to reduce them is less evidenced" (Crawford 2007, p. 161).

Instead, offenders are allocated to groups in accordance with their criminogenic needs and their risk of harm. This dehumanising process was criticised by interviewees, who saw such practices as potentially counterproductive within the probation officer-probationer relationship.

I am always worrying that those are too simplistic answers that take no

account of people's individuality. As soon as you start sort of marginalising

people and say, oh yeah that's a group of offenders. Now, that's what makes

me laugh when people talk about offenders as one commodity, as if they are

all exactly the same. I mean we don't do it with other people, you know, you

wouldn't say sort of, well I suppose we do a lot of times because we talk

about Americans, don't we or we talk about Germans or Dutch or whatever

as always one group, they are all the same etc., etc. But when you talk about

any other groups and talk in terms of they are all the same, denying their

individuality then obviously you have got people sort of quite rightly saying,

but no, hang on, isn't that racist, isn't that sexist.

(Probation Officer 4)

In this section it has been suggested that the introduction of OASys has resulted in a significant loss of power by probation officers over how they organise their

supervision of offenders. It has been argued that this has led to a shift in the professional ethos of the probation service towards law enforcement. As one of the respondents highlighted:

> *We are aiming at targets all the time. But you know, obviously, we can't lose sight of the fact that we are working with people, not names and numbers. We are working with people, we are trying to help them to improve their lives.*

<div align="right">(Probation Officer 2)</div>

In the next section, it will be discussed how OASys is used to identify the risk that an offender might pose.

4.4.2 Offender assessment

The number of supervision meetings, length of sentence, and kind of activities and programmes put in place by a supervising probation officer depend on how a probationer scores on OASys during their initial risk assessment. Very high risk, for example, is defined as "an imminent risk of serious harm. The potential event is more likely than not to happen imminently and the impact would be serious" (Ministry of Justice, 2010a, p. 7). Hence, probation is concerned about speculative future behaviour rather than past offending, which is managed through supervision and a variety of activities.

> *If it is "imminent risk" you come together every two or four weeks.*

<div align="right">(Probation Officer 3)</div>

This trend of managing risks that *might* occur in the future is also evident in current legislation. Indeterminate imprisonment for public protection in the case of sex and violent offenders has been introduced in the Criminal Justice Act (2003). The sentence targets offenders who have been assessed as dangerous, but have not committed an offence that justifies a life sentence. Jacobson and Hough's investigations have revealed that "around 6,000 people have received the sentence since it was implemented in April 2005; about 2,500 of these are currently being held in custody beyond expiry of their minimum term custody, or tariff" (Jacobson & Hough, 2010, p. v). The authors call the policies around indeterminate sentencing

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completely inadequate and the "least carefully planned and implemented piece of legislation in the history of British sentencing" (Jacobson & Hough, 2010, p. vii).

Indeterminate imprisonment for public protection exemplifies a tradition within British politics where a succession of governments tried to exceed their predecessors in their attempts to be tough on crime. As the above example demonstrates, within the criminal justice system this has at times led to the development of hysterical and polemic and not necessarily well-informed measures that emphasise deterrence and incapacitation.

Lancaster and Lumb (2006) distinguish two principles that guide probation officers in their assessments, defence and defensibility. The authors argue that the defensiveness of methods that are utilised by the probation service is measured in relation to the extent to which future harm is prevented. At the same time, a probation officer's decisions have to be defensible in court. OASys, in this context, provides seemingly scientific and unbiased assessments, and makes recommendations of an equally scientific nature as to the appropriate sentence. In previous research, however, it has transpired that inconsistencies among probation trusts have remained. Coulbeck (2004), for example, noticed that probation officers from different areas still vary in their interpretation of risk categories.

Most of the probation programmes and activities, especially those around education and skill training, oblige the offender to have capacity to understand and process complex information. Canton and Hancock (2007) stress that many of the programmes require attendees to have an IQ of 80 or higher. Assessing an offender's intellectual capacity, therefore, appears to be of utmost importance as some probation orders can require specific educational skills. 'Failing' in an order means breaching a probation order, which will then be dealt with by a magistrate or in some cases by a crown court. Breaches are punished very severely, which can entail the probation order being revoked and a prison sentence being imposed.

> *People who persistently breach an order will end up in prison anyway. We are told that we have to look very seriously at breaches.*
>
> (Magistrate 1)

In this context, it was surprising that no formal assessments are done to identify the level of functioning of persons on probation. Whether and what kind of support is given to an intellectually impaired offender lies completely within the discretion of the individual supervising probation officer:

> *IR: How are people with ID being treated in the CJS? Are they treated any differently?*
>
> *IE: I think they are given more allowance for non-compliance. There is more flexibility. But what I think is that each officer will tell you here what they will find acceptable and unacceptable and we have a policy saying what is acceptable or unacceptable. It does not state that people with ID can have more flexibility or less flexibility. But it is up to the probation officer or the probation service officer to make that judgement.*
>
> <div align="right">(Probation Officer 2)</div>

Respondents talked of having been trained in mental health issues, yet it was mentioned that no procedures are currently in place which would allow for an offender's intellectual capacities to be measured or acted upon:

> *If somebody has got mental health issues we will often know that before they get to us. If somebody has got mental health issues there is somebody I can go to immediately to get that confirmed. If somebody has got learning needs there isn't a process, that doesn't get flagged up. There is no system for that, there is no assessment for that.*
>
> <div align="right">(Probation Officer 5)</div>

It transpired that intellectual capacity was constructed in terms of basic skills and expertise which are required to gain employment.

> *IR: Is there actually anything that allows you to measure an individual's intellectual capacity?*
>
> *IE: No. As far as I am aware people come and we do a form, a basic skills assessment. Again, they tick boxes at what age they left school, if they have any qualifications, have they worked. If they are coming out at a certain score then we will put them on a basic skills assessment.*
>
> <div align="right">(Probation Officer 2)</div>

The interviewees' lack of training was accompanied by a lack of preparation. When confronted with an offender who may have an intellectual disability, respondents often did not know how to deal with them, or found it difficult to assess their capacities. This was particularly evident when respondents were confronted with a probationer who had a borderline intellectual disability:

Well for example the guy I said who is 79 [IQ] I think for him there is nothing. I mean I couldn't actually tell you if it is that what is causing his problem in terms of understanding the work that we are doing. Which I think is a big problem that I can't tell you that.

(Probation Officer 3)

Complicating the situation even further, interviewees voiced a concern that they did not have information about where to get advice or help when supervising a potentially intellectually disabled probationer. Collaboration with specialist agencies, clearly, appeared to be insufficient:

Now, I know there are organisations, government organisations, like Adult Learning Disability Team. We don't really have partnership working with them. We do have partnership working with the Mentally Disordered Offenders Team.

(Probation Officer 5)

This demonstrates that partnership working as recommended by the Bradley Report and required by the Valuing People Now (2009) paper has not been implemented. In particular, respondents did criticise that offenders with a borderline intellectual disability often had difficulties in accessing specialist services. It was stressed that usually a person's IQ is used to determine eligibility. People who have capacity but require specialist assistance, therefore, may not get the support that they need:

I think it probably is known. I mean just chatting with people who think they have got people with learning disabilities on their caseload. But like me, they are bit stuck as to what to do. It is that sort of people that fall between, who the disability services will work with and sort of what you call your average IQ, that group that fall in between.

(Probation Officer 3)

Similarly to the police, the level of functioning of convicted individuals was determined indirectly during conversations between probation officer and offender. It was highlighted that a person with intellectual disabilities either had to be already known as being impaired or had to display obvious signs of their needs:

> *IR: Let me just clarify one thing. In case there is somebody coming here and there is no information in place that this person may have an intellectual disability, then it is quite unlikely that it will actually come up?*
> *IE: I would say that depends on what was written previously, when there has been a previous assessment.*
> *IR: Yeah, but that's what I mean, if there is no previous assessment…*
> *IE: If there is no previous assessment then I would have to depend on my own sort of nose. But I don't recall any training on spotting people with learning difficulties[14], which I think is a deficit.*
>
> (Probation Officer 4)

Some of the interviewees stressed that identifying an intellectual disability, especially at the pre-sentencing stage, is complicated further as the majority of offenders present educational needs as well as deficits in their social competence.

> *I suppose when you see most young people who come through our system you are going to get a fairly high proportion who haven't made it through the educational system.*
>
> (Probation Officer 4)

Having difficulties in understanding or communicating, for example, was stated to be a common problem among persons under probation supervision. Consequently, these difficulties were not believed to be valid indicators of an intellectually impaired mind:

> *You can't assume we would pick that up necessarily at that stage [pre-sentence report] because we work with lots of people for whom*

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[14] This particular respondent continuously used the term learning difficulties. At the very beginning of the interview the difference between difficulties and disabilities was explained to the interviewee. Unfortunately, it was not possible to restrain the respondent from using such imprecise terminology. However, it was established numerous times throughout the interview that the interviewee was, indeed, referring to learning/intellectual disability and not learning difficulty.

communication or the spoken word isn't, you know, is difficult to understand.

<div align="right">(Probation Officer 6)</div>

Apart from uncertainty around identification, it also became evident that there appeared to be confusion of how an intellectually disabled offender might be different in their needs compared to their non-disabled counterparts. Some of the respondents were concerned about wrongly labelling people as being disabled.

> *So that was a very clear-cut case. So you could say yes, he has got learning disability, how are we going to actually address that. But in other times it's, you are afraid of sort of labelling somebody with that when in actual facts it is just pure behaviour. So I think there is still a lot of…, it is a pretty grey area really. I think I would value a bit more training on it to be honest with you.*

<div align="right">(Probation Officer 4)</div>

The probation service, however, use specific tools to ascertain a person's intellectual functioning. For the pre-sentence report this is done by asking a set of questions which are mainly around general qualifications, school education as well as numeracy and literacy skills, such as "When did you leave school?" and "Have you got any qualifications or certificates?"

The type of question reflects the approach of the probation service to offending. Offending behaviour is perceived to be caused by certain incapacities or a lack of skills, which have been identified as necessary to be a functional member of society.

> *There is the two sections really I think that you are talking about is, education, training and employment section. Education, training and employment section we are looking at things like, did they go to school? Did they have any complication? Have they had employment? Have they had good continuous employment? Are they motivated in doing any more training? Are they interested in training? That sort of thing. We assess if the person has poor essential or basic skills.*

<div align="right">(Probation Officer 5)</div>

The probation service, in this context, is supposed to provide the offender with education, activities, treatment and supervision to assist the individual in stopping their offending behaviour. Needs and particular incapacities are analysed by probation officers in an individualising framework which identifies precursors of offending behaviour:

> *We start off with a pre-sentence report with lifestyle factors, the reasons they committed the offence. I then identify what the most appropriate sentence would be for that person which you recommend to the court.*
> *[...]*
> *I look at all lifestyle factors so things like employment, lifestyle, drug and alcohol.*
>
> (Probation Officer 3)

This is a very positivist assessment which is based on a clear cause and effect chain. OASys, in this context, translates causes of criminal behaviour into risk factors which are personal deficits that an offender might have. This approach does not concentrate on an offender's reasoning in a particular situation, but pays exclusive attention to the situation itself. The information generated by OASys, therefore, is de-contextualised. Social, or in this context criminal, behaviour becomes individualised and detached from social factors and socio-economic struggles and conflicts.

The very term "criminogenic need" can in itself be seen as an expression of this individualising process. Improving an offender's faculties to secure employment in the labour market is, therefore, understood as reducing the risk of re-offending. In particular, learning and employment have been identified to be prominent needs among offenders (Cluley, 2007). A person's way of learning and understanding, however, remain neglected. This appears to be particularly disadvantaging for intellectually disabled persons, especially if their needs are not identified.

As OASys does not pick up information in relation to a person's level of intellectual functioning, identification of an individual's needs, in this context, can only be achieved by the supervising probation officer. It is, therefore, concerning that probation staff have become detached from the assessment process through the introduction of OASys. In addition, time constraints under which probation officers

work when generating reports and the time-consuming process of completing an OASys assessment have significantly decreased direct social interactions with probationers. Within the current climate of austerity measures and budget cuts this pressure on probation officers is likely to increase. Mair et al. (2006) showed that as a result of such pressure, assessments have been done improperly or incompletely in the past. This can have devastating consequences for the offender as their risk assessment, and thus their management plan generated by OASys, will be incorrect and might not properly reflect a person's needs and abilities. Such a scenario was described by one of the respondents:

> *He got a community order with the requirement to complete our "Think first" programme which, as the name suggests, is a cognitive behavioural programme. It's of 22 sessions in duration, each session 2½ hours long, it's group work based, it's all reading and writing. How on earth an individual suffering from ADHD is supposed to get through that is beyond me.*
>
> (Probation Officer 1)

As the above example outlines, if not identified in their intellectual impairments offenders could be seen as breaching their court order. In this context, the following section will concentrate on how the risk assessment process is informed by key targets around remorse and rehabilitation.

4.4.3   The reformable offender

The success of a person's probation period appears to be measured in relation to their understanding of their wrongdoing. When evaluating a probationer's progress, respondents from the probation service particularly focus on an offender's willingness to cooperate with their supervising probation officer. The successful implementation of a probation order, which informs the continuous risk assessment around an offender's propensity to re-offend, was based on a close collaboration between offender and probation officer.

> *So unlike the police who want to detect who has actually done it we try to detect why the person has actually done it and place it into some kind of social context. We also, it is a medium towards, to test the amount of*

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remorse regarding the offence, explore attitudes to victims and sort of..., see
whether or not there is a high or medium risk or no risk of re-offending.

<div align="right">(Probation Officer 4)</div>

A person's capacities appear to be constructed in a framework that is very specific to probation, and which concentrates on the link between a person's potential needs and criminal behaviour. This causes something of a dilemma for a probation officer concerned about an individual's level of functioning. After becoming suspicious about an individual's level of communicating and understanding, the supervising probation officer has to make a decision whether possible needs are caused by a lack of education or if the person has, indeed, an intellectual disability:

I was just talking to someone thinking, you know, you have got really poor
comprehension. You seem to not be able to grasp at all what we are
discussing. There is immaturity and then there is learning needs and
sometimes you have to try and find out which one of the two it is.

<div align="right">(Probation Officer 5)</div>

Like custody sergeants, probation officers constructed crime as voluntary, deliberate behaviour:

A lot of the offenders I see are not mentally disordered ones; they are people
who haven't got any discipline in their lives.

<div align="right">(Probation Officer 5)</div>

In this context, probation officers appear to evaluate an individual's capacity as being sufficient if the person is able to distinguish between right and wrong. Therefore, probation officers are re-evaluating the legal condition of *mens rea* during sanctioning, not only to adjust the sentencing to the individual offender's needs, but also to embed a potential breach of a probation order into an epistemological framework of free choice.

I suppose my basic feeling on that is that people have to be responsible for
their own behaviour. But most people actually have some awareness of
what's right and wrong.

<div align="right">(Probation Officer 6)</div>

As the quote below exemplifies, a concept of free choice is used when offenders are evaluated in their progress whilst serving a community sentence. This concept is based on a rational actor who has capacity to fully comprehend the complexity of their acting, and who also understands how criminal justice professionals may interpret this acting in relation to central aspects of reform and rehabilitation.

> *I fully admit I am not trained in assessing learning disabilities. But I felt that he had a sufficient insight to know that what he had done was wrong. However, despite the fact knowing that it was wrong he chose not to sort of say that's the way life is, you know. There was very little remorse, to sort of, no, you are right, I shouldn't have done it. He actually tried to deny it and he wanted to go back to court and change his plea to not guilty.*
>
> (Probation Officer 4)

As the above quote demonstrates, acknowledging past offending behaviour and displaying remorse are the key variables by which progress and success of probationary supervision are measured. By integrating educational needs into a model of free choice, respondents appeared to be more likely to interpret obstructive behaviour in terms of uncooperativeness rather than impaired social functioning. When respondents addressed the concept of a remorseful offender, it became evident that an offender's regret was perceived as an indicator of a person having sufficient capacity:

> *IR: How is an individual's intellectual capacity being assessed?*
> *IE: Various methods. Obviously, you have got your own professional assessment of them, the answers they are giving you, whether or not they understand your answers, whether or not they understand the issues, their behaviour and their motivation for doing it.*
>
> (Probation Officer 1)

Any person who has not been clearly identified as intellectually disabled and does for whatever reasons obstruct the meticulously bureaucratic probationary management process is likely be labelled as uncooperative. At pre-sentence stage this might entail that a probation officer assesses a person as unsuitable for a community order:

So, in many cases if it appears to us that there is basically nothing we can
do and there is a criminogenic need to address but unfortunately the
offender is giving absolutely no indication of any cooperation, is resistant to
the process from the start, I personally would not be recommending or
proposing, I should say, a community based sentence.

(Probation Officer 4)

Within the context of offenders who are supervised, such behaviour will be interpreted as a breach of the probation order with potentially severe consequences for the offender.

I was trying to help him and to reduce his risk of offending. So I used to sort
of say, look, use this as a resource. We can try and, sort of, do as much as
possible.
[...]
Now, had he been more cooperative I would have probably got some, an
assessment done as to sort of his learning skills because that was a
condition of his order as well, to improve his skills at sort of reading and
writing etc. We never got that done because he never brought his glasses. It
was basically, it was difficult all around. In the end, he has only recently
appeared in court for this sort of assault and the court made the judgement
that, you know, it was a pretty serious assault and he got five months' prison
for it and his order was revoked. So I have got no opportunity, well I, I
wanted to work with him, but I couldn't do any work with him because he
just wouldn't cooperate.

(Probation Officer 4)

It cannot be ascertained whether the probationer who the officer quoted above refers to was intellectually disabled. However, the statement outlines that the concept of free choice, which is applied by the probation officer, increases the risk of potential needs being misinterpreted as uncooperative behaviour. Mason (1999) highlights that intellectually disabled people are likely to have problems around numeracy, literacy and communication. People who have intellectual disabilities also often find it difficult to keep appointments or may refuse education or training (Mason & Murphy, 2002a), which can make supervising this population difficult

and might require extra resources. If such resources are not made available, supervision and management plans could be inadequate, possibly counteracting efforts around rehabilitation and reform (Mason & Murphy, 2002b).

The respondent quoted above clearly interprets the outcome as a failure which, to some extent, appears to undermine their professional integrity in reforming offenders by implementing a mix of welfare-orientated activities and measures around control and discipline. The interviewee maintains their professional identity by integrating the offender's actions and responses into a model of voluntary decision-making. In this context, potential incapacities are reconstructed as deliberate disobedient behaviour.

It becomes something of a 'catch 22' situation for offenders who have intellectual disabilities. The individualising OASys assessment, which is based on a concept of a reasonable man or a rational actor, leaves ultimate responsibility for failing to comply with a court order with those on probation. If an offender does lack insight into their past offending due to being intellectually impaired, it is likely that this will be perceived by the probation officer as the rationale that underpinned the criminal behaviour in the first place. In this context, the offender is likely to be assessed as lacking empathy, which will be a decisive factor in determining a person's risk of re-offending. Intellectually impaired offenders are, therefore, exposed to an unfair assessment that does not correctly identify their needs. As a result, this population is more likely to be assessed as high or even very high risk, which might exclude them from community sentences. When discussing assessing offenders for a pre-sentence report, a respondent explicitly outlined the process of rationalising a probationer's behaviour and decision-making:

> *I would try to explore their understanding of right and wrong when I was doing the report and make reference to that. I would make reference to some of the excuses that people might have used to justify their behaviour. So in that respect I wouldn't deal with that case any different than any other.*
>
> (Probation Officer 6)

Probation officers were extremely motivated to provide the best supervision possible, and to find appropriate programmes according to a probationer's capacities and abilities. Many of the respondents referred to the concept of 'going

the extra mile' when discussing their profession. This shows that despite government interference, an increasing number of performance targets and a changed ethos of the service, many probation officers have maintained a social and welfare orientated approach within their occupation.

However, during the analysis it has become apparent that the service is ill-equipped and underfunded for dealing with intellectually disabled offenders. There is no clear understanding of what characterises a person with intellectual disabilities, or how supervision should be adjusted to the needs of intellectually impaired probationers.

In addition, the way in which the probation service operates is contrary to attempts that aim to empower people with intellectual disabilities (Scull, 1984). In this context, probation may be seen as an even more extensive and elaborate way of exercising disciplinary power over people than measures around containment and incapacitation. The restrictions that can be imposed by the probation service can deeply penetrate a person's private life in a way that far exceeds imprisonment. This confirms the view of Lacombe (1996) who argues that alternatives to existing systems of social control often result in an intensification and expansion of control, particularly if such alternatives appear to be more open and welfare orientated. In fact, Lacombe (1996) argues, such alternatives simply conceal the control that is exercised, and thus increase its power over the social body.

During the past decade, the probation service has been affected by severe budget cuts. The situation has been outlined in a 2010 publication by Jonathan Ledger, the General Secretary of the probation and court staff trade union:

> "Workloads in terms of those subject to probation supervision rose by 39 per cent in the 10 years up to 2009 […whilst] in the past three years the number of frontline staff has actually dropped by 17 per cent – there are fewer probation officers now than there were in 2003" (Ledger, 2010, p. 416).

Ledger (2010) continues by highlighting that on average only 24% of a probation officer's time is spent on face-to-face supervision; the rest of the time practitioners are occupied with updating records and attending to other bureaucratic tasks. The money spent by the government on the probation service has been further reduced by 4% during the 2010/2011 period.

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It appears questionable whether it is appropriate to subject intellectually disabled offenders to probation supervision considering the changed ethos of the service and the time and financial constraints within which officers operate. Probation orders can be very complex and, like programmes and activities to which probationers are allocated, require offenders to have capacity to organise themselves, to understand complex information, and to function socially and intellectually at least at an average level. Intellectually disabled offenders require a much more intense and, thus time-consuming, supervision, which currently appears unlikely to be provided by the probation service considering the increasing workload that probation officers have to organise with decreasing resources.

4.4.4   Summary

Like judges, probation officers have lost their discretionary powers when dealing with offenders, demonstrating a greater interference by the government and an increasing monopolisation of power in the hands of the government. This development has resulted in a more rigorous system, limiting probation officers when considering individual circumstances. Additional pressure results from probation officers being measured in their performance mainly in relation to quantitative targets, such as the time needed to complete OASys assessments. In this context, probation officers have stopped being innovative and interpretive when working with probationers.

OASys does not pick up on a person's level of intellectual functioning whilst restricting probation officers in individually assessing a person's understanding. Thus, there is an increased risk of intellectually disabled people remaining unidentified when engaging with the probation service. Identification was complicated further as some indicators of social impairments, for example difficulties in understanding and communicating, were stated to be common problems among probationers and thus were often dismissed as not being valid indicators of intellectual disability. Like prosecutors, probation officers put greater emphasis on engagement than reasoning, constructing an intellectual disability mainly as a lack of employability skills rather than an impaired understanding.

The focus of OASys assessments on risks that offenders might pose to society means that less attention is paid to risks to which offenders themselves might be

exposed while being on probation. Interviews with probation officers have demonstrated that the emphasis on increasing probationers' skills in relation to employability might significantly disadvantage offenders with an intellectual disability, as most probation programmes require attendees to have an IQ of at least 80. As the system is not adapted to offenders with intellectual disabilities, and probation officers are not sufficiently trained in spotting intellectual disabilities or working with intellectually disabled people, this population appears to be at a significantly higher risk of breaching the conditions of their probation order compared to their non-disabled counterparts. This applies even more so due to the focus of probation work on remorse, which presupposes an offender's understanding of their wrongdoing.

Hence, the inadequate assessment of offenders with intellectual disabilities through OASys, which in its focus is based on a concept of a reasonable man with sufficient capacity, appears to increase the likelihood of this population being assessed as high risk. In the extreme, this might exclude intellectually disabled offenders from probation orders altogether.

5. Concluding discussion

Within this study, an attempt has been made to scrutinise the processes by which people with intellectual disabilities are dealt with when engaging with the criminal justice system. Two theoretical stands have been utilised, resulting in taking two separate and to some extent opposing approaches to the topic which, nevertheless, supplement and complement each other by overcoming the gap between agency and structure. Consequently, two themes have been pursued in this thesis.

By using symbolic interactionism, decision-making at the level of individual agents was examined, focusing on how different criminal justice practitioners construct and negotiate their reality. In this context, communications and interpretations of respondents were investigated to gain understanding of how criminal justice professionals organise and adjust their behaviours in different situations and conditions.

By using Foucault's theory of discourse being the carrier of knowledge and power, the author tried to deconstruct discursive formations of power that have been disadvantaging people with intellectual disabilities by favouring this population's social exclusion. In this context, the discourse of truth at two different periods in time was analysed, arguing that despite significant improvements in the legal status of people with intellectual disabilities there appears to be a continuation of this population's exclusion.

During the eugenic movement, a discourse of truth surrounding people with intellectual disabilities was generated that made it impossible for this population to live independently. Intellectually disabled people either had to live with their families or were institutionalised (Simpson & Price, 2009). During this time, the political and scientific discourse was dominated by an all-inclusive concept of disability, which in a very generalising manner labelled intellectually disabled people as dysfunctional. This discourse was concealed in its roots, as key concepts were not directly related to the emerging industrial economy but to a natural order of things (cf. Tredgold & Soddy, 1956). In this context, independence was proclaimed to be a basic prerequisite for survival in nature, as a consequence of which an intellectually disabled person's inability to adapt to their environment was defined as pathological.

By applying a medical model, behavioural symptoms of intellectual disabilities were defined as and linked with social disorder (Anden, 1922; Porter, 2002) and dependency (Goddard, 1911; Penrose, 1933). People with an impaired level of intellectual functioning were perceived to pose a risk to the moral order of society at the time, but also posing a threat to future generations. Denying any alternative form of knowledge and excluding any social factors from the discourse, this medical fascism (Holmes et al., 2006) gave exclusive power to psychiatry, generating an individualising discourse of truth that linked general concepts of morally correct behaviour to a sound mind. This was a socio-medical discourse which portrayed intellectually disabled people as a risk to the social and economic order in society. Furthermore, this discourse of truth created the conditions that gave rise to theories around population control by sterilisation and institutionalisation (Doll, 1930; Gibbons, 1926; Rentoul, 1906).

The discourse of truth during the eugenic movement, therefore, represents unequal formations of power in that it functionally exercised control by denying access to social space, such as education or employment (cf. Best, 1930). As part of this study it has been demonstrated that this discourse did not affect only people with intellectual disabilities, but widened its power over other groups, for example women (Lennerhed, 1997) or ethnic minorities (Reilly, 1987). Environmental factors were interpreted as observable risk factors, but ultimately causes for a person's behaviour were perceived as being rooted within the individual (Erickson, 1931).

The discourse of truth around risk in relation to intellectually disabled people at the time was distinct. It defined a person and their intellectual disability as one social object. After the Second World War, the discourse surrounding intellectually disabled people changed. Increasingly, capacities and abilities started to be acknowledged, which has often been linked with processes of deinstitutionalisation and empowerment of people with intellectual disabilities (Carling, 1993; Parkinson et al., 1999). Kinsella (2005) suggests considering an institution as a social concept, whereby an institution represents a constructed social space with specific formations of power that determine opportunities and chances in the life of the institutionalised. When taking this perspective towards institutions, it becomes clear that in discussions around empowerment and social inclusion of people with

intellectual disabilities, focusing on the number of hospitals that might still exist or have been closed is insufficient. Instead, one should ask whether the institutional imbalance of power has changed or remained stable.

It could be argued that the political discourse has not changed significantly in its core issues. People with intellectual disabilities are still defined in relation to their dependence on the help of others, as in Goddard's (1911) definition of "feeble mindedness". Furthermore, the discourse around protection of the public has been as prominent as ever in recent years and risk management in the form of future risk prevention by incapacitation still dominates political and strategic decision-making.

Regardless of how successful the 'empowerment movement' may have been at any moment, there has always been a theoretical dilemma confronting any strategy which aims to give more self-advocacy and independence to people with intellectual disabilities. The discourse surrounding intellectually disabled people throughout the last century was based on a medical model of disability and an exclusively liberal model of citizenship (Redley & Weinberg, 2007). This has remained stable and independent from the changing discourse which defined and justified if and what kind of support should be made available to people with intellectual disabilities, or to what extent this population should be included or excluded in society.

Hence, whilst at the beginning of the twentieth century a generalised medical model of intellectual disability focused exclusively on inabilities and incapacities, current approaches that have sought to empower intellectually disabled people have been concentrating in an equally generalising manner on potential abilities when demanding more independence and self-advocacy for this population. In this study, it has been demonstrated that both approaches are equally indiscriminate and ignorant when putting potential needs or capacities in relation to the demands of specific social settings. Redley and Weinberg (2007) make a very valid point by arguing to discard this generalising medical concept of disability as suggested by medical professionals, and instead to judge what assistance might be needed in relation to specific interactional contexts occurring in particular social settings.

> "Recent policy initiatives aimed to empower people with learning disabilities
> have erred in too thoroughly embracing strictly liberal models of citizenship

that prioritise issues pertaining to voice and participation over issues pertaining to care, security and wellbeing on the assumption that if properly implemented the former will ensure the latter" (Redley & Weinberg, 2007, p. 782).

To some extent, it appears that the old system of psychiatric hospitals has been replaced by the criminal justice system when dealing with intellectually disabled persons whose behaviour has been assessed as posing a risk to society. Indeed, it has been demonstrated in previous research that an increasing number of people with intellectual disabilities come into contact with the criminal justice system (Kebbel & Davis, 2003; Petersilia, 1997; Taylor & Lindsay, 2010), a trend that has been observed in countries around the western world where hospitals have been closed (Gunn, 2000; Priebe et al., 2005). Recent studies which reveal an increasing prevalence of people with intellectual disabilities within the prison population (Hall, 2000; Hayes, 2005a; Talbot, 2008), indicate a new form of institutionalisation of a perceived problem population through the criminal justice system.

By using Foucault's theory of discourse and power, it was possible to demonstrate how this new process of institutionalisation has been accompanied by a different discourse. It is a disjointed discourse of truth, whereby a person and their intellectual disability are functionally separated and individually addressed. The disjointed discourse of intellectual disability, therefore, defines an alleged offender as a culpable person who can be held responsible for their deliberate and voluntary decision to engage in an act of criminal behaviour. Hence, the flawed concept of truth, reason and justice give meaning to the criminal justice system and, most importantly, maintain and reproduce it in its norm-giving and norm-enforcing power. In this context, the discourse of truth has a legitimising role to play, in that it forces attention to be exclusively paid to the universal application of law to seemingly objective social facts in isolation of the social context in which law is produced. In other words, the nature of law and its origins are ignored.

The discourse of truth is legitimising the legal and social order in that it diverts attention away from disadvantaging and oppressing social structures that limit people in their chances and opportunities in life. This kind of discourse has been characterising the government's strategy in its response to criminal behaviour. When the Prime Minister David Cameron addressed the way that people who were

involved in the recent London riots have been dealt with by the criminal justice system, he was very clear about his focus on individual guilt and responsibility. "Responsibility for crime always lies with the criminal" (Cameron speaking in the House of Parliament 11/08/2011, Channel Four News).

When engaging with the criminal justice system, people with intellectual disabilities appear to be disadvantaged on two dimensions. First, the disjointed discourse of truth, which is generated during criminal justice proceedings, is based on a fragmented understanding of needs that people with an intellectual disability might have. Second, the way in which criminal justice professionals construct reality is informed by this disjointed discourse of truth that emphasises capacity to reason and individual culpability, evoking attitudes that are less favourable towards supporting and assisting potential criminals.

Recent changes have made the criminal justice system more punitive and rigorous, not only because of changes in sentencing policies, but also because of the increasing attempts by the government to monopolise power by introducing a range of targets around conformity and speed of criminal justice proceedings (Mair et al., 2006). Most of these targets are highly symbolic and gain their meaning through their communicative properties. Such performance targets increasingly restrict criminal justice professionals in their discretion, devaluing professional expertise by forcing former decision-makers into a role of mere executors (Crawford, 2007). In this context it has become more difficult for criminal justice agents to pay attention to personal circumstances of individual defendants.

This study has shown that these recent changes have increased the risk of intellectually disabled offenders becoming caught up in the criminal justice system, and receiving longer and more punitive sentences than their non-disabled counterparts. The public interest, for example, which prosecutors use to decide whether an individual case should be taken to court, appears to be in favour of prosecution, particularly as increasing emphasis is given to the needs of victims. In relation to certain offences it has been demonstrated in this thesis that prosecutors might be politically pressured into bringing specific charges against a person, which entail pre-defined mandatory sentences.

When prosecutors assess a particular case they objectify both the alleged criminal and their crime, which allows for the particulars of a case to be related to the abstract nature of law. It is during this process of objectification that political ideologies around control and deterrence penetrate the criminal justice discourse, allowing, for example, for a racist or knife crime to be dealt with in a particular way, and setting the course for proceedings to follow.

Such political ideologies have promoted proactive and preventative risk management in criminal justice (Jacobson & Hough, 2010). The infiltration of the criminal justice system by political ideologies around deterrence and control has led to an epistemological transformation of criminal justice. The probation service in its redefined emphasis on enforcement rather than support exemplifies this development. This service in particular has been changed dramatically, and has become a risk management agency with an emphasis on punishment and retribution (Forbes, 2010; Kendall, 2004).

It has also been shown that constraints on judges around protection of the public might exclude intellectually disabled people from more welfare-orientated punishments. In the literature it has been outlined that community care services are often not sufficiently funded to provide necessary supervision and safety for the convicted offender and the public (Kebbel & Davis, 2003; Petersilia, 1997; Scull, 1984; Simpson & Price, 2009). This study has demonstrated that judges often decide against community care, as such services are not perceived to fulfil basic requirements around protection of the public. This might, to some extent, explain the higher prevalence of people with intellectual disabilities among the prison population. If this is so, then the old hospital system has been replaced by the criminal justice system, and attempts to empower and socially include people with intellectual disabilities have failed. This study highlights the urgent need for real alternative care programmes to be made available to intellectually disabled offenders as the criminal justice system fails to take account of, or to address appropriately, the needs of this population.

Within the context of this study it has been demonstrated that the criminal justice system draws its normative and enforcement powers from a discourse of truth that concentrates on capacity and intent. People who are classified as vulnerable because

of impaired intellectual functioning become incorporated into this system through a disjointed discourse of intellectual disability whereby capacity to reason and intellectual ability are functionally separated. The theory helps to explain the system's ability to maintain its traditional way of operating when dealing with intellectually disabled offenders. Moreover, the theory draws attention to processes through which crime is portrayed as an act of voluntary and deliberate decision-making. Finally, the theory highlights that criminal justice agents do not make decisions in relation to objective facts. Instead they create facts by generating a discourse of truth around individual capacity and culpability. As this discourse diverts attention from disadvantaging social structures, the criminal justice system routinely reinforces the existing social order through the ideologically charged discourse of truth which it generates.

By analysing the structures of the criminal justice system, it was possible to identify the functional interplay of different agencies in their generating of the discourse of truth around offenders. It has been demonstrated how the police, by providing support in custody, reconstruct an intellectually disabled detainee as having capacity to make statements and to give evidence in relation to their alleged offence.

This discourse of truth is then presented and further strengthened in its persuading powers by the Crown Prosecution Service who in court reconstruct the discourse as being a balanced contest between accusatory and exculpatory arguments. Finally, judges and magistrates function as guardians of truth who, when summarising and concluding a trial, communicate sentences as object lessons which contain seemingly objective theories about an individual's behaviour (Scheffer et al., 2009).

The analysis of the data of the present study has shed light on how a particular discourse of truth is generated at different stages of the criminal justice system, allowing positivist tendencies around culpability, capacity and, ultimately, guilt to prevail with regards to intellectually disabled alleged offenders. However, if the analysis had stopped here, it would not have taken account of how professionals interpret this setting and how different constraints are negotiated when decisions are made, reducing the scientific focus on structures while neglecting agency. Trying to

find an answer to this problem constituted the main reason for merging Foucault's theory of discourse and power with the theory of symbolic interactionism.

Using this dual approach allowed for resistance by agents at different levels of the criminal justice system to be identified and explained. It was possible to detect two forms of resistance. On the level of the police, existing safeguards were sometimes ignored or insufficiently used. This appeared to be the result of biases that officers held against detainees in relation to their guilt and their potential abuse of safeguards to protect themselves from sanctioning. Some of the police respondents did not construct their function as custody sergeants in accordance with PACE, which would require them to strictly remain neutral and uninvolved in any matters of criminal investigation. Instead, this group appeared to negotiate their role as a compromise between statutory obligations as outlined in PACE and informal commitments rooted in police culture.

It has been outlined in this study that failure to respond appropriately to the special needs and vulnerabilities of people with intellectual disabilities in custody suites is to some extent the result of custody sergeants' insufficient awareness and knowledge regarding intellectually disabled detainees, highlighting the need for more and better training to address these issues. It appeared, however, that sergeants' attitudes of favouring measures of control and discipline over more welfare related measures had an at least equally strong impact on officers' reluctance to comply with current law which entitles intellectually disabled people to certain measures of support during detention.

In relation to prosecutors, using a symbolic interactionist stand made it possible to scrutinise this group's opinions of how the criminal justice system should be operating. In this context, the victim's rights to some form of compensation for their victimisation were stressed, as well as the universal application of law. As a result, prosecutors were reluctant to allow special measures or treatment to be made accessible to intellectually disabled defendants, supporting the current disparity in the provision of help to witnesses and defendants.

In contrast, it transpired that judges had probably the clearest understanding of courts as a constructed social space, an arena in which social conflicts are fought out. These respondents expressed a much greater willingness to negotiate a

compromise between society's expectations for retribution and a defendant's individual circumstances. This group was most critical of recent changes, strongly opposing current attempts by the government to monopolise power in criminal justice matters.

Finally, probation officers expressed concern about the strong enforcement focus of their agency due to the prescriptive nature of OASys prohibiting them from using discretion and therefore preventing them utilising their professional experience when dealing with individual probationers. As interviews have shown, this group of professionals, nevertheless, strongly uphold the concept of 'going the extra mile', paying attention to the individual life circumstances of offenders.

As outlined in section 2.2, in his writings, Foucault failed to address individual struggles and thus was not able to explain if, why and when people resist domination. The data of this study clearly suggest that individual actors do not simply mirror formations of power that surround them. Hence, perceiving actors as mere vessels of power would mean neglecting deliberate decision-making by individuals, which may contradict existing normative rules.

Within the context of the present study, using Foucault's theory of power provided a methodological gaze upon criminal justice, allowing for an explanation of how the criminal justice system maintains its traditional way of operating when engaging with people who have intellectual disabilities. It was possible to complement this insight by using a symbolic interactionist approach, which has produced knowledge about respondents' attitudes based on their individual experiences and values outside Foucault's concept of power and control. Therefore, this study has also shed light on why people with intellectual disabilities are still at risk of becoming incorporated into the criminal justice system, despite efforts to divert them and treat them in the community. In addition, the methodological approach of this thesis has allowed demonstrating not only how but also why people with intellectual disabilities remain disadvantaged due to their vulnerabilities and special needs when engaging with the police and the courts.

By merging Foucault's theory of discourse and power with symbolic interactionism, it was possible to analyse social and political ideologies that are inherent to criminal law, whilst at the same time paying attention to how the concept of justice is

interpreted and applied by criminal justice professionals in relation to a particular situation. Hence, through this study theories have been developed that acknowledge justice an ongoing process which is constantly renegotiated through micro-level interactions. Fusing the two theories enabled the researcher to make a link between welfare-orientated macro-level policies and at times welfare-opposing disciplinary micro-level actions by criminal justice professionals, which often appeared to outline conflicts between crime control and due process values (Skinns, 2009).

This study has mainly focused on how intellectually disabled people are treated when engaging with the criminal justice system. In particular, the importance of identifying intellectually disabled people's level of intellectual functioning has been stressed. During interviews with forensic medical examiners this notion was challenged. One of the respondents mentioned that identification of impaired intellectual functioning is not necessarily always positive or helpful for the alleged offender. The respondent highlighted that once labelled as intellectually disabled, a person is likely to be diverted into an alternative system which is structured around dependence and control. It strips the person off their right to privacy, and puts them at risk of being sectioned and indefinitely institutionalised.

A judge, who tried to refute public opinion that insanity provides criminals with a potential 'escape strategy', also addressed this point:

> *I think most defendants are wise enough to say that they don't want to go insane. I mean if they are, they are mainly the people who the prosecution is going to accept that it was diminished responsibility and then, of course, they will be sentenced to life imprisonment. Because if they are in that state they are not going to be fit enough to be released. So they join the Sutcliffes and the Donald Neilsons and all that of this world, locked up at Broadmoor or somewhere else.*

> (Judge 1)

This alternative argument, however, does not oppose the present study's general appeal for better identification and support of people with intellectual disabilities. On the contrary, in agreement with this study the above argument should be understood as a critique of the extreme responses with which criminal justice professionals tend to react when engaging with intellectually disabled individuals.

Often a person is either acquitted or given the maximum sentence (Cockram, 2005; Hayes, 2007).

5.1 Limitations

The limitations of this study are mainly methodological in nature. For practical reasons, implementing Grounded Theory had to be compromised in two ways. First, literature was reviewed prior to data collection. This initial literature review informed the research proposal which outlined the existing body of knowledge within the field of criminal justice and intellectually disabled people. Constituting a further modification of the Grounded Theory approach, specific research questions were formulated to outline what incremental contribution the present study would make.

Second, it turned out to be impossible to immediately transcribe every interview allowing for an initial analysis to be carried out to identify main themes for later interviews. In an attempt to minimise the effects of this limitation, themes were recorded by taking field notes whenever more than one interview was conducted during one day. It is, however, acknowledged that taking field notes during an interview cannot equal an analysis of transcripts. Hence, some themes to which respondents may have referred in individual interviews may have remained unnoticed, and could not be followed up and further developed in later interviews.

Another methodological limitation resulted from merging Foucault's theory around the power of discourse with symbolic interactionism. It proved impossible to consider both approaches equally in their entirety when trying to combine them for the purpose of this study. However, fusing central aspects of both theories allowed developing a theory around the discourse of truth that is generated through criminal justice proceedings, whilst paying attention to how law is applied within the autonomy of individual criminal justice professionals. It is acknowledged that the analytical focus of this study has concentrated more on structural effects within the criminal justice system that determine individual behaviour, and that guide proceedings through which a defendant's intent and responsibility are constructed and demonstrated in the social space of the court arena. To a lesser extent, attention

has been paid to how criminal justice professionals from different agencies negotiate reality, which influences how intellectually disabled offenders as a group become labelled as criminals who can be justifiably transferred through the mainstream criminal justice system.

Data that were generated with forensic examiners were particularly limited as it turned out to be very hard to approach these professionals. In addition, this group of interviewees did not represent the varying schemes of healthcare provision that were used by police in custody suites in the three geographic areas in the North West on which this study concentrated.

5.2 Recommendations

5.2.1 Awareness training and support of professionals

All professionals that were interviewed in this study expressed a strong sense of fairness and justice. It seems very likely that a better understanding of the needs and vulnerabilities of intellectually disabled people will quickly cause current practices of their identification and handling to be changed and improved. In this context, criminal justice professionals need to be better trained in issues around intellectual disabilities. Often respondents confused intellectual disability with dyslexia or mental illness. This increases the risk of an alleged offender not being correctly assessed in their needs and thus being deprived of the support they might need. It has to be emphasised more clearly that people with intellectual disabilities often have an impaired understanding of complex information and situations, which might cause anxiety and fear. Furthermore, their disability might make it more difficult for this group of defendants to fully understand all requirements of their sentence or the need to turn up for court hearings etc.

It is, therefore, important to highlight to professionals that whether support is made accessible to alleged or also convicted offenders should not depend on the severity of an offence, but on an individual's level of understanding. In general, people with intellectual disabilities need to be acknowledged in terms of their needs, whereby abilities have to be appreciated without neglecting incapacities. A conceptual change of both fairness and justice might be useful, whereby mechanisms of help

and support are not perceived as loopholes in the system and as a possible path to freedom for potential offenders.

Awareness of criminal justice professionals needs to be raised to constantly determine whether a suspect understands the processes of which they are part. This cannot be achieved by simply asking, "Did you understand what I have just said?" Previous research (Talbot, 2008) has shown that intellectually disabled people who engage with the criminal justice system are often insecure during social interactions with others, and tend not to express when having difficulties in understanding. Some interviewees in this study confirmed this notion. The suspect should be asked to repeat in their own words what they think is asked or expected of them during the various criminal justice proceedings. This will require more time and lengthen processes in due course. It will, however, improve fair treatment of individuals with intellectual disabilities who engage with the criminal justice system.

It is suggested that joint training is organised for probation and police officers and forensic medical examiners in issues around intellectual disabilities as more consistency is needed in how professionals from these criminal justice agencies are trained. Furthermore, providing joint training might also assist in improving consistency among professionals in their performance. Such consistency would be based on shared knowledge and an agreed understanding of needs and vulnerabilities of people who are intellectually disabled.

Also prosecutors should have basic awareness training around intellectual disabilities. The training should highlight capacities and inabilities that people with intellectual disabilities have. Such training might help members of the crown prosecution service to make a more informed decision in relation to the Public Interest Test, allowing for more attention being paid to the effects that a sentence might have on a defendant. Greater awareness might also change attitudes of criminal justice professionals, which currently undermine support, whereby addressing possible needs and vulnerabilities is perceived as a weakness of the system, potentially allowing criminals to avoid punishment.

Eventually, respondents in this study, especially those from the police and the probation service, claimed not to know where to ask for support when being confronted with intellectually disabled offenders. Thus, more information needs to

be made available, particularly to police and probation officers, on where to get advice from in relation to how to deal with people who have intellectual disabilities. This could be done by providing contact details of intellectual disability services such as Mencap, or locally operating Learning Disability Teams.

5.2.2 *Communication & exchange of information among professionals*

Communication and exchange of information needs to be improved. It was mentioned by respondents from various agencies that information about a person's level of understanding sometimes is not passed on or only indirectly expressed. In this respect, the recommendations of the Bradley Report as well as the requirements of Valuing People Now (2009) around collaboration between agencies and exchange of information need to be put into practice. This will improve awareness of all involved professionals at all stages of the criminal justice system. In this context, clearer guidelines are needed for forensic examiners, outlining what information can be or has to be passed on to custody sergeants.

5.2.3 *Identification and recording of intellectual disability*

Previous research has shown that if persons are not identified when engaging with the police, they are likely to remain unidentified throughout all further criminal justice proceedings (Talbot, 2008). In this context, it was especially concerning that custody sergeants often highlighted that other criminal justice agencies shared the responsibility for identifying an intellectually disabled person. This demonstrates that custody officers appear to be unaware of the importance of their role within the criminal justice system. Hence, more training of police officers might be useful, outlining the important and gate-keeping position of the police within the criminal justice system in relation to providing support to vulnerable individuals or initiating processes of diversion.

None of the assessments that are currently done in custody suites contain items that address a person's level of understanding. In this context, the role of forensic examiners should be better clarified, recognising their specialism and advising appropriate training. Current training seems to concentrate mainly on legal issues and self-defence, rather than on specific medical conditions that might occur in custody (Schlesinger, 2003; Wall, 2008). Forensic examiners, however, will only be

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of use if sufficient training is provided in the area of intellectual disability and it is within their remit to assess arrestees in their intellectual functioning.

Equally, the recording of intellectual disabilities needs to be improved. Currently, there are only indirect signs that might outline to professionals at different stages of the criminal justice system that a defendant is intellectually disabled, for example that an alleged offender was in need of an appropriate adult during police interview.

5.2.4 Provision of healthcare to detainees

More forensic examiners are needed who are permanently and immediately available to custody sergeants. One of the complaints expressed by the police was in relation to the significant delays caused when medical advice was needed or an appropriate adult had to be present during interviewing suspects. This study has demonstrated that difficulties or limitations in accessing medical advice are hindering custody sergeants in their attempts to meet performance targets around the speedy processing of detainees. This puts additional stresses and pressures on sergeants, which increases the risk of mistakes. Forensic examiners would also profit from a permanent presence in custody suites as it would enable them to instantly attend to problems occurring at any time, including out of office hours.

It is recommended that a universal system of healthcare is established in custody suites as this will significantly improve consistency of health assessments and recordings. A nurse/doctor scheme, whereby nurses are constantly placed in custody suites and doctors are on call, appears to be most efficient in relation to costs and response time.

5.2.5 Provision of support to alleged offenders

This study has identified and urgent need for better access to appropriate adults. It is suggested that a scheme is established consisting of trained appropriate adults who can be quickly and easily approached. In particular, appropriate adults need to be provided with appropriate training. Research has shown that appropriate adults often have a minimal input during interviews, and thus the value of their assistance is debatable. Appropriate adults should be specialised or at least trained in various vulnerabilities of different groups of defendants identified as vulnerable, such as intellectually disabled people, individuals with mental illnesses or persons with

addictions. Appropriate adults who are properly trained for their role will significantly improve a defendant's situation during detention. In addition, such a scheme will significantly increase consistency in how vulnerable people are treated and supported in different parts of the country.

More generally, support that is currently provided to intellectually disabled defendants needs to be decisively improved. During police interviews it is a legal requirement that an appropriate adult is present, as it is acknowledged that the suspect might have difficulties in understanding questions and proceedings because of their disability. However, once in the court arena, support is limited and defendants are often on their own. The difference in support that is made available in court to intellectually disabled crime witnesses or victims and to defendants appears to reflect a desire to punish, rather than demonstrating fair and equal treatment. It is suggested that defendants should be entitled to the same help and assistance as crime witnesses or victims. Support should be made available in accordance with a person's capacities and needs in relation to the specific court proceedings during their trial.

The qualitative data generated and analysed in this study has raised significant and new ways of thinking about concepts of justice and punishment in relation to discourses surrounding intellectual disability and criminal justice. The study revealed how changes in the law have not resulted in changes of criminal justice professionals' attitudes when making decisions regarding their strategic behaviour in relation to people with intellectual disabilities. Criminal justice principles of fairness and justice will remain impaired as long as the key lessons learned from this study go unrecognised.

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Appendix A: The Gill Case

'In 2001, the claimant was convicted of wounding with intent to do grievous bodily harm. An automatic life sentence was imposed and the tariff was set at four years. That tariff period expired in May 2005. The first parole board review took place in 2003 and recommended that the claimant be assessed for several offence-related programmes so that the areas of risk which had been identified, such as use of violence and lack of responsibility for offending behaviour, could be addressed. However, in 2004, the claimant's IQ was found to be below the level required for participation on most of the offending behaviour programmes. The claimant also had literacy difficulties which prevented him from being offered a place on the programmes. In 2006, a second review of the claimant's case took place, but it was decided not to direct his release or recommend a transfer to open conditions on the basis that there was no support for such courses of action. It was noted that the claimant's literacy problems made his participation in offending behaviour programmes impossible, yet without such participation his risk reduction could not be measured, and that in the absence of such evidence no positive recommendation could be made. It was also noted that "unless means [were] found to address [the claimant's] offending behaviour without exclusive reliance upon improving [his] literacy and involvement in offending behaviour programmes [his] constructive progress through the prison system [would] be impeded." In 2007, the claimant's IQ was tested again and found to be below the threshold required for attendance on offending behaviour programmes. In late 2008 and early 2009, the possibility of the claimant receiving individual support so that the core concepts of offending management programmes could be delivered was discussed but not proceeded with because no-one with the suitable skills could be located in the relevant area. However, in May 2009, the decision was taken to transfer the claimant to a lower security prison as a result of a perceived lowering of the risk of his re-offending and his positive behaviour as an employee in a trusted position within the prison's kitchen. In a probation assessment report written in September 2009, it was observed that the claimant had been let down by the system, in that he was unable to access the treatment he required because of his learning difficulties, and that he had "languished in prison without any real offence-focused work being completed". The claimant proceeded to issue proceedings by way of judicial review, challenging

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the defendant Secretary of State's alleged failure to enable him to access offending behaviour programmes which, it was said, had greatly impeded the claimant's ability to reduce his risk and make progress towards release' (Source: www.mentalhealthlaw.co.uk, accessed 16/03/2011).

Appendix B: Coding

<u>Descriptive codes</u>

Training	Problems/ pressure	Changes	View of other agencies	Responsibilities	ID in the CJS	ID and crime
Preparing respondents to identify and deal with people who are intellectually disabled	With regards to communication, info-exchange, training of staff, training opportunities etc.	Changes in punishment, perception of crime, treatment of criminals, approach to crime and justice as perceived by respondents	How do agents view professionals from other agencies, co-operation, exchange of info, change of knowledge and CJ concepts	Who dominates discourse within the construction of ID as well as who is mainly in charge of organising the assessment to be done	Descriptive code of how people are being treated due to lack of resources etc.	Prevalence of contact between CJS agents and ID suspects

Manageability, disjointed discourse of vulnerability

Construction of truth

How knowledge and information is being used in the construction of truth

Medical knowledge

Appropriate adults

Organising practices

Construction of the criminal

How criminal behaviour is conveyed as act against society, how criminal is portrayed as enemy in order to justify the court as an objective 3rd party (criminal-court-society) that holds competence and 'wisdom' to prove an individual guilty of acting deliberately against society and to determine the appropriate punishment

Construction of punishment

Diffusion/ continuity of discipline

How power is exercised in order to govern/ rule/ organise people's actions

Bureaucracy of punishment

Construction of justice	Construction of crime	Reasonable man	Capacity	Function of punishment	Function of justice	AA enabling mechanisms
Around capacity and the participating engaging defendant	Making sense of evidence	Threshold being used within the CJS	Construction of ID	Mainly of symbolic nature (e.g. deterrence) especially when limits of the system become clear (cf. interview prosecutor)	Systems of power and control	Suggestibility
Responsibility, accountability, capacity	Risk assessment, foreseeability	Justifies conviction and punishment	With regards to the police, there are not many training opportunities	Function prisons-alternatives, rejection of prisons, support of prisons	Monopolisation of power by the government, agents losing their discretion	Securing evidence
	Causes of crime	Also serves as distraction from insufficient service provision	Further complications due to detainees being often intoxicated		Justice mainly victim-orientated	
			Might be frightened because of the surroundings		Distinction between good and bad, sane and insane	
					Division of social space	

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