

HIDDEN IN PLAIN VIEW:

The impact of popular beliefs and perceptions, held as factual knowledge about the Criminal Justice System, on incidences of wrongful accusation and conviction.

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ABSTRACT

Available research demonstrates that public perceptions and beliefs about the Criminal Justice System (CJS) differ from its actual processes and procedures, but there is little research on the effects of such a difference, specifically with regard to wrongful accusation and/or conviction of factually innocent persons, and their families.

Perceptions and beliefs, held as reliable and accurate knowledge, may impact on wrongful accusation/conviction of the factually innocent, both on the lived experiences of wrongly accused/convicted persons themselves, and on perceptions held about them (and responses to calls for case reviews) within the wider public. Although a great deal of research has been carried out on the subject of wrongful conviction generally, this has focussed, in the main, on legal, procedural and structural causes of wrongful conviction, and, in particular, on a small number of ‘high profile’ cases.

This research examines perceptions and beliefs held as knowledge by individuals claiming to be factually innocent, wrongly accused/convicted persons, and the results of attempts to employ such perceptions and beliefs to maintain claims of innocence.

Further, the experiences of family and friends of the wrongly convicted, whose lives continue in the community following the conviction of their family member, are examined, with particular attention to the interface of beliefs and perceptions between such families and the wider community. To a lesser extent, the role of the media, in shaping public opinion, the effects of media coverage on trial procedures and outcomes, and non-reporting or selective reporting is also addressed.

A series of semi-structured interviews was carried out throughout the UK, with wrongly accused/convicted persons, family members of those individuals, and members of groups and organisations working to highlight the problems of wrongful accusation and conviction. A survey aimed at examining key perceptions and beliefs, held as factual knowledge about the CJS within the wider public, was also conducted.

The analysis of the data indicated that not only do individuals and families attempt to employ erroneous perceptions and beliefs as factual knowledge in cases of wrongful accusation and conviction, but that such attempts feed into and support the case against the wrongly accused (in direct opposition to the aims and objectives of those employing them). Furthermore, knowledge of the actual workings of the CJS (held by CJS actors) can be, and is, used to exploit the ignorance of those so accused, and their family members. This is made possible because legal meanings of key words and phrases are vastly different from their commonly understood meanings, a factor known only to CJS actors, and not, generally, to the wider public.

Political rhetoric and media representations support and reinforce those commonly held understandings, simultaneously maintaining the inaccessible code of actual CJS processes, thereby influencing public perceptions of those who are accused and convicted.

CHAPTER ONE

The Criminal Justice System: common perceptions and beliefs

Introduction

Research has demonstrated that public perceptions of the CJS are greatly removed from the reality of how the system actually operates (e.g. Green, 2008, Naughton, 2006, JUSTICE, 2002a, Green, 1997, 1996). Further, many people believe that their perceptions constitute reliable and accurate *knowledge*, whereas research indicates that they are, in fact, often wildly inaccurate (Gray, 2009, Roberts & Hough, 2007, Garside, 2003).

One area where public perceptions and the reality of the CJS are thrown into sharp relief is that of miscarriage of justice, and, more specifically, wrongful conviction of the factually innocent.

The definition of wrongful accusation and conviction of the factually innocent, for the purposes of this study, are those accusations and convictions which began with a police investigation that concluded that there was a case against an individual which was both chargeable, and actionable in a court of law, that individual maintaining that s/he did not commit the crime. This distinction is made in order to properly emphasise a specific type of wrongful accusation/conviction and to differentiate from, for example, wrongful accusations made as part of official denials (e.g. the blaming of Liverpool football fans in the Hillsborough Stadium disaster) or detentions and convictions obtained under anti-terrorist legislation. This distinction is necessary to demonstrate the apparent 'ordinariness' of processes and events in the cases studied, in contrast to the extra-

ordinary circumstances of large scale incidents or the perceived ‘terrorist threat,’ that extra-ordinary factor being sometimes used to explain away events and processes as having been influenced by, and the result of it.

Although people accept that the CJS is a ‘human system’, as opposed to a mechanistic system, and, as such, will be prone to human error, there is a general belief that, (a) there are safeguards in place to correct those errors, (b) such errors are rare occurrences, (c) the innocent have nothing to fear from the CJS, as its purpose is to convict the guilty and acquit the innocent (the perception being that innocence in itself will be recognised by the system), and (d) that it is, in fact, *human error* which is at the root of Miscarriages of Justice and wrongful conviction of the factually innocent (Naughton, 2004) (emphasis added), rather than systemic or procedural failings.

Yet many of the concepts and terms on which these beliefs are based (and whose meanings are ‘taken for granted’ or considered ‘self evident’) are, in fact, poorly defined and understood.

Concepts of ‘truth’ and ‘reasonable’ in criminal justice

Firstly, most people believe that the CJS exists to uncover the truth (Barnhizer, 2007a, Naughton, 2006, Balkin 2003), yet the very concept of ‘truth’ itself is a ‘*slippery set of concepts*’ about which ‘*we have very little actual understanding*’ (Barnhizer, 2006, p.18). Further, there is a failure to understand the difference between commonly held notions of truth (Scruton, 2007, Leiter, 2005, Cohen, 2001), legal ‘truth’ (Barnhizer,

2007b, 2006, Naughton, 2004, Roberts, 2003, Balkin, 2003), and ‘truth’ as it is produced from ‘revelatory knowledge’ (Green, 2008).¹

‘Beyond reasonable doubt’ is another term whose meaning is ‘known’ or taken to be somehow self-evident, yet the term, though oft quoted, is nowhere properly defined (Sheppard, 2003, Fitzpatrick, 2002). Some research indicates that jurors are confused by the failure to define the reasonable in reasonable doubt in court (Law Reform Commission NSW, 2008) which, in itself, highlights the difference in public perceptions (that jurors will be given ‘proper’ or adequate guidance on this critical matter) and the reality (that guidance is couched in ambiguous and technical language), as summed up by Mellinkoffe (2004):

Take for example, reasonable doubt and beyond a reasonable doubt. Because they are so often repeated – it is assumed that they must have some definite meaning that in the context ‘reasonable’ is precise. Few have had the courage to say with England's Chief Justice Goddard: ‘I have never yet heard any court give a real definition of what is reasonable doubt, and it would be much better if that expression was not used.’ (p.302-303).

The confusion is compounded by the fact that ‘*efforts to guide and control jury decision-making are a central feature of jury instructions*’ (Stoffelmayr & Diamond 2000, p.10). As recently as August 2010, the fierce debate about how judges in England

¹ A more detailed analysis of the different forms of ‘truth,’ and the relationships between them, is conducted in the section ‘Perceptions of Truth and Law.’

and Wales should direct juries with regard to the meaning of ‘beyond reasonable doubt’ was still raging.²

In fact, the term ‘reasonable’ is used in several areas of the CJS, even though it is, in many ways, another ‘slippery concept.’ For example, under the Prevention of Terrorism Act (1974) and its expansion to encompass international terrorism in 1984, police power to arrest anyone suspected of being ‘*concerned in the commission preparation or instigation of acts of terrorism*’ (Hillyard, 1988, p.69) was contingent on a suspicion based on ‘reasonable grounds.’ The 2005 update to this same Act allows a constable to arrest, stop and search any person or vehicle, search premises and seize any article which ‘*s/he reasonably suspects may be involved in the commission, preparation or instigation of terrorism,*’ (Prevention of Terrorism Act 2005, Part V, Sections 41- 49), yet nowhere does any definition of ‘reasonable’ appear. Officers involved in the shooting of Jean Charles de Menezes in Stockwell tube station, London, on July 22nd 2005, claimed throughout subsequent enquiries that their suspicion that Mr de Menezes was a terrorist was ‘reasonable,’ based on intelligence available to them (e.g. IPCC Stockwell Two, p6, retrieved 22/01/09).

Fitzpatrick, referring to the obstacles faced by those attempting to obtain permission to appeal, reminds us that ‘*[a]s lawyers are aware, reasonableness is a notoriously elusive concept*’ (Fitzpatrick, 2002, p.2).

On just these two concepts, ‘truth’ and ‘reasonable’, it becomes apparent that there are many possible meanings, interpretations and applications with regard to their use in

² ‘Reasonable Doubt,’ Wolchover D & Heaton Armstrong A, CLJW, 7th August 2010.
<http://www.criminallawandjustice.co.uk/index.php?/Analysis/reasonable-doubt.html>

criminal or legal proceedings which may differ markedly from the beliefs and expectations of the general public.

Knowledge about, and confidence in, the CJS.

Despite having little accurate or factual knowledge about the CJS, some research shows that, in fact, people generally have a great deal of confidence in the CJS; in particular, trial by jury, and in its abilities to correctly convict the guilty and acquit the innocent. For example, JUSTICE reported in 2002a that of all respondents in the most recent British Crime Survey at that time, 85% of those surveyed trust juries to come to the right decision, 82% believe they get a fairer trial from a jury than from a judge, and 82% believe the quality of the justice system is better when it includes jury trials as often as possible. This is in spite of Fitzpatrick's claim that '*depending on the statistics to which one subscribes, it might be contended that the best part of 98% of cases never get anywhere near a jury*' (Fitzpatrick, 2002, p.3). It is unlikely, given media portrayals of crime (both fictional and non-fictional) which highlight the most serious crimes as common, frequent and typical (Scruton 2007, Garland, 2006) that the majority of the public are aware that only 2% of all cases brought before the courts are tried before a jury.

However, even concepts of 'confidence' in the CJS can become mired in semantics – in a study in the USA, 80% of respondents in a 1999 ABA M/A/R/C survey agreed or strongly agreed with the statement '*[i]n spite of its problems the American justice system is still the best in the world*', although, surprisingly, only 30% of respondents in the same survey were either extremely or very confident in the United States justice system. (Asimow, 2007, p.655). Logically dissected, the above quote (from the

M/A/R/C survey) suggests either that Americans consider a 30% satisfaction rate to be ‘the best in the world,’ or there are processes by which they can hold, at the same time, apparently opposing opinions about the same system. Elliot’s warning that ‘*the dynamics of cultural phenomena, symbolic practices and systems of thought do not float through time and space without social anchorage in social context and historical habitats*’ (Elliot, 2003, p.7) is perhaps, in this context, worth noting.

It may be that the role of rhetoric in contemporary communication, given the immediacy of information technology³ is, as Wall puts it ‘*confused with reality*’ (Wall, 2008, p.46). Alternatively, acceptance of one’s own country’s CJS, once socialised in childhood, does, in fact, remain remarkably resistant to alteration later in life (Tyler, 2006). Undoubtedly, the processes by which beliefs and perceptions about the CJS are constructed and maintained are numerous and complex (Barnhizer, 2007a, Garland, 2006, Leiter, 2005, Cohen, 2001), and people can hold conflicting views without any apparent conscious acknowledgement of such conflict (Leiter, 2005, Cohen, 2001).

Factors leading to wrongful conviction

The common perception, that wrongful conviction is most generally obtained through human error, is not borne out by research (e.g. Kennedy, 2004, Naughton, 2002, Mansfield, 1993). Several factors impact on whether a conviction will be obtained, of which human error is only one. Misdirection by judges is by far the most common reason for cases being *referred* for appeal, but that does not necessarily constitute ‘human error’, as judges have a great deal of freedom in their interpretation of law (Barnhizer, 2007a, Balkin, 2003, Naughton, 2002), although it is, of course, an error in

³ Breaking news is reported in real time, twenty four hours a day, internet access is widely available, and politicians have direct access to the public, and vice versa, as never before.

law. While successful appeals on the basis of misdirection by judges demonstrate an error in law, cases referred on this basis may not succeed, if the interpretation of the Appeal Judges is that the trial judge has not, in fact, misdirected the jury. Also, the rules which govern permission to appeal are very narrow, and could, in themselves, account for misdirection by judges *appearing* to be the most common cause of wrongful conviction (Naughton, 2004).⁴

Other factors leading to wrongful conviction are unreliable confessions (O'Brien, 2008, Gudjonsson, 2002), financial and other incentives (Roberts, 2003, Naughton, 2002), non disclosure of evidence (Green, 2008, McBarnet, 1983), malicious accusations (Kennedy, 2004), and badly conducted defences (Fitzpatrick, 2002, JUSTICE, 2002a, Green, 1996). Others include (increasingly) erroneous expert testimony/procedures (Dror & Charlston, 2006, Ward, 2004a), forensic failures (errors in DNA and fingerprint results, for example), (Dror & Charlton, 2006, Fitzpatrick, 2002), mistaken identity,⁵ (Valentine, 2006:16, Memon & Bromby 2005), legislative obstacles, such as the 'time loss' rule in England and Wales, under which, if an appeal is not successful, the result could be a substantial increase in sentence (Naughton 2002, Mirillees-Black 2002: 10). Plea bargaining, and the increasing pressure on defence lawyers to encourage their clients to plead guilty (JUSTICE 2002a, Fitzpatrick, 2002) are still others. There is little public understanding that in many ways, the ingredients of wrongful accusation and conviction are already built into the CJS.

⁴ This is also discussed further in the section 'Perceptions of Truth and Law.'

⁵ This is a particular problem in Scotland where Dock Identification is still allowed. It has been abandoned or disallowed in other countries because of the inherent bias of the process.

However, the point at which all wrongful *convictions* begin is with wrongful *accusations*, and the role of the police in this respect cannot be under-estimated (Green, 2008, O'Brien, 2008, Naughton, 2007, McBarnet, 1983).

The public is generally unaware that innocent people can be, and are, convicted without any error of any sort. Due process does not consider matters of guilt or innocence as such. Due process demands that guilt must be proven, beyond a reasonable doubt, within the particular principles of due process (e.g., Barnhizer, 2006, Naughton, 2006), rather than the public perception of trials being a search for 'the truth.'

All of these factors, individually or collectively, contribute to the incidence of wrongful conviction. As previously stated, there is also a widely held belief that there are safeguards in place both to prevent and correct the 'errors' which lead to wrongful conviction, beginning with the right of any individual to be presumed innocent until proven guilty.

The presumption of innocence, taken as given, is another profoundly misunderstood concept (Sheppard, 2003), and reforms in the wake of the events of September 11th 2001⁶ have both eroded the presumption of innocence, and at the same time, encouraged a more general presumption of guilt⁷ (e.g. Peirce, 2010, Kennedy, 2004,

⁶ The Anti-Terrorism, Crime and Security Act 2001, and expansions to the Prevention of Terrorism Act in 2005, 2006 and 2008, provided for increased police stop and search powers, detention without charge on suspicion of involvement with terrorism, 'freezing orders' to seize assets, expansion of the national DNA database, and so forth, and introduced '*many provisions that increase the general powers of the police and other state agencies but with no restraint that such increased powers are confined to anti-terrorist activities*' (Davis 2003, p.332).

⁷ The introduction of "pre-emptive" measures, such as detention without trial of foreign nationals and control orders (not restricted to foreign nationals) (Frenwick & Phillipson 2011), the expansion of CCTV surveillance on public housing estates (Fay, 1998), the focus on "radicalization" as inextricably linked with terrorism, and the resultant allegations of widespread "spying", "intelligence gathering" and "surveillance" in Muslim communities (Richards 2011), are some examples of reforms which allow for the targeting of individuals on the basis of what it is believed they may do, or are likely to do. Others, such as the right for juries to draw "negative inference," in certain circumstances, from a suspect's decision to enact his right to remain silent (Green 2008), the removal of the

Sheppard, 2003, Roberts, 2003).

Expert evidence

Reliance on expert evidence is widespread, and often unquestioned, yet there is ample evidence that experts can, and do, get it wrong. (Wade, 2004, Ward, 2004a, Erzinclioglu, 1998). However, public faith in the abilities of science remains strong, even if its principles are poorly understood (Fisher, 2008, Jamieson, 2007, Valentine 2006:16, Ward 2004a, Erzinclioglu 1998).

On Tuesday 7th April 2009, The Independent reported on proposed new powers for judges to exercise ‘gate-keeping’ duties to ensure that ‘expert’ evidence is reliable, accurate and relevant, following recent cases of overturned convictions on the basis of flawed expert testimony. The difficulties of such ‘gate-keeping’ duties are immediately apparent – judges would have to be ‘experts’ in whatever domain they are required to make such decisions. Ward warns of another difficulty, that judges who have ‘*decided similar cases in the past may be inclined to believe experts they already know well*’ (Ward, 2004a, p.382).

The central role of expert witnesses in circumstantial cases is widely accepted and unquestioned, although there have been several wrongful convictions obtained solely on the evidence of ‘experts.’ (Fisher, 2008, Lean, 2008, Ward, 2004a). Yet some research suggests that juries expect expert evidence (‘scientific’ evidence) as a fundamental and essential component of prosecution or defence cases (Deutsch & Cavender, 2008).

protections provided by Double Jeopardy legislation (Taylor 2005), and legislation allowing evidence of bad character and previous offences to be put before the jury (Kui 2006) in England and Wales demonstrate procedural changes which encourage a presumption of guilt.

Appeals and overturned convictions

Although the terms miscarriage of justice and wrongful conviction are often used interchangeably, there is, in fact, an important distinction. A miscarriage of justice can occur even when the convicted person is factually guilty of the crime charged. Wrongful conviction of the factually innocent, on the other hand, is precisely what it says – a person has been convicted of a crime that they did not commit, or, in some cases, did not even happen (e.g. Naughton, 2006).

This is one area where public perceptions diverge from the realities of the CJS – there is a widely held belief that many ‘criminals’ are ‘getting off on (legal) technicalities,’ to the extent that overturned convictions of the factually innocent continue to be viewed with suspicion. (O’Brien, 2008, Naughton, 2006). These perceptions are, no doubt, influenced by Government initiatives claiming to ‘*rebalance the system in favour of victims of crime ... and... bring more offenders to justice*’ (e.g. Home Office, 2004), although, statistically, these claims are misleading⁸(Kennedy, 2004, Fitzpatrick, 2002) , and also by the fact that only a small number of high profile cases of overturned convictions become known to the public in general, often accompanied by sensationalist media coverage carrying the unmistakable hint that the person whose conviction has been overturned is not, in fact, innocent (Naughton, 2007, Kennedy, 2004).

Media coverage, research and government reform have all centred mainly on this small number of high profile cases of wrongful conviction, supporting and encouraging the public perception that wrongful conviction of the factually innocent is a rare event,

⁸ A discussion of conviction and detection rates is included in the section ‘**Government**’ later in this chapter.

which can be, and is, rectified (Naughton, 2007). The fact that the mechanisms by which this rectification occurs can also be used to free those seen as ‘guilty,’ by using technicalities to evade punishment, encourages doubt as to the innocence of many whose convictions are overturned (Naughton, 2004).

In the UK, this may be in part because of the large number of high profile cases which emerged during the early 1990s. The linkage of many of these with the terrorist activities of the IRA created a sense of unease that factually guilty criminals were being freed on legal technicalities. The much publicised comments of appeal judges in the case of Danny MacNamee (1997) and the M25 Three, whose convictions were not related to terrorist activity (2000), that the successful appeals were not findings of innocence, did nothing to allay that unease (BBC 1992 – 2000).

This, however, simply highlights another public misconception about the purpose and function of various elements of the CJS: the court of appeal does not, in fact, exist to find guilt or innocence, but rather to ensure that trials were conducted fairly, within the particular principles of due process (Naughton, 2006, JUSTICE 2002b).

Misperceptions and wrongful accusation and/or conviction

These facts raise some interesting questions. If wrongful conviction of the factually innocent is inevitable (Naughton, 2006) and there are several factors which, of themselves and collectively cause these convictions, but the general public is ‘profoundly ignorant’ (JUSTICE, 2002a) of the system as a whole, and of the processes of wrongful conviction in particular, how might that ignorance impact on an innocent member of the public, facing wrongful accusation or wrongful conviction? In what

ways might s/he attempt to employ beliefs and perceptions about how the system works, when faced with a reality which is far removed from those beliefs and perceptions? To what extent might faith that the system exists and functions to do what that individual *believes* it does create a situation where s/he fails to take appropriate action, or agrees to actions, behaviours and processes which are ultimately against his/her interests? What, in turn, would be the effects on the wider public – how might others react to someone who has been wrongly accused, but is presumed by others to have been rightfully accused?

This is one area which research has been neglected. Most research has tended to focus on the causes of wrongful conviction, legal structure and the role of law, on attempting to identify the rate of incidence of wrongful conviction, or on the likely effects of Government reform on future incidence of wrongful conviction, missing the centrality of perceptions of ‘the law’ in people’s everyday lives:

‘almost nothing has more impact on our lives.... The law is entangled with our everyday existence, regulating our social relations and business dealings, controlling conduct which could threaten our safety and security, establishing the rules by which we live (Kennedy, 2004, p.3).

Although some research has been done on the *after* effects of wrongful conviction (e.g.Naughton 2004:7, MOJO 2004), the effects and impacts of the *process* of wrongful accusation and conviction on the innocent individuals concerned have largely been ignored.

For example, there appears to be a tendency for factually innocent people who have been wrongly convicted to continue to trust that the very system which has convicted them will somehow recognise and remedy its ‘mistake’ (e.g. Scraton, 2007). Even after conviction, these people have little understanding of how, for instance, their own statements were ‘reconstructed’ for use against them, or of how ‘legal truth’ inevitably overwhelmed their own ‘truth’ (Green, 2008), and appear not to understand, at least in the early stages, that appeal processes will follow the same legal doctrines that shaped the original trial. Therefore, even after conviction, the collision of beliefs with actual CJS processes continues, undermining individuals’ abilities to have their concerns properly addressed, and their cases properly reviewed (Lean, 2008, Green 1996). Scraton (2007) documents a similar effect on the survivors and bereaved relatives of ‘major incidents’ such as the Hillsbrough football stadium disaster or the Dunblane shootings, whose initial trust that official enquiries would uncover the truth and establish the ‘facts’ of these events, was demolished by the processes and procedures of those enquiries.

Further, official denial (Scraton, 2007, Cohen 2001) is an obstacle which, at the same time as blocking individual attempts to produce ‘the truth,’ also reinforces public perceptions and opinions that the original decision or finding was, in fact, correct.

Part of the difficulty is that wrongful convictions of the factually innocent remain *alleged* miscarriages of justice until a Court of Appeal overturns the conviction. There are, then, no official statistics, and no real way of knowing the full extent of the numbers affected (Naughton, 2006). An attempt to estimate the incidence of ‘actual innocence’ convictions, carried out by Zalman et al (2008) concentrated on the

estimates of officials within the CJS in the United States which, perhaps unsurprisingly, found that officials believe that the incidence of innocent people being convicted for crimes they did not commit is between 1-3% of all convictions, although the researchers concede that '*[what] cannot be known with absolute certainty is how closely the respondents' estimates reflect the true frequency of wrongful convictions*' (Zalman et al, 2008, p.92). Similarly, figures for successful appeals in England and Wales cannot reflect the numbers of wrongful convictions of the factually innocent, because (a) some appeals will, inevitably, overturn convictions of the factually guilty, and (b) the Courts of Appeal do not consider issues of innocence or guilt when considering whether a conviction is legally 'safe,' as already discussed, (c) not everyone claiming factual innocence and wrongful conviction will obtain permission to appeal.

That the justice system does not recognise factual innocence as a ground for appeal *in itself* further compounds the difficulty.

The wrongly convicted and the media.

Faced with such enormous difficulties in having their cases re-examined, some individuals claiming factual innocence turn to the media in an effort to have their truth acknowledged. It is often with great hesitation and trepidation that such a step is taken, as many wrongly convicted individuals have been the subject of high profile, sensationalist media coverage before and during their trials (Jenkins, 2008, Lean 2008, Scraton, 2007).

Until 1999, prisoners in England and Wales were banned from talking to journalists investigating alleged miscarriages of justice (Independent 9th July 1999) and, although

the ban was overturned by the court of appeal, the decision to allow access to journalists is, in reality, in the hands of individual prison governors, and some prisoners have been punished, by losing privileges, for talking to journalists without permission. (For example, Suzanne Holdsworth, whose conviction was overturned in December 2008, had telephone privileges withdrawn after she spoke to a reporter from the BBC in 2007 (BBC News 6th Dec 2007)).

In Scotland, there is no right to visits by journalists, authors or other media personnel. If friends holding (or having held) these professions wish to visit prisoners, they must sign an undertaking not to use any 'material' obtained during visits for 'professional purposes' such as journalism, broadcasting or publication (The Prisons and Young Offenders Institutions (Scotland) Rules 2006, No 94, 63, (8)).

It is clear, then, that public beliefs and perceptions about the CJS, with particular regard to the incidence of the wrongful conviction of factually innocent individuals, are shaped and influenced by many factors, and as a result, may differ considerably from the actual practices and processes employed. Although there is a great deal of literature covering the individual factors themselves, and some literature examining the interplay of these factors, there is little research available on the immediate effects of erroneous perceptions and beliefs, held as factual knowledge, on the processes experienced by wrongly accused/convicted persons.

From these questions and the corresponding lack of research within which to examine them, emerged the research questions in this study:

To what extent, and with what consequences, do public perceptions and beliefs about the Criminal Justice System, held as factual and reliable knowledge, differ significantly from the actual objectives and operation of that system, with particular regard to the incidence of wrongful accusation and/or conviction of the factually innocent?

It is not enough to assume that people may hold beliefs and perceptions as factual knowledge about the CJS, all of which may be erroneous. What is required is an understanding of which beliefs and perceptions are held as factual knowledge, where these are erroneous, and in what ways attempts to employ such beliefs and perceptions as factual knowledge may impact on incidences of wrongful accusation and conviction. What is the extent of the role of the different “languages” utilised by ordinary members of the public and CJS actors, and in what ways does this difference impact on investigation, trial and conviction?

Also required is an understanding of how erroneous perceptions and beliefs come to be held as factual knowledge in the first place, and how they are reinforced and maintained, particularly when information becomes available to undermine their reliability. To what extent is trust in the CJS reinforced by government policy, legislation and rhetoric, and media representations? Does the use of expert witnesses enhance trust in, and support for, CJS processes?

Do popular beliefs and perceptions in and of themselves, contribute to incidences of wrongful accusation and conviction? How do popularly held beliefs and perceptions about the CJS impact on public responses to high profile crimes, police investigations and convictions, in general, and claims of wrongful accusation and conviction in

particular? What are the effects of the emergence of information about CJS processes which runs contrary to popular beliefs and perceptions?

The following chapters will address key areas where popular perceptions and beliefs have influenced significant events and processes in 30 cases of wrongful accusation and/or conviction of individuals claiming factual innocence. These include the experiences of the wrongly accused and convicted themselves, their families and friends, and responses to these cases by the media and the wider public.

Chapter Two examines available literature addressing aspects of public perceptions and beliefs about the CJS, and the processes which lead to criminalisation and conviction. The numerous interwoven and interdependent influences which feed into perceptions and beliefs are addressed, and gaps in available research identified, leading to the emergence of the research questions on which this study is based. Of particular interest are theoretical approaches examining themes of centralisation, control and dissemination of information, information as ‘knowledge,’ and concepts of truth and justice; the interplay of these approaches being brought together in an attempt to understand the roles of belief, information, assumed knowledge, and trust in ‘truth’ and ‘justice,’ for those without specialist knowledge of the CJS.

Chapter Three includes a detailed report of the approaches taken, and methods used in this study, and a short discussion of the results of the scoping survey examining public beliefs and perceptions about the CJS. The challenges peculiar to research about this subject matter are discussed, including the difficulties encountered in obtaining official

access to those most directly affected – the wrongly convicted - and the more subtle difficulties of access to the families of the wrongly accused and convicted. These include overcoming the distrust of those families, that distrust resulting from their perceived betrayal by the CJS, fear of participation endangering future processes which may see the conviction of their family member quashed, and a deep suspicion of written and recorded accounts of their experiences being misrepresented. The chapter also discusses the steps taken to overcome such challenges, and the emergence of a network of trust amongst individuals in similar circumstances – in spite of their deeply held suspicions regarding ‘outsiders,’ there was a natural affinity to those who had lived through, or were living through, similar experiences. Wider public hostility and resistance (including internet “hate campaigns” and direct threats) to claims of wrongful accusation/conviction, and to those attempting to research and highlight those claims are also addressed.

Chapters Four, Five and Six examine individuals’ experiences of involvement in investigation, charge, trial and conviction in serious crimes, including the experiences of related, non-accused individuals, at different stages of these processes. The beliefs and expectations held by those involved are examined in comparison to events as they actually unfolded, and the steps and measures taken, or attempted, by individuals to rectify what were initially perceived to be errors and misunderstandings. These chapters are arranged in such a way as to attempt to address the chronological experience of wrongful conviction, from initial accusation or involvement, through preparation for, and the process of trial, to the post conviction experience. It is acknowledged that the stages are interdependent; the division into “chronological” chapters is an attempt to examine an ongoing process, whilst remaining mindful of the influences of each stage

on all of the others. For example, the requirement for evidence to be presented at trial in particular forms (in order to meet legal definitions of “admissible,” “probative,” “reliable” or “credible”), may influence what types of evidence are sought during police investigations, but this will not be apparent to those who are the subject of those investigations. The chapters, in this context, attempt to strike the delicate balance between what is known to CJS actors, and what wrongly accused persons and their families believe to be reliable knowledge about CJS processes.

Chapter Four addresses police investigations; practices known and accepted within police activities which are largely unknown to the wider public, the difficulties encountered by individuals attempting to communicate with investigators in the belief that common words, phrases and concepts have the same meaning to investigators as to “ordinary” members of the public, the effects of the combination of pressures on police forces to improve clear-up rates and performance, and the discretion afforded much of police work, the effect of over-confidence in abilities to detect dishonesty, and presumptions of guilt in policing culture are discussed. Comparisons between the expectations and beliefs of those who have become the subject of serious police investigations, and the actual experiences they encountered, are highlighted in an attempt to explain why suspected or accused individuals, and their families, take the actions (or fail to take the actions) they do. The impact of those actions (or inactions) is examined in terms of the “specialist understandings” held by investigators, whose goals may be different from those under investigation (although those under investigation believe those goals to be the same).

Chapter Five addresses popular beliefs and perceptions about what constitutes “evidence,” both within police investigations, and trial processes. A number of different types of evidence, believed by the wrongly accused/convicted and their families to be important in the processes of “proving” their innocence, or eliminating them from suspicion, are discussed, in comparison with the legal and technical rules and restrictions which render them “unusable” or “irrelevant” in CJS processes. The gap between perceptions of “all of the evidence” being heard at trial, and the reality of the selective processes which determine what will become evidence, and what will not, is highlighted, and the consequences of failures amongst lay people to understand the technical definitions, or specific legal definitions, of certain types of evidence (e.g. eyewitness identification, forensic or expert evidence, police statements as evidence) are also discussed.

Chapter Six addresses experiences with legal professionals and court processes, in particular the communication difficulties encountered by lay people, with no legal training or understanding, attempting to understand, and adequately express themselves to, legal professionals. The professional pressures and expectations of legal professionals, and the role of the Legal Aid system in decision making in legal processes, are also discussed. Common beliefs and perceptions about well known terms and phrases are contrasted with the actual processes and procedures which form “real life” application of those terms and phrases, highlighting not only the gap between public beliefs and perceptions, but the consequences of individuals progressing on the basis that those beliefs and perceptions represent reliable, factual knowledge.

Chapter Seven examines post conviction processes; the common belief that the right to appeal is “automatic,” and the difficulties encountered by individuals who discover that this is not the case. The impact of wider public perceptions of an “automatic” right to appeal, leading to public perceptions that failure to obtain permission to appeal, or failed appeal hearings, indicate that the original conviction was “correct” (i.e. that the individual was guilty of the crime) is addressed, in comparison to the tight restrictions which surround permission to appeal. Further, the legal technicalities of the appeal process are highlighted, and the many common-sense assumptions about appeal processes are discussed in that context. This chapter brings together the cumulative effects of common beliefs and perceptions, employed as reliable and factual knowledge, on incidences of wrongful conviction, and highlights the struggle of individuals who eventually come to understand that their erroneous beliefs and perceptions have, in themselves, played into those wrongful convictions. A short discussion of support and campaign groups, and their roles in assisting the wrongly accused/convicted, as well as disseminating information about the problem of wrongful accusation/conviction, demonstrates some of the shortcomings and obstacles faced by those groups.

Chapter Eight draws a number of conclusions from the research undertaken: the manner in which political influences impact on the experiences of wrongly accused and convicted individuals, and their families; the implications of the differences in legal and lay understanding and applications of common terms and phrases and the critical role of police investigations as the stage at which all wrongful accusations and convictions begin (and the impact of different understandings therein). The centrality of specialist knowledge to all CJS processes, including legal representatives’ communications with their clients, is contrasted with the lack of understanding created by the inability of non

CJS actors to access that specialist knowledge, and the numerous ways in which these influence wrongful accusation and conviction of factually innocent individuals. A number of areas of further research are discussed.

CHAPTER TWO

Literature and Theoretical Perspectives

Introduction

This chapter aims to draw together a variety of different theoretical perspectives addressing concepts of crime, law and order, justice, power, surveillance and public perceptions and acceptance of prevailing representations of the Criminal Justice System.

Although these approaches do not examine wrongful convictions or miscarriages of justice per se, they provide a framework within which incidences of wrongful conviction, and the processes by which they are obtained, may be examined and compared, in particular, with a view to identifying how information about the CJS comes to be held as 'knowledge.' Situating the findings of this study within such a framework is intended to allow gaps in existing theoretical approaches to be identified, and to extend the framework in which incidences of wrongful conviction, as identified by this study, may be assessed.

Durkheim's approach to the manner in which 'knowledge' about crime and the CJS is circulated and absorbed into public acceptance and recognition was rooted in concepts of society as an 'organic' entity.

Concepts of 'normality' as self-perpetuating, and the production of 'knowledge' are addressed thus: as the influence of the 'conscience collective' of 'primitive societies', based on tradition and familial ties, declined (this in itself as a result of industrialisation

and the emergence of larger 'organised' societies), new 'rules of conduct' were needed to regulate norms, values and boundaries, in particular with regard to the Division of Labour. For Durkheim, these 'rules of conduct,' forming part of the social solidarity required as part of a 'healthy' society, would continue to emerge and become consolidated via legal systems, through rational interventions and contracts, laws which would clarify acceptable behaviours and transactions, but which were consensual rather than fear-based, and the diminishing effects of 'external inequalities' as organised societies continued to develop. (e.g.Mason, 2010, Durkheim E, 2008: 7)⁹

Durkheim's functionalist approach represented crime as both normal, and necessary in order for society (and, in particular, legal systems articulating rules, values and boundaries within societies) to develop and accommodate expansion. The centrality of the law in demonstrating collective norms, values and behaviours, emerged as industrialisation increased both the physical density of societies and the numbers of social interactions between diverse groups (Mason 2010).

In this approach, crime, law, and other interventions are seen as inevitable factors emerging from 'society' as an organic entity. In order for societies to be 'healthy,' there must be enough flexibility for adaptation and development, and, at the same time, crime, and its punishment, are useful tools for strengthening and reinforcing collective norms and values, but the aim is to maintain (or restore) 'social equilibrium'; the 'organic' analogy implying that this equilibrium is a 'natural' balance to be attained within 'healthy' societies.

⁹ In 'Criminological Perspectives: Essential Readings,' by McLaughlin E, Muncie J, Hughes E (eds) 2008.

One of the main criticisms of Durkheim's approach to crime is that no consideration is given to the impact of power relations on the creation, implementation and maintenance of laws and legal systems. The abilities of the powerful to manipulate and control both the development of legal systems, and the imposition of sanctions, as well as the distribution of knowledge and information are not addressed, although, with reference to educational systems, he states that education is '*a continuous effort to impose on the child ways of seeing, feeling and acting at which he would not have arrived spontaneously*' (Hoenisch, 2005, para:2).

Although Durkheim also notes the utility of crime as both a means of identifying areas of society where change may be required, and a means of strengthening social cohesion and solidarity, by identifying (and thus reinforcing) the rules and boundaries of acceptable conduct, this utility is based in a codification of behaviours and transactions seen to be an objective expression of a new form of consensus-based conscience collective, rather than the imposition of controls and restrictions imposed by the powerful on the populace.

Foucault's work on discipline and surveillance, however, addresses these issues, expanding the theoretical base for the examination of the questions of how people come to hold erroneous beliefs and perceptions as factual knowledge with regard to the CJS. He begins with the premise that disciplinary power

'had to be given the instrument of permanent, exhaustive, omnipresent surveillance, capable of making all visible, as long as it could itself remain invisible. It had to be like a faceless gaze that transformed the whole social

body into a field of perception, thousands of eyes posted everywhere, mobile attentions ever on the alert, a long, hierarchicalised network' (Foucault, 1991, p.214).

Surveillance at every level of social interaction produces information which can then be used to shape and influence social organisation, adapting, as it can, to a constant flow of updated information. It is, according to Foucault:

'a type of power, a modality for its exercise, comprising a whole set of techniques, procedures, levels of application, targets; it is a physics or an anatomy of power, a technology. And it may be taken over either by specialised institutions (penitentiaries or houses of correction of the 19th century), or by institutions that use it as an essential instrument for a particular end (schools, hospitals), or by pre-existing authorities that find in it a means of reinforcing or reorganising their internal mechanisms of power' (Foucault, 1991, p.215),

Within these concepts, it is possible to locate the existence of misperceptions held as knowledge within the framework of disciplinary power. Pre-existing authorities, in this sense, employ continual surveillance, to *'classify, to form categories, to determine averages, to fix norms'* (Foucault, 1991, p.190), and those categories, averages and norms are circulated throughout society, but stripped of the specialised nature of the knowledge from which they were created.

Naughton (2007) suggests that *'official statistics... are about normalising the population ... because 'few' of us fancy being pathological, 'most of us' will try to make ourselves normal, which in turn affects what is normal'* (p.49).

The emphasis is on a statistical base for 'normality,' and that 'normality' will become increasingly self-perpetuating – surveillance, as it expands ever more intimately and deeply into every area of social interaction produces 'knowledge' which is then put to use to organise, adapt, and mediate social structures and behaviours, and consolidate what is, and is seen to be, normal: *'the circuits of communication are the supporters of an accumulation and a centralisation of knowledge'* (Foucault, 1991, p.217), which *'has infiltrated all others [modalities of power], sometimes undermining them, but serving as an intermediary between them, linking them together, extending them, and above all, making it possible to bring the effects of power to the most minute and distant elements'* (Foucault 1991, p.216).

Inherent in this process are notions of self regulation, and participation of all citizens in the processes of surveillance and regulation – it is not so much state imposition of discipline and surveillance as such, but a process which requires both acceptance and participation by the populace.

This continuous process of discipline and self regulation provided the backdrop to a sharp cultural, political and social shift from the late 1970s in the UK (Garland, 2006).

Following the economic downturn in the early to mid 1970s which *'brought closure to the equilibrium and stability on which post-war capitalist state power had depended'* (Scraton 2002:2, p.15), a *'gradual shift to control'* took place, *'involv[ing] the law, the*

police, administrative regulation, public censure, [a] qualitative shift in the balance and relations of force amounting to a 'deep change,' which was *'based on the appeal to traditional values and morality that provided the 'law and order' crusade with its grasp on popular morality and common sense conscience'* (Scruton, 2002:2, p.23).

Part of this 'deep change' arose from the effects of market de-regulation, from which the middle classes benefited – *'relatively thriving, but nevertheless anxious about the pitfalls abounding in the new de-regulated market place'* (Morgan & Hough, 2008:2, p.50) – and which gave rise to perceptions of the 'law abiding, responsible, security conscious' individual, whilst encouraging hostility, fear and blame towards those who were not (or rather, were not perceived to be) law abiding, responsible or security conscious – outsiders, the 'enemy within,' those within the 'excuse culture,' the dangerous 'other' or 'others' and so forth (Morgan & Hough, 2008:2).

As a result, crime and responses to it, from the late 1970s to the present, came to be viewed in two apparently contradictory ways.

On the one hand, with the acceptance of rational choice theory, routine activity theory and so forth, crime is accepted as a routine phenomenon, a normal, mundane part of everyday life (e.g. Matthews & Young, 2008, Garland 2006). It is not, in this context, individual offenders who need to be differentiated or corrected, it is simply the routine-ness of crime that needs to be governed by the implantation of non intrusive controls in the criminogenic situation itself, and/or attempts to modify the interests and incentives of actors, working with, and through, rather than on actors (Garland, 2006).

Notions of responsabilisation (an extension of Foucault's 'self regulation') require individuals to participate in reducing 'opportunities' for crime, as part of their self image as law abiding, responsible citizens – the criminal in this case is 'situational man' – '*moderately rational, self interested, unfettered by any moral compass*' (Garland, 2008:41, p.462), and alert to opportunities for criminal actions.

The aim of participatory approaches is to '*ensure all individuals and agencies contribute* [to security, reduction of opportunities for crime, etc, because they see it as in their interests to do so]... *enlisting and enrolling inter-agency co-operation and reponsibilisation of private individuals and organisations,*' to '*create governors and guardians in the space between state and offender*' (Garland, 2008:41, p.460).

The new objectives of reduction of crime, reduction of fear of crime, a culture of security consciousness and public safety are all based on this concept of working with, and through, actors rather than on them.

Whilst Foucault's approach de-emphasises the power of the state; '*the state does not have [this] unity, individuality, rigorous functionality or importance..... [it] is no more than a composite reality, a mythicised abstraction whose importance is a lot more limited than many of us think*' (Foucault, 1991, p.103), the centralisation of power and control, and the dissemination and circulation of discourses which shape and influence public perceptions of 'normality,' 'responsibility,' 'order,' and 'risk,' echo Gramsci's theory of cultural hegemony – '*the inculcation of the populace with the ideals of the hegemonic group through education, advertising, publication, etc, along with the mobilisation of a police force as well as military personnel to subdue opposition.*'

(Felluga,2009), (<http://www.purdue.edu/guidetotheory/marxism/terms/>),and Chomsky's argument that it is the powerful who control the means of knowledge production and dissemination, and the law, in order to protect their own interests (e.g. Mitchell & Schoeffel, 2003).

What is striking about this approach, however, is that it neither attempts to address, nor even acknowledge, structural causes of crime, or even individuals in need of 'correction.' The sole concern is one of management of the criminogenic situation, with the expectation and normality of crime taken as given.

On the other hand, neo conservative approaches encourage and reinforce crime control policies which, *'can invoke images of 'the criminal' that depict him... as profoundly anti-social.... with few redeeming factors and little social value. Some... are evoked in ways that are barely human, their conduct being essentialised as 'evil' or 'wicked' and beyond all human understanding.'* (Garland, 2006, p.135).

Scraton contends that the portrayal of 'the criminal' in this manner creates a threat so serious that

'[i]n the ensuing 'moral panic,' what follows is an orchestrated, hostile and disproportionate reaction by the authorities incorporating surveillance, containment and regulation' (Scraton, 2002, p.27). He continues, citing Goode and Ben-Yehuda (1994: 82) *'Closely associated with the moral outrage surrounding a particular act or sequence of events is a widely and immediately disseminated rush to judgement, invariably*

feeding highly publicised calls for increasingly regulatory interventions. It is a pattern which strengthens state control; tougher or renewed rules, more intense public hostility and condemnation, more laws, longer sentences, more police, more arrests and more prison cells... a crackdown on offenders.'

This combination of '*preventative partnership and punitive segregation*' (Garland 2006, p.147) not only serves to heighten the very fears it purports to be trying to allay, but also circulates and reinforces perceptions about criminal justice – 'knowledge' about criminal justice, in this sense, is '*based upon collective representations rather than accurate information; upon a culturally given experience of crime, rather than the thing itself.*' (Garland, 2006, p.158).

The shift towards more punitive approaches – for example, the willingness of New Labour to '*pursue a pathway from modernity – assimilation and incorporation – to post-modernity – separation and exclusion*' (Morgan & Hough, 2008:2, p.50) has its roots in the corresponding re-casting of criminal justice issues in economic and managerial terms (e.g. Morgan & Hough, 2008, Garland, 2006). Erosion of rights and safeguards is justified on the basis of 'efficiency,' 'values,' and the supposed rationality, choice, and lack of responsibility of those who engage in criminal acts – for example, increased government criticism of '*a human rights culture that places greater weight on the protection of the accused than on the safety of the public,*' and '*the protection of suspects afforded by full due process.....has become too expensive and too cumbersome,*' leading to reforms to '*make enforcement easier and to reverse the burden of proof*' (Morgan & Hough, 2008: 2, p.52). Others include '*the removal of the*

right to silence, proposals for mandatory drug testing of suspects as well as prisoners, challenges to the right to jury trial, the legal regulation of asylum seekers and the scope and force of the Terrorism Act 2000’ (Scruton, 2002:1, p.33), leading Scruton to conclude that *‘the long march of authoritarianism has continued unabated.’*

This interconnection between perceptions of crime and criminal justice issues, and the *‘populist appeal of authoritarian rhetoric’* (Scruton, 2002:1, p.33) highlights the shift away from attempts to tackle structural causes of crime, and inclusionary, rehabilitative approaches, to a focus on ‘the offender’ as a figure for hostility, blame and exclusion, leading Hudson to conclude that *‘deserved retribution,’ ‘protection from dangerous or persistent offenders,’ and ‘strong action against kinds of offending that become suddenly prevalent’ are now established priorities within western criminal justice processes’* (Hudson 1996, p 55).

As an example of how discourses regarding the changing perceptions of criminal justice processes impact those very processes, Green offers a theory of ‘revelatory knowledge,’ in police investigation and prosecution cases, in which

‘there is a standard method by which ... hidden pieces of knowledge are produced, that is, brought to light. ... a thing is found (a witness, a suspect, a volunteered statement, an inanimate object) which can be precisely and accurately represented, but the meaning it brings with it, from its original context – its overt meaning, however obviously displayed, or clearly and positively expressed and intended – is never accepted as its true meaning. Openly offered meaning is normally regarded by

investigators as being actively misleading – resistant to the production of knowledge they seek – and so they close off meanings that are offered to them.

Power is exercised to overcome the resistance of people and other objects, and what is then revealed behind or beyond those resistant surfaces, through the exercise of power, is fitted into appropriate contexts of existing knowledge by experts who interpret it and give it meaning (Green, 2008, p.11).'

What is important in Green's theory is that the method of extracting knowledge is 'standard,' and that it emphasises the need to 'produce the knowledge they seek,' suggesting an instrumental approach based in an already decided framework – the 'knowledge' they seek is only that which will fit, in particular ways, within that framework.

Also, the 'appropriate contexts of existing knowledge', are firmly embedded in a framework of authoritarian, punitive approaches which portray the 'criminal' (and, more frequently, 'the suspect,') in Garland's terms as anti-social, barely human, and evil (Garland, 2006, p.135). This serves to highlight the extent to which the view of offenders and suspected offenders as intrinsically 'criminal' (openly offered meaning is...regarded...as being actively misleading) has become institutionalised.

There are parallels with Gramsci's concept of cultural hegemony here – the "appropriate contexts of existing knowledge" are reinforced by the processes used to

elicit the “pieces of knowledge” to be fitted therein, the powerful (police investigators) setting and controlling the parameters of what is accepted as “knowledge.” These processes are hidden from the wider public who are, instead, encouraged to believe that police investigations are impartial assessments of information, in order to uncover “the truth” about a given set of circumstances.

Scruton, with reference to enquiries into several disasters (Hillsborough, Dunblane, the sinking of the Marchioness, etc) points to ‘*several features*’ which demonstrate an ‘*officially sanctioned and sealed version of ‘the truth’’*’ (Scruton, 2002:1 p.35), those features including

‘the abuse of discretionary powers with impunity...the inadequacy of investigations through lack of disclosure....the silencing of alternative accounts through condemnation and vilification... the manipulation and management of the media including purposeful misinformation...’
(Scruton, 2002:1, p.35),

mirroring many of the concepts of Green’s processes of Revelatory Knowledge production.

Cohen’s analysis of denial, (literal, interpretative or implicative), suggests further confusion and manipulation of public perceptions of criminal justice issues, in that official denial can support and reinforce cultural denial (Cohen, 2001). For example, individuals holding the belief that the CJS is just, fair, and governed by strict rules to ensure that innocent people are not deliberately targeted, pursued and convicted may,

when faced with evidence that exactly such targeting, pursuit and conviction takes place on a regular basis, rely on official denials; ‘Our rules and procedures say this cannot happen, therefore, it cannot happen’ (literal denial), ‘this is an unusual occurrence which has come about because of certain specific circumstances – it is certainly not proof of a routine incidence of wrongful conviction’ (interpretative denial), or ‘this is a known, dangerous criminal – while he may not *actually* have committed this crime, we know for certain he would have committed serious offences had he been left free’ (implicatory denial).

Indeed, Cohen’s ‘denial’ and Green’s ‘closing off of alternative explanations’ appear as complementary approaches to knowledge production and dissemination within the CJS, which reinforce and maintain popular images of crime, dangerous criminals, effective, strong state responses, and so forth.

In these contexts, the ‘specialist knowledge’ of Criminal Justice discourse, whilst on the one hand appearing to have spread beyond the boundaries of criminal justice agencies to become part of the wider ‘public knowledge,’ yet on the other, retaining its specialised form within those agencies, has come to be perceived as ‘factual information’ on which members of the public rely, and which they use to back up calls for tougher regulations, sentences, and punishments.

Widespread use of the language of the CJS (forensics, DNA, expert witnesses etc) reinforces the impression of knowledgability, when, in fact, many of the terms used are poorly understood. Similarly, a strong belief in the abilities of science to provide all of

the answers (Fisher, 2008, Barnhizer, 2006) reinforces the acceptance of perceptions as knowledge.

Barnhizer refers to the 'leakage' of knowledge or 'truths' from one realm into others as part of a political strategy whereby positions are '*reformulated in terms...that fit within the discourse being used...*' (Barnhizer, 2006, p.29).

Whilst people believe that they have 'knowledge' about the CJS, it is not the *specialist* knowledge, which is retained and controlled within CJS agencies, but is rather a 'false consciousness'¹⁰, based on ideals and belief systems which are supportive of the status quo. 'Leakage' in this context, however, is perhaps more a strategy of leaving terms ill defined and vague, whilst encouraging the notion that they are both self-evident and universal. The '*thousands of eyes posted everywhere, mobile attentions ever on the alert*' (Foucault, 1991, p.214) pick up and respond to cues which appear to be rooted in 'knowledge and understanding,' shaped and influenced by a culture of fear in which '*[t]he public's concern about terror has become a kind of resource which can be mobilised for giving other threats greater definition*', (Furedi 2007a:para 9) and as a result, people are encouraged to demand more 'protection' and 'security' at the expense of rights and freedoms.

¹⁰ Boudreaux et al (2003, p.3) suggest an economic model of false consciousness in which "Rational ignorance implies that people will invest resources in acquiring and carefully processing information when the stakes warrant doing so. But rational ignorance also implies the converse: a person will acquire less knowledge about some event the lower his or her influence over the outcome of that event is and the lower his or her stake in the outcome of that event is." Coupled with the contention that "when the information given the parties and the public is distorted, any faith in the system's "visible" and "neutral" procedures is equally distorted." (Fox (1999,p.15), it is possible to locate the existence of false consciousness in a combination of distorted information being accepted without the need for greater knowledge or further processing, on the basis that the vast majority of people believe that they will never become closely involved in CJS processes, especially as potential suspects or accused persons.

At the foundation of all of these approaches are relations of state power, knowledge and control. Garland refers to the '*dialectic of freedom and control*,' whereby '*the continued enjoyment of market-based freedoms has come to depend on the close control of excluded groups who cannot be trusted to enjoy these freedoms*' (Garland, 2006, p.198). The emphasis on 'choice' and 'responsibility' is used, when controls are imposed on offenders, to '*affirm their supposed freedom, their moral responsibility, and their capacity to have acted otherwise*' (Garland, 2006, p.198), and at the same time, the desire for '*security, orderliness and control, for the management of risk and the taming of chance.....[has led to] immediate consequences for those caught up in its repressive demands, and more diffuse, corrosive effects for the rest of us*' (Garland, 2006, p.194).

There are, then, a number of factors which appear to influence the manner in which people come to believe or accept that perceptions about the CJS are, in fact, reliable knowledge. If, indeed, this dual approach to crime and 'criminals' is driven by beliefs and perceptions held as factual knowledge, yet, because the vast majority of people will never come into direct contact with the CJS (except in very minor ways,) then it may be assumed that attempts to employ these perceptions and beliefs as knowledge in serious criminal investigations would result in unexpected and unforeseen outcomes. Furthermore, the way other members of the public view those accused and convicted of serious crimes, and public opinions about how crime and criminals should be dealt with, are likely also to be based on perceptions and beliefs, held as factual knowledge, which do not accurately reflect the realities of crime and the CJS.

In order to appreciate the degree to which people erroneously interpret beliefs and perceptions as factual knowledge, how these beliefs and perceptions are manipulated

and controlled, and the effects of those beliefs and perceptions on the incidence of wrongful conviction of the factually innocent, it is necessary to look at the various factors which weave together to produce those beliefs and perceptions, how they have come to be considered 'knowledge' and where they diverge from the actualities of the CJS in operation.

Perceptions of 'truth and law'

Research indicates that there are widely held perceptions of the concepts of truth and law as universal - that there is 'a' truth and 'a' law, omnipresent and overarching all other truths and laws. Barnhizer suggests that '*one of the most basic consequences to flow from the invention of science is that the idea grew that there is only one truth, not many truths, about anything*' (Barnhizer, 2006, p.17).

Following from this, studies have shown that people generally accept the obligation to obey 'the law,' when 'the law' is perceived to be fair and just (Tyler, 2006). Concepts of fairness and justness themselves then, however vaguely defined, appear to inform decisions about whether or not to obey the Law, and if, when and why others should obey the Law.

Rights in law, such as the right to be presumed innocent, the right of every person to be considered and treated equally, the right to a 'fair trial' and so forth, are believed to be inalienable, even though there is a great deal of evidence to show that this is not the case (O'Brien, 2008, Fitzpatrick, 2002, McBarnet, 1983). Whilst the rights, themselves, may indeed exist, the opportunity to exercise them is often compromised or thwarted by the processes and procedures in the CJS (Peirce, 2010, Green, 2008, Kennedy, 2004).

As previously discussed, people have a tendency to believe that criminal investigations and trials operate as a quest to find ‘the truth’ about what happened in given circumstances, and fail to appreciate or understand the difference between truth in this context, and legal truth (Balkin, 2002), or even that such a difference exists.

There is also a tendency to believe that factual innocence and truth telling will be enough in themselves to ensure that the innocent and truthful are recognised as such (Hartwig, Granhag & Strömwall, 2007, Scraton, 2007) and will not become targets of suspicion or pursuit by the CJS.

The matter is further complicated by the oath taken in courts, which is instantly recognisable to most – to tell ‘the truth, the whole truth, and nothing but the truth.’ Again, it becomes apparent that, even if there were a ‘whole truth,’ the rules of due process would make it impossible to tell, as the very nature of questioning, whether by the police (Green, 2008), or lawyers and judges in court (Scraton, 2002, McBarnet, 1983), is designed to elicit very specific answers. The closing off of possible answers, as in police interviews (e.g., Green, 2008, p.13-14) resembles the well known ‘*please [just] answer yes or no*’ (McBarnet, 1983, p.23) of judges’ instructions in court.

The idea that ‘a’ truth may be elicited, instrumentally, is inconceivable to many. ‘Common sense’ dictates that innocent people with a vested interest in *the* truth being revealed would take every step to ensure that truth, in all its various forms would, and should be revealed, even if some aspects of that truth are embarrassing, self-incriminating (at a very low level) or irrelevant. Some studies, as well as personal accounts from wrongly convicted individuals (O’Brien, 2008, Jenkins & Woffinden,

2008, Hartwig et al 2007), reveal that innocent but wrongly accused people include extraneous information in statements to law enforcers in the belief that this will be recognised as supportive of their innocence. Because of this belief that ‘the’ truth is easily identified, along with the common belief that those who have done nothing wrong have nothing to fear from the CJS (Kennedy, 2004) it does not occur to people that their statements may be deconstructed and then reconstructed for use against them (Green, 2008).

The restriction of opportunities to tell ‘the truth’ then leads to further public misperceptions. Believing that individuals who have been accused or/and convicted have had the opportunity to tell the police, their own lawyers, and eventually a jury their version of events may lead to the perception that these people were then convicted because either they were lying, or had not, in fact, revealed ‘the whole truth.’ This is especially significant where defence lawyers, adopting the official legal stance that it is for the prosecution to prove guilt, advise their clients not to give evidence in their own defence (Green, 1996). This course of action (or rather inaction) is often interpreted as the accused having something to hide (Lean, 2008). The idea that an innocent person would not attempt to assert their innocence, in a trial which apparently aims to examine allegations against them, simply makes no common sense to many. The consensus that the truth –the one truth- belongs to the innocent may be the trapdoor between which ideologies leak.

Public perceptions of ‘the law’ as the main protector of public safety, and a sense of trust that that protection is properly, fairly and honestly achieved is a remarkably

resilient phenomenon (Tyler, 2006, Kennedy 2004). Tyler reported a general acceptance and sense of obligation among American people to obey the law:

‘Children acquire diffuse support for the political system as part of the socialisation process of childhood. ...Once established, such support is a long-term affective predisposition, coupled only loosely to self interest’ (Tyler, 2006, p.177) and concluded that *‘Children are socialised to value the legal procedures of their own countries, and to view those procedures as naturally and self-evidently fair’* (Tyler, 2006, p.177).

An area of increasing confusion regarding ‘truth’ in criminal cases is that of so-called ‘expert evidence.’ Few cases considering very serious crimes arrive in today’s courts without ‘scientific,’ ‘forensic,’ or other ‘expert,’ evidence. The portrayal of this type of evidence as virtually infallible (Deutsch & Cavender,2008, Fisher 2008), coupled with its presentation in highly technical jargon (Ward ,2004a, Bourgeois et al, 1993) can lead to public beliefs that ‘expert evidence’ is reliable and trustworthy, even if that evidence is not fully understood by lay people (including jurors).

Yet, at the same time, there is the contradictory belief that juries find guilt (or innocence) on the evidence before them, raising the question, how can any jury come to a conclusion, beyond reasonable doubt, based on evidence jurors do not understand?

In fact, the legal position is that it is for the jurors to decide which witnesses to *believe*, not necessarily which witnesses they understand (Ward, 2004a), and it is here, once again, that public perceptions and the realities of actual criminal trials diverge; it may be that the view of defence representatives and experts as ‘helping criminals’ (e.g.,

Ward, 2004a) influences jury decisions on which witnesses are believed. The complexity of expert evidence often means that evidence the jury did not *understand* cannot be later used, once de-mystified, as grounds for appeal, as it does not meet the ‘new evidence’ criteria required for appeal (see below),

The absorption of discourses ‘borrowed’ from scientific disciplines into legal discourse creates ‘hybrid artefacts’ (Cottrell, 1998), allows those ‘hybrid artefacts’ then to spread into public perceptions and beliefs, coming to be held as ‘facts’ and ‘knowledge.’

An example of this is the use of the term ‘microscopically indistinguishable,’ used by experts to claim that fibres found at crime scenes are ‘linked’ to clothing belonging to the accused. Whilst it may be true that fibres are ‘microscopically indistinguishable’ from clothing belonging to the accused, the experts fail to properly explain is that those fibres could also come from *any* item of clothing, belonging to *any* person, if the item of clothing was made from a similar fabric. Mass produced clothing renders the term ‘microscopically indistinguishable’ virtually meaningless in terms of identifying *specific* items of clothing (INNOCENT 2009,Lean, 2008), yet jurors, and the public in general, believe that the link is reliable and scientific. Explanations such as this are rarely available to jurors, their experience, instead, being a bewildering array of contradictory statements from experts, all claiming a reliable scientific basis for their assertions (Ward, 2004a).

The appeals system

The belief that the appeals system exists to correct the wrongful conviction of the factually innocent leads people to two erroneous conclusions – (1) that safeguards exist to protect wrongly convicted innocent people, and (2) they work, in that wrongful

convictions are sometimes overturned at appeal. This is also impacted by the belief that wrongful convictions are rare occurrences, when, in fact, they are not (Naughton, 2002).¹¹

When we consider that *‘[a successful appeal] bears no relation to whether a successful appellant is factually guilty or innocent: these are not questions that our CJS pursues’* (Naughton, 2005, p. 165-167) and, *‘this court [quashing of conviction in the Bridgewater case] is **not concerned with the guilt or innocence of the appellants**, but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that **the integrity of the criminal process is the most important consideration for courts** which have to hear appeals against conviction’* (Naughton, 2006, p.5) (emphasis added) and, *‘Public expectations are quite straightforward... the CJS exists to convict the guilty and exonerate the innocent. Public discourse works from the premise that the appeals system exists...to correct the errors of criminal trials by overturning the convictions of the innocent’* (Naughton, 2006, p.4), we are left with the puzzling question of how all of these truths or understandings can co-exist without any apparent ‘chaotic collision’ (Naughton, 2001).

Similarly, the strict and narrow application of law is generally a matter of ignorance. Believing, for example, that appeals exist to overturn the convictions of the factually

¹¹ “The Lord Chancellor's Department's statistics on successful appeals against criminal conviction show that in the decade 1989-1999 the Court of Appeal (Criminal Division) abated over 8,470 criminal convictions - a yearly average of 770. In addition, there are around 3,500 quashed criminal convictions a year at the Crown Court for convictions obtained at the magistrates' courts. (Naughton, Observer Crime and Justice Debate, 2002). Although these indicate acknowledged miscarriages of justice in terms of flawed trial processes, or the acceptance of relevant new evidence, they do not, and cannot, account for claims of wrongful conviction by factually innocent individuals whose cases do not meet the criteria for appeal, or those whose appeals have failed.

innocent, people are generally unaware of the tight restrictions which govern permission to apply for appeal.¹²

It is more likely that a public perception that appeals courts exist to overturn the wrongful conviction of the innocent will lead, on failure of that appeal, (or failure to obtain permission to appeal) to the presumption that the person must, indeed be guilty.

Public (non specialist) concepts of truth and law, then, are broad, general concepts which appear not to address, or perhaps even be aware of, the many anomalies apparent in the actual application of these concepts within the CJS.

Wrongly accused individuals are, until the point of accusation ‘members of the public,’ holding the same beliefs and perceptions as others who have not been accused. An interesting perspective which may go some way to offering an explanation as to why members of the public make judgements and assumptions about CJS processes, without supporting evidence, is the ‘justice motive’ (Lerner 2003). Lerner found that, in ‘high impact’ situations, where participants become emotionally aroused, an

‘automatically elicited, relatively simple heuristic’ (Lerner, 2003, p.397) is activated and *‘[i]n situations where people are confronted with matters of serious consequence, the emotions and related cognitions elicited by the initial justice heuristic may dominate the person’s attention and shape the subsequent reactions to restore justice’* (Lerner, 2003, p.398).

¹² for example, the ‘New Evidence’ rule. An appeal cannot be applied for in England and Wales unless it is supported by new evidence. The definition of new evidence is ‘that which was not, or could not reasonably have been known at the time of trial’. Even if this hurdle is overcome, another test must be met – a reasonable explanation must be given as to why the evidence was not adduced at trial (Fitzpatrick 2002). Although these requirements do not currently apply in Scotland, there has been a trend towards assessing appeals applications on the basis of them.

A 'high impact' situation for ordinary members of the public (sensational media coverage of a particularly shocking crime, for example), may elicit a predictable 'justice motive' based on a relatively simple heuristic – 'people who do bad things are evil/dangerous and must be punished.' There is no requirement, in this situation, to further rationalise such a response, and, so long as the emotional content is maintained at a sufficiently high level, the response is likely to remain the same – a demand for 'justice' to be 'restored,' by apprehending and punishing the 'offender.' Such media manipulation of emotional responses may account for the continued suspicion directed at many wrongfully convicted individuals whose convictions are eventually overturned.

Wrongly accused persons also find themselves in a 'high impact' situation, and their immediate response 'I've done nothing wrong,' is likely to dominate their attention and shape their subsequent reactions. The problem here is two-fold. Caught up in an emotional reaction, and unable to 'step back' and review the situation logically or rationally, the wrongly accused person has already set a direction from which it may be impossible to return (especially in a situation where investigators are employing tactics such as those suggested in Green's theory of Revelatory Knowledge). At the same time, a public perception of that person has already been constructed, and a public response to that construction is already in place, isolating those claiming wrongful accusation and conviction still further.

Policing

Police investigations are considered, by the general public, to be exercises in fact finding, fact evaluating, and fact comparison – that is, police officers will consider all of the evidence as they uncover it, and from that, draw conclusions about what is most

likely to have happened, based on the evidence (Green, 2008, Kennedy, 2004). The reality, that presumptions of guilt are commonplace, and some investigations appear to pursue only that evidence which will support the police's chosen direction, is barely conceivable to many (O'Brien B, 2009, O'Brien M, 2008, Green, 2008, McBarnet, 1983,). As a result, the 'largely unsupervised' work of police investigators (JUSTICE, 2002a) is conceived by the public to be carried out within structured, limited and professional boundaries. This conception may be enhanced both by media portrayals of police work (whether fictional or 'reality TV' type documentary), and by government policy and rhetoric – the role of government and the media is discussed below. Yet, the facts of policing are that *'the notion of constabulary independence - constables are legally entitled to take independent action - is compounded by the highly permissive nature of many police powers'* (Jefferson & Grimshaw, 1984, p.60).

A number of high profile cases in recent years, in which shoddy or corrupt police practices were publicly highlighted (Jean Charles de Menezes, 2005, Damilola Taylor, 2002, and Stephen Lawrence, 1993, for example), whilst showing certain police forces in a poor light in specific circumstances, does not appear to have had an overall impact on public beliefs and expectations about what the police are supposed to do, and actually do. Perhaps, like the perception that wrongful convictions are rare events, the general public is unaware that police routinely make the same errors and failures of duty as those witnessed in the high profile cases (McBarnet, 1983). Indeed, accounts of police lies and denials in both the Hillsborough disaster and the Dunblane shootings, and the extent to which those lies and denials were accepted by judges and the media are indicators of a *'complex discourse of denial....bolstered by the language of legalism'* (Scruton 2007, p.77), in which *'official discourse implicates the rule of law,*

harnessing its processes and procedures to conduct a sophisticated 'legal defence'
(Scruton, 2007, p.77).

Kennedy reports findings from a 2003 study by Professor Roger Matthews at the Centre for Criminology, Middlesex, which reveal that only 47% of respondents agreed that the police do a good or excellent job, but this is not necessarily a reflection of what the public believe the police 'job' entails, and may be a result of exaggerated claims regarding increases in crime.¹³

Martin (2008:8, p158), draws on Home Office research in the 1980s, reported by McLaughlin & Murji (1997, p88) to point out that [this research]

'presented a picture of police work which differed considerably from the public image.... Contrary to police and media characterisation, law enforcement and crime related work accounted for a relatively small proportion of police time, and that most calls were related to the '24 hour social service' side of policing.'

Therefore, public conceptions of the police doing a 'good or excellent' job are likely to be coloured by a perceived failure by police to reduce crime rates, especially as so much publicity surrounds policies geared towards increasing police numbers to 'tackle crime.'

The 1980s and 1990s saw a shift in emphasis towards the 'victims' of crime, placing the

¹³In fact, The British Crime Survey of January 2003 showed that 'more and more people believe that crime is rising despite the fact that overall there has actually been a 28% fall since 1997' (Kennedy, 2004, p68).

victim at the centre of the criminal justice process, and new policies included initiatives to keep victims informed at every stage (Home Office, 2003). This, in part, was designed to increase public confidence in the police, and to give the impression that ‘something was being done’ (e.g. Young 2008, Garland, 2006), even as it became widely recognised that crime was a normal part of everyday life (Young & Matthews, 2008, Garland 2006).

The massive expansion in both police numbers and police powers (Morgan & Hough, 2008, Young, 2008:2) has serious ramifications for both the concept of justice being done, and being seen to be done. The ‘inflammatory rhetoric’ (Garland, 2006) which leads to public calls for more police and more police powers rarely addresses the wide-ranging discretionary powers already available to police, the lack of any coherent or systematic framework for ‘police investigations,’ the abilities of police forces to cover-up wrongdoing within their ranks, and the effects of a ‘results driven’ approach (and expectation) which puts pressure on officers and entire forces to produce evidence of ‘clear up rates.’ (Young 2008:2, Green 2008, Mansfield 1993).

The Hillsborough and Dunblane incidents, and the shooting of Jean Charles de Menezes in Stockwell tube station, all highlight dishonesty in police reporting of their actions, and attempts to cover up failings in procedures. Yet there is a reluctance within the CJS to take decisive action against officers who indulge in dishonesty or cover up (Young, 2008:2) – for example, North (1999) concluded that the Cullen Inquiry following the Dunblane shootings ‘*appeared unwilling to challenge the status quo*’ (Scotland on Sunday, March 1999). Files which had been closed at the time of the inquiry were opened to the public in 2005, leading North to conclude in a public statement that, ‘*Too*

often, the inquiry appeared as a process run by the Establishment, largely for the benefit of the Establishment in an attempt to minimise damage and to reassure the public that there was not too much to worry about (Scruton, 2007, p.104).

The coroner presiding over the inquest into the death of Jean Charles de Menezes instructed jurors that they could not return a verdict of ‘unlawful killing,’ and calls for the police officers involved to be tried for perjury were ‘*immediately rejected by the Independent Police Complaints Commission*’ (BBC December 2008a), following which the Guardian reported that the family of Mr de Menezes accused the coroner of ‘*presiding over a complete whitewash*’ (Guardian 12th December 2008).

The actual assumptions and perceptions of police investigators themselves, although evidently bound to affect their behaviours and the decisions they make, are masked in the public concept of ‘professionalism’ within the police. Like other professionals, police officers are expected to put aside their personal thoughts and opinions, and deal with ‘the facts,’ yet research suggests that police ‘culture’ means that officers approach their tasks from a mindset which presumes guilt (Green, 2008), and is over-confident in its own abilities to detect deception (Hartwig et al, 2007).

Police officers are not immune to the effects of popular concepts of ‘dangerous criminals’ (Green, 2008, Kennedy 2004, Mansfield, 1993), and, in fact, are more likely to believe that they ‘know’ the types of persons to be singled out for attention, investigation, pursuit and detention (Green, 2008, Hartwig et al 2007). Reforms which allow officers to stop and search, or to detain without arrest create the circumstances in

which officers can pursue strategies to elicit ‘revelatory knowledge’ based on their own, institutionalised concepts of ‘truth’ (Green, 2008).

The public are also generally unaware of the impact of police practices on trial processes. For example, public belief that it is a legal requirement for ‘all of the evidence’ to be released to the defence prior to trial leads to further misunderstanding. Firstly, in direct opposition to the public belief, the law ‘*legitimises withholding of [evidence] from the defence*’ (JUSTICE, 2002b, p.13). Because of the discretion afforded the officer making decisions about what evidence to disclose to the defence, JUSTICE claims ‘*no one knows how much injustice is being created simply because no one knows how much valuable material is being withheld*’ (JUSTICE, 2002b, p.13).

Secondly, a public which believes that ‘all of the evidence’ has been available to the defence is likely to believe that a conviction must mean (a) that there was strong enough evidence to convict or (b) that the defence evidence was not strong enough to convince the jury of the defendant’s innocence. There is a general agreement across many studies that an erosion of the presumption of innocence, and an attendant increase in a presumption of guilt has been taking place over recent years (e.g. Kennedy 2007, Garland 2006, Sheppard , 2003, Roberts, 2003, Mansfield 2002, Naughton, 2011, 2002, Kassin & Fong 1999).

Additionally, judges are generally more likely than not to accept police testimony as truthful (Scruton 2007, Kennedy 2004), feeding into public perceptions that flawed police ‘evidence’ does not make it into the courtroom situation. In essence, this simply leaves open a process by which police officers are able to fabricate or falsify evidence –

and, in some cases, may even be encouraged to do so in order to bring closure to high profile cases, without fear of sanction (Punch 2009, Young, 2008:2, Green, 2008).

The differences in public perceptions about police and policing, and what police and policing actually entail, raise questions as to how those differences influence cases of wrongful conviction of the factually innocent. A combination of a huge prison expansion programme (Giddens, 2008, Matthews & Young, 2008), increased numbers of police officers with poorly defined duties and largely unsupervised working conditions, and a public opinion ‘fanned’ by a mass media with a ‘institutionalised focus on negative news’ (Young, 2008:2) provide the conditions in which innocent people can be wrongly accused and convicted.

Government

The last thirty years or so has seen a centralising within political agendas of issues of ‘law and order,’ and public expectations that political parties will implement policies which ‘acknowledge’ victims, and are tough on criminals (Scruton, 2007, Garland, 2006, Hillyard et al, 2004). Morgan & Hough (2008) note that it is ‘*to middle-income Britain, relatively thriving, but nevertheless anxious about the pitfalls and tensions abounding in the new, deregulated marketplace, that the major political parties make their pitch*’ (p.50).

The shift from the late 1970s onwards towards an economic model of criminal justice, and the attendant emphasis on responsabilisation and security consciousness began in the private sector, with insurance companies and commercial enterprise focussing on finding ways to reduce or displace the costs of crime to them – the emphasis being on

prevention of crime rather than punishment, and minimising risk, rather than ensuring justice (Garland, 2006).

Implicit in these approaches is the need to protect the conditions of capitalist accumulation and expansion (Garland, 2006, Mitchell & Schoeffel, 2003, Cohen, 2001). Power, control of the means of knowledge production and dissemination, strategies which require the participation of ordinary citizens in issues of security and responsibility, and a widespread belief in individual responsibility and choice combine to increase state control –

‘spatial controls, situational controls, managerial controls, system controls, social controls, self-controls – in one social realm after another, we now find the imposition of more intensive regimes of regulation, inspection and control....with the singular and startling exception of the economy, from whose deregulated domain most of today’s major risks routinely emerge’ (Garland, 2006, p.195).

When the Labour government came to power in 1997, focus on the causes of crime emphasised social exclusion as a major factor – those ‘left behind’ as a result of the decline of industry and the changed economic climate (Matthews & Young, 2008). The initial emphasis on causes of crime long held to be ‘poor social conditions’ – education, housing, family background, drug abuse, etc, (Matthews & Young, 2008), led to the implementation of policy initiatives aimed at re-integration - working families tax credits, ‘inclusionary’ policies aimed at re-integration of, in particular, young offenders

(community penalties, etc), initiatives to cut truancy, the introduction of the minimum wage, for example (Matthews & Young, 2008).

However, Tony Blair's famous phrase 'tough on crime, tough on the causes of crime' also emphasised notions of rights and responsibilities, insisting that it was the right and duty of society to '*punish those offenders who have violated the rights of others in a way that properly reflects the seriousness of the crime*' (Young & Matthews, 2007, p.6) and noting that the costs of crime were borne by both the 'excluded' and the 'included.' Over time, emphasis on the 'causes of crime' came to focus on criminals themselves as the major 'cause,' and 'tough on crime' became more realistically 'tough on criminals,' as part of a general trend towards more hostile, less tolerant public responses to crime.

It is clear that government policies and political announcements feed from and into public perceptions, and with notions of law and order central to political advantage, government policy became increasingly 'reactionary' (Garland, 2006), introducing initiatives in response to public opinion, but in what Morgan and Hough (2008, p.52) refer to as '*a research-free zone.*'

The '*single clear priority – to rebalance the system in favour of the law abiding citizen and victims of crime and to bring more offenders to justice*' (Justice for All, 2003) raises several difficulties. Home Office statistics indicate that 95% of cases in the lower courts, and 87% in the higher courts result in convictions¹⁴, leading Naughton to point out that the White Paper '*seems to forget that not all of those brought to trial will be guilty*' (Naughton, 2002 ,p.1) .

¹⁴ In England and Wales

However, statistics regarding the number of offenders ‘brought to *justice*’ paint a wholly different picture – the clear up rate between 1991 and 2001 fell from 12 crimes cleared up per officer per year to 10, leaving 4 million unresolved, reported crimes per year (Young, 2008:2), and Martin (2008:p.158) questions whether increased expenditure on policing would have any significant impact on crime levels. Similarly, Young states that Labour’s ‘*attempts to increase the size of the police force, whilst embarking on a massive prison-expansion programme... [introduced] ‘policies which fly directly in the face of research evidence’* (Young 2008:2, p.35).

Popular support for these policies, as an expression of public intolerance and hostility towards a group increasingly perceived as fearsome and excluded (Garland, 2006), fed by intense and sensational media coverage of crime, and police demands for greater numbers and powers, found its reflection in government rhetoric and policies which represented increased police and tougher, longer prison sentences as ‘the answer’ to crime (e.g. Giddens, 2008, Garland, 2006, Kennedy, 2004), yet ‘Justice for All’ aims to increase detection rates from just 18% to a mere 25% ; at the same time as introducing measures to lock up prisoners for longer and introduce tougher measures to ‘tackle’ crime, this Paper quite explicitly concedes that 75% of crime, even after these measures are implemented, will go undetected (Young, 2008:2).

The tendency to over-simplify the complexities of criminal justice issues is not, of course, restricted to the UK – Campbell, et al, commenting on attempts to amend youth justice policy in Canada refer to ‘*the prominence of the language of rationalism, polarisation and over-simplification,*’ the resultant amendments doing ‘*little to reduce*

the ambiguity and contradictions of Canada's youth justice policy' (Campbell et al, 2001, p.272).

Government policies which play to public fear of crime may, in fact, increase those fears, leading for calls for more legislation and more police powers. Wall highlights the possibility of government attempting to '*effect governance through fear*' (Wall, 2008, p.46), and Fitzpatrick warns that public perceptions of increasing crime, and the attendant fear of becoming a victim of crime, enhance the possibility of public acceptance of policies which '*[run] the risk of perpetuating the myth that the most appropriate way to develop victims' rights is through the erosion of those of defendants*' (Fitzpatrick, 2002, p.7).

One factor playing into this risk is the increased focus on 'the victim' being placed at the centre of criminal justice matters. The 'rights of the victim' have become a fundamental concept in criminal justice discourse, leading to '*the aim of serving victims....becom[ing] part of the redefined mission of all criminal justice agencies*' (Garland, 2006, p.121). Legislative measures which attempt to address victim issues, from 'victim impact statements' to paedophile registers, are often '*designed to be expressive, cathartic actions, undertaken to denounce the crime and reassure the public*' (Garland 2006. p.133), rather than measures actually understood to have any positive, long term impact on crime and crime control. What is important, according to Garland, is '*their immediate ability to enact public sentiment, to provide an instant response, to function as a retaliatory measure that can stand as an achievement in itself*' (Garland, 2006, p.133).

An example of these measures being '*typically...passed amidst great public outrage in the wake of sensational crimes of violence*' (Garland, 2006, p.133) is that of the James Bulger murder in 1992. Following public outrage, '*whipped up and exploited by the media,*' (Lord Goff, cited Scraton 2007, p.114), the then Home Secretary intervened to lengthen the sentences passed (a move later overturned by the European Court) (Scraton, 2007). This highlights another area of profound misunderstanding and ignorance; the separation of powers of government and judiciary.

Several recent high profile cases, in which 'suspects' have been named and photographed in advance of any charges being brought, raise disturbing questions about the undermining and erosion of rights, and the possible impact on potential jurors and witnesses (Lean, 2008).

Central to Government policy on criminal justice issues over the last two decades has been the role of the prison and what has become known as the '*prison industrial complex*' (Giddens, 2008). According to Giddens, '*large numbers of people – including bureaucrats, politicians and prison employees- have vested interests in the existence and further expansion of the prison system*' (Giddens, 2008, p.832).

Beginning first in the USA in the 1990s (Reimann, 2007), and followed by the UK, a reversal of the trend of rising crime rates and falling imprisonment rates occurred, and the opposite began to emerge – falling crime rates coupled with increasing imprisonment rates. According to Garland this is, in part, because '*the ruling assumption now is that 'prison works' – not as a mechanism of reform or*

rehabilitation, but as a means of incapacitation and punishment that satisfies popular political demands for public safety and harsh retribution' (Garland, 2006, p.14).

Cohen's observation, that *'the prison population has spiralled beyond the most pessimistic estimates.....consequently, Victorian prisons due for demolition remain overcrowded, infested and insanitary, while regimes are locked into the priorities of security, discipline and order'* (Scraton, 2002:2, p.320), highlights the extent to which *'the turnaround [from Labour, in 1985, proposing to reduce imprisonment, and emphasising inclusion and rehabilitation, to proposals and policies aiming at the exact opposite – increased imprisonment and exclusion] could not have been more complete'* (Young, 2008:2, p.42).

The combination of populist policy-making, penal populism, an emphasis on imprisonment as a means of controlling and excluding those perceived as dangerous or threatening, and a mass media focussed intensively but distortedly on crime and the dangers of crime, has created a situation where accusation or suspicion can all too quickly become judgement and condemnation, before any consideration of rights or legal process has been implemented. Furthermore, policies which erode or remove protections against wrongful accusation, detention or conviction obtain popular support from a public self-identity of 'law abiding, responsible citizens,' most aptly summed up by the idea that those who have done nothing wrong have nothing to fear from such measures (Jamieson, 2007, Kennedy, 2004).

Media

The failure of research to find a conclusive link between media representations and

behaviour led Gauntlett (1998, p.9) to suggest that media influences are more likely to be *'about influences and perceptions, rather than effects and behaviour.'* There is some evidence to support this position, in particular with reference to where people get information about the workings of the CJS (Deutsch & Cavender, 2008, Wall, 2008, Asimow, 2007, Robson, 2007), and further research supports the suggestion that media representations both reflect and change public opinions and attitudes (Wall, 2008, Asimow, 2007, Garside 2003). The role of the media in reinforcing fears is also addressed by Garside:

'media representation ...[may be] stimulating fear or anxiety that was not present before, or amplifying already present fears' (Garside, 2003, p.2).

Garside also notes the economic considerations which influence the choices open to media providers,¹⁵ reflecting Chomsky's suggestion that the media industry is controlled by *'the interests of the dominant institutions'* by a series of *'complex filters'* (e.g. Mitchell & Schoeffel, 2003, p.13). The result is that

'...critical debate'... incorporates the basic assumptions of the official doctrines and thereby marginalises authentic and rational critical discussion... [and] the 'responsible critics' make a major contribution to the cause by bounding the debate within certain acceptable limits' (Mitchell & Schoeffel, 2003, p.13),

¹⁵ *'success [of any programme] is about how many people watch...as media industries are engaged in ..greater free market competition with each other for airtime, market share, circulation figures and advertising revenues, informing their audiences or readers becomes less and less important in comparison with merely entertaining them, or pandering to their prejudices'* (Garside, 2003, p.4).

introducing the link between the economic success of media productions with the ability of the dominant culture to circulate information and ideals which support the status quo.

There are several factors to consider – to what extent do people believe that information about criminal justice issues in the media is accurate and reliable? What are the processes by which certain news stories or programmes depicting crime issues are selected? What is the relationship between fear of crime and media coverage? How does media coverage shape public opinion? Why is coverage of criminal justice issues reported in the manner it is? What are the effects of fictional portrayals of crime and the CJS?

According to Chomsky's 'Propaganda Model'

'the media... present a picture of the world which defends and inculcates the economic, social, and political agendas of the privileged groups that dominate the domestic economy' and 'the media serve their societal purpose by... the way they select topics, distribute their concerns, frame issues, filter information, focus their analyses through emphasis, tone, and a whole range of other techniques...' (Mitchell & Schoeffel, 2003, p.15).

As discussed earlier, crime and perceptions of crime are central to the changed political climate of the last thirty years, a climate which fosters 'them' and 'us' attitudes, a demonising and dehumanising of 'the other,' and the creation of opportunities for ever tighter mechanisms of control. Indermaur and Hough highlight the importance of penal

populism to electoral advantage.¹⁶ Media representations of crime and dangerous criminals as an ever present threat reinforce those attitudes, and at the same time, provide opportunities for catharsis – Garland points out that

‘privileging of... the ‘victim discourse’ ... pushes us to respond to crime as an emotional, human drama and prompts us to think of criminals as more numerous, more threatening and more dangerous than they typically are’
(Garland, 2006, p.158).

Often, the language and tone of media coverage is clearly designed to evoke emotional responses and to invite judgement and condemnation. Many high profile events are treated in this manner, whipping up almost hysterical public responses (Lean, 2008, Scraton, 2007, Kennedy, 2004), leading Scraton to comment,

‘closely associated, at least in popular discourse, with dehumanisation is the related process of demonisation, through which established, ascribed negative reputations are consolidated. Once any claim on humanity has been denied, openly rejected, anything goes’ (Scraton, 2007, p.78).

Research shows that a large proportion of the population reports obtaining information about the CJS from media sources (e.g. Gray 2009)¹⁷. Cohen, however, warns that ‘we

¹⁶ ‘penal populism has been part of the political landscape for many years...[it] thrives on public misunderstandings about crime and justice, and honest politicians are sometimes at a disadvantage if others are perceived as presenting ‘solutions’ to crimes.’ (Indermaur and Hough 2007:11, p.199).

¹⁷ ‘around 75% of people reported obtaining their information regarding the CJS from television and radio, 50% from documentaries, and 33% from broadsheet newspapers,’ and that these respondents ‘considered that their sources of information were either fairly or very accurate...the public receive a distorted picture of the patterns of crime ... as well as telling the public about crime, or at least certain types of crime, the media also tells the public what to think about it’(Gray 2009, p.58 – 59).

know nothing worthwhile about the cumulative effect of media imagery. Research deals more with the earlier stages: how events are initially selected and presented. The media scan events and places, decide what constitutes 'news,' filter and frame the issues, contextualise the problem and set the political agenda' (2001, p.169), although Indermaur & Hough (2007:11, p.202) assert that 'the media are at the centre of all the influences [on public opinion].... Not only do the broadcast and written media represent a central source upon which public knowledge of crime and justice is based, they also serve this function in a particular way, reflecting the commercial, or quasi commercial, pressures to retain their audiences and thus their revenue.'

It may be reasonable, whilst heeding Cohen's warning, to concede that members of the public may conclude that what they have obtained is 'knowledge,' although they may be more or less aware of the extent to which that knowledge has been shaped by the scanning, filtering, choice and contextualisation of the information presented to them.

Barkan takes this a step further, commenting that

*'most of our knowledge about crime comes from what we read in newspapers, watch on tv or see in movie theatres. From these sources we get a distorted picture of crime, and we hear about **solutions that ultimately will do little to reduce it**' (Barkan, 2001, p.2) (emphasis added).*

Just as the 'knowledge' of crime received and accepted by the public is distorted, so, too, are the 'solutions' offered by the same processes.

From these accounts, it seems reasonable to conclude that members of the public obtain information about the CJS from the media, and that information is likely to be distorted and shaped by several factors. Notwithstanding Cohen's warning, there does appear to be a level of public belief that information about the CJS, gained from the media, is reliable and accurate.

One aspect of media portrayals of criminal justice issues which have not yet been covered is that of fictional representations. The enduring popularity of the crime drama demonstrates the public's on-going fascination with crime and criminal investigation (Robson, 2007). Certain fictional television programmes are believed to have a real impact on what people think they know about the law and legal processes. Crime dramas in the past tended to rely on portrayals of *'the lawyer as truth-discoverer'* (Asimow, 2007, p.674), reinforcing public belief in the adversarial system by *'teaching generations of Americans that lawyer-controlled trials are the only way to uncover truth and attain substantive justice'* (Asimow, 2007, p.683).

Robson suggests that *'[tv] provides a compelling narrative account of how crucial social phenomena like the justice system operate....it has the potential to alter the priorities and perceptions of citizens as to how the system works'* (Robson 2007 p.333), and cites Fiske's suggestion that *'whilst genres come in and out of fashion, they are popular when their conventions bear a close relationship to the dominant ideology of the time'* (Fiske 1987, p110).

Ferrell (2005:7, p150-51) defines the nature of the relationship between media and public opinions thus:

'the mass media transmit not only information, but emotion... the mass media regularly over-emphasise the threat posed by street level crime... [the] cumulative result of these distortions remains soundly political; they regularly amplify and misdirect public fears over crime, set inappropriately punitive public agendas regarding crime control, and ready the public for the next moral panic over crime and criminality... All the while, commercial films, popular music, and nightly television programming offer a swarm of crime and crime control characterisations, by turns celebrating and condemning the activities of outlaws, police officers and judges. In the end this ongoing stream of dramatic imagery accumulates into a vast cultural stockpile, a complex of images, symbols and meanings by which individuals and groups come to make sense of crime, violence and crime control.'

The enormous success of the programme 'CSI'¹⁸ has led to research into the possible 'CSI effect' (Deutsch & Cavender, 2008).

Whilst more research will be required to assess the full impact of the CSI effect, (and here, Cohen's warning is most appropriate), Deutsch and Cavender (2008, p.34) suggest that the programme has '*...pushed forensic science and concepts into the popular discourse [and] accompanying this diffusion has been the sense that science and the*

¹⁸ CSI – Crime Scene Investigation – is a fictional television series depicting forensic investigation and resolution of crime, the emphasis being on the reliability and success of the scientific method in 'getting to the truth.'

police are virtually infallible.’ Drawing on Tuchman’s concept of a ‘*strategic web of facticity*’¹⁹ they offer the possibility that

‘CSI uses a web of facticity to bolster the seeming authenticity and accuracy of its forensic realism even as it disseminates meanings about criminals, their threat to society, and the police who are aligned against them.’

The result of this portrayal of forensic policing is that it has ‘*...affected the public consciousness about policing and science,*’ even though ‘*most viewers lack a science background*’ (Deutsch & Cavender, 2008, p.36), and Deutsch & Cavender argue that jurors may return guilty verdicts based on an over-confident reliance on scientific forensic evidence, although, of course the opposite may also be true – that jurors will acquit if scientific or forensic evidence is absent, or poorly presented.

The former was addressed by Professor Allan Jamieson²⁰ in a speech at the annual United Against Injustice (UAI) conference in London, 2007. Prof Jamieson, echoing JUSTICE’s concerns about unrealistic expectations about what the CJS can deliver, warns that the public have unrealistic expectations and beliefs about what forensic ‘science’ can deliver. The unregulated and discretionary practices in many fields of forensic ‘expertise’ (Fisher, 2008, Erzinclioglu, 1998) often mean that evidence believed to be obtained through scientific procedures (empirical investigation, ability to

¹⁹ ‘*a strategic, ritualistic practice which ensures that a group of presented facts is seen as credible and objective*’ (1978:184) and that, ‘*when taken together, present themselves as both individually and collectively self-validating*’ (1978:106) Deutsch & Cavender 2008 p36).

²⁰ Professor of Forensic Science, The Forensic Institute, Glasgow.

be reproduced, recognised and accepted standards of proof) can very often be nothing more than opinion²¹ (INNOCENT, 2009, Fisher 2008, Jamieson, 2007, Ward, 2004a).

The connection between ‘science’ and policing in fictional portrayals of criminal justice is, however, well established, yet the failings of scientific evidence, and the dangers inherent in over-reliance on this type of evidence, have also been documented (although perhaps less routinely).

The Observer, in 2002, for example, published the results of a study in Austin, Texas, which found that in over 1% of cases, science labs either falsely matched DNA samples, or failed to notice a match (Observer 02/02/2002). Dror and Carlton’s study found that fingerprint experts, unaware that their findings were part of the study, reported results which were inconsistent with results they had returned in the past, on the same prints, in two thirds of samples (Dror & Carlton, 2006). Although there was strong evidence to suggest that biasing contextual information may have influenced the reported results, there were, in fact, inconsistent results returned on two samples in the control group, highlighting the fact that it is, in the final analysis, human decision making which provides the outcomes in many forensic processes which are considered by the general public to be the result of scientific procedures.

Some recent successful appeals have been based upon exposure of flawed scientific evidence (INNOCENT, 2009), and case-notes of several individuals claiming wrongful conviction highlight serious flaws in such evidence as used in trials (INNOCENT, 2009, Lean, 2008).

²¹ The McFadyen Lecture, March 2011, notes that expert evidence is admissible as an exception to the “opinion rule,” allowing experts to offer opinions on the basis of specialist knowledge, expertise or experience

The Shirley McKie case, in Scotland, in which Ms McKie's fingerprint was claimed to have been found at the scene of a murder (Ms McKie was a police officer at the time) has had wide reaching consequences. 117 experts from 18 countries examined the print, and agreed that it did not match Ms McKie (www.shirleymckie.com), yet the Scottish Criminal Records Office, which had made the initial decision, refused to concede that a mistake had been made. Over ten years, the case demonstrated many of the factors already discussed – denial, cover-up, continual reinforcement of the professionalism and reliability of the SCRO experts until, in 2007, the Scottish Executive made an out of court settlement for compensation, and awarded Ms McKie damages. In spite of this the SCRO continued to stand by its original findings, and an inquiry is currently under way to consider the many unanswered questions surrounding what are widely seen as official failures in this case.

Despite such clear and obvious shortcomings of the abilities of 'expert' evidence, the fictional portrayal of such evidence as infallible still commands huge audiences.

Notable by its absence from research into media effects on public opinions regarding the CJS is literature addressing the particular effects of media coverage of high profile criminal cases before and during trial. If, as Scraton suggests, after '*any claim on humanity is denied, openly rejected...anything goes,*' how might such portrayals impact on an innocent person so portrayed? With reference to distorted and dishonest media coverage of the Hillsborough disaster, Scraton reports,

'None of the authors or commentators could be made accountable for their errors of judgement. There is no collectivised right to privacy, no right to

accuracy, and no right to redress. It is an indictment of the effectiveness of the formal complaints procedures...that untruthful and damaging reporting lived on. It caused immeasurable pain and suffering to the bereaved and the survivors, compounding the institutional injustices while clearly influencing legal and policy outcomes associated with the disaster'
(Scraton, 2007, p.77).

If media coverage can have such damaging effects on such a large group, it begs the question, what may be the effects on the 'lone voices' of innocent individuals claiming wrongful conviction?

One medium where information about wrongful conviction of the factually innocent is plentiful is the internet. Websites set up by supporters and campaigners to highlight individual cases provide detailed coverage of those cases, including in many instances, transcripts, copies of witness statements, examples of mistakes and cover-ups and so on (e.g. www.stephenmarshisinnocent.co.uk, www.kevinnunn.webeden.co.uk, to name just two of many). Others, such as www.innocent.org, www.mojoscotland.org , provide links to numerous individual sites, providing updates and 'latest news' items. Whilst this is a rich source of information, it is, as yet, uncoordinated, scattered, and of variable quality and depth, making comparisons problematic, and conclusions difficult to draw with any real confidence.

The rapid growth of such sites, however, indicates another area of media influence which is much less obvious, that of non-reporting. The tendency for media portrayals to appeal to popular beliefs and perceptions means that, in a similar fashion to police

investigation techniques as outlined by Green, only that which fits this approach will be published or broadcast, leading to distorted, incomplete, and ultimately misleading coverage (e.g. Gies, 2008).

From all of the processes discussed above emerges the understanding that many “truths” are obtained from information, depending on how that information is processed and interpreted. As these truths aggregate in and around particular contexts, based on an internal logic which binds them together, they become supportive of a larger concept of “the truth” (e.g. Green, 2008, Scraton, 2007, Cohen 2001). Where powerful groups and actors, accessing specialist knowledge, elicit specific “truths,” the aggregation of those specifically elicited truths reinforces and strengthens the status quo (Barnhizer 2007a, Ferrell 2005, Mitchell & Schoeffel 2003).

The same, however, is true of information and experiences which are excluded from dominant paradigms; from the aggregate truths obtained from information discarded or negated by processes intended to elicit specific “truths” – those supportive of existing (and powerful) truths – emerges an alternative narrative of truth, one which conflicts with, and challenges, the status quo. That alternative narrative, referred to by Scraton as “the view from below” (2007, p10) represents a compelling view of social processes and structures, rooted in common concepts of truth and knowledge, which is, in itself, hidden in plain view, its means of communication and recognition blocked by existing paradigms, discourses and processes (Green 2008, Mitchell & Schoeffel 2003).

Conclusions

The wrongful conviction of factually innocent individuals is the result of many different, interconnected factors, from government policy to public perceptions of crime and the CJS, from fictional and non fictional media representations of crime to police strategies and operations.

Barak (1998:1, p6), referring to criminological inquiry, points out that *'we must take into account several dimensions of social reality that constitute the interconnected world of psychologies, biologies, political economies and mass mediated communications,'* within which public perceptions and beliefs held as factual knowledge about the CJS, the realities of how that system actually operates, and the differences between the two, reside.

The available literature demonstrates the many ways in which public perceptions, beliefs and opinions may be influenced, manipulated and controlled, and the social, cultural, political and economic considerations whose continuous interaction and interdependence produce and disseminate knowledge.

At a time when

'The state now has virtually untrammelled authority to sentence a convicted criminal for any purpose, and with any degree of severity', and 'it [is] commonly supposed ... that justice has largely been satisfied once an offender has been tried and convicted with due process' (von Hirsch, 2008, p.341-345),

incidences of wrongful conviction of the factually innocent pose particular problems of recognition and resolution.

The tendency for certain crimes to be presented by the media in a sensationalist and shocking manner, along with a more pervasive public perception of the ever present fear of crime, creates the foundation for emotional responses towards those seen as ‘criminal,’ and ‘dangerous,’ – responses which increasingly demand harsh and punitive reactions, both by the public generally, and the state specifically.

Often, wrongly accused/convicted persons have, themselves, held those beliefs and perceptions prior to their wrongful accusation or conviction, raising questions of what effects, impacts and processes occur within those individuals whose ‘normality’ is suddenly and unexpectedly wrested from them.

Tony Blair, in his first speech after coming to power in 1997, insisted that, under New Labour, there would be ‘*no forgotten people*’ (Matthews & Young, 2008, p.7), yet the political, economic and moral climate of the last decade has moved ever more towards intolerance of perceived criminality, heavy reliance on (and expectation of) imprisonment as a means of dealing with those deemed ‘dangerous’ and ‘criminal,’ and tighter state control and surveillance.

The incidence of wrongful accusation and conviction of factually innocent individuals, therefore, struggles for recognition against a wide range of influences hostile to, and intolerant of, those perceived to have been ‘properly’ investigated, tried and convicted of serious crimes.

As discussed throughout this chapter, the centralisation of power, control and specialist knowledge, as a means of protecting economic interests to ensure the continued expansion and accumulation of capital, is supported and reinforced by processes which circulate and define notions of “normality.”

The emphasis on economic interests encourages the acceptance of, and participation in, surveillance at every level of social interaction; the self-identification of “law-abiding citizens,” coupled with concepts of responsabilisation, creating a normality which simultaneously identifies “outsiders,” and classifies them as targets for hostility, exclusion, blame and punishment.

The abilities of the powerful to collect, classify, and control specialist knowledge, and to circulate knowledge, re-cast in particular forms, is set in a framework of existing beliefs and perceptions which can readily accommodate that re-cast knowledge – for example, the popularity of authoritarian rhetoric, emotive responses to moral panics, concepts of official denial, the techniques used to elicit revelatory knowledge, the ability to justify greater controls by evoking fears and anxieties, themselves supported by distorted media focus on crime, and the perceived dangers of failing to accept and implement those greater controls.

Further, those actors and agencies eliciting specialist knowledge are, themselves, informed by the ideals which the knowledge they seek is intended to reinforce – the tendency of judges to accept police evidence as truthful and reliable, for example, the discretion afforded police officers and forces, and the political value of popular policies

concerning law and order. At the same time, these actors and agencies have the power to quell opposition, that power being accepted as legitimate, and legitimised, by the wider public.

The portrayal of many truths as “the truth” is contingent on the ability to define, specify and control the aggregation of truths which are woven together to present officially sanctioned, and popularly accepted, versions of truth.

In this way, a number of factors combine to support the simultaneous centralisation of power, control and knowledge, and the dissemination of information to be accepted as “knowledge” which will reinforce that centralisation.

Alternative interpretations, understandings and experiences – alternate truths – are excluded, negated or diminished by the strength of dominant discourses – the means by which to communicate those truths are effectively closed off by processes which have no need or use for them.

It is in the examination and analysis of those alternative truths that “*critical analysis has a significant role in resisting the political and ideological imperatives of official discourse, state-sponsored evaluations of official policy initiatives and the correspondence of vocational training to the requirements of the crime-control industry.*” (Scruton, 2007, p239).

CHAPTER THREE

Methodology

Introduction

Researching the lived experiences of factually innocent, wrongly accused/convicted persons and their families involves what Scraton refers to as *'seek[ing] out, record [ing] and champion[ing] the 'view from below', ensuring the voices and experiences of those marginalised by institutionalised state practices are heard and represented'* (Scraton, 2007, p.10).

In designing this study, a number of unique factors had to be taken into consideration. Previous experience of individuals claiming factual innocence of wrongful accusation or conviction, and their families and supporters, demonstrated that often these individuals and families are spread across the whole of the UK – there are few areas where 'clusters' of people falling into this category could be found. Furthermore, studying the experiences of individuals and families falling into different policing areas and court jurisdictions was necessary to identify whether the problems and difficulties faced were as a result of particular police forces or courts, or whether there was something more institutional and widespread at the heart of these experiences. This was of particular importance to this study because of the emphasis on examining whether perceptions and beliefs about the justice system caused individuals to take actions (or fail to take actions) which may have contributed to their wrongful accusation/conviction. If a particular police force had gained a local reputation, for example, for using techniques and strategies which were outside the general public's expectations, it may be that reactions to police investigations in such areas would

become informed by that police reputation, and would therefore reflect a different experience from people in areas where such a reputation did not exist.

Moreover, it would be expected that the processes leading to wrongful accusations or convictions would take different forms, in different parts of the country, dependent on the many factors which are believed to play a part in what become alleged wrongful convictions, such as the use of certain experts in particular areas, the different types of crime being considered, and so on.

Because of the distinction made earlier between *alleged* wrongful convictions and convictions overturned by the court of appeal²² it was necessary, for the purposes of this study, to identify individuals who were claiming factual innocence of the crimes of which they had been accused and/or charged and convicted. Since many of these people do not appear in any official statistics (either because they have been unable to obtain permission to appeal, or because appeals have failed, or (in the case of the wrongly accused) because the original wrongful accusation did not result in a conviction), gaining access to these individuals and their families and supporters was always going to be a trust based exercise, with recommendations and introductions being made from existing contacts. A decision was taken to restrict this study to individuals with no previous convictions, or only very minor convictions, to focus on the experiences of ‘ordinary’ members of the public with no prior experience of the CJS (Onwuegbuzie & Leech, 2007)

²² i.e., the court of appeal can and does overturn convictions of factually ‘guilty’ people, in that those people did commit the crimes in question, but due process was not followed, and therefore the conviction is considered ‘unsafe.’

For the purposes of this study, those claiming wrongful accusation/conviction and factual innocence were taken to be, in fact, innocent of the crimes of which they had been accused/convicted: the study focuses on beliefs and perceptions, and therefore the complex technical matter of ascertaining actual vs legal innocence falls outwith its scope, as discussed in 'Ethical Considerations' below.

Previous experience had also highlighted the difficulties of gaining access to these individuals. Whereas some individuals and families desired publicity and a 'high profile' approach to draw attention to their concerns and complaints, others were afraid that such publicity may impact negatively on their quest to have their convictions (or those of their loved ones) re-examined. This posed a double difficulty in terms of this study; on the one hand, families and supporters seeking publicity would have nothing to gain from participation, as all participants and case details would be anonymous, and on the other, the distrust of those families who did not want publicity would have to be overcome. This was a particular concern in cases involving charges/convictions of a sexual nature; managing the expectations of vulnerable participants, whilst ensuring their experiences and views were properly represented (Scruton, 2004), was an ever present consideration.

An integral part of this study was to examine the experiences of those claiming wrongful accusation/conviction, and their families and supporters, against a backdrop of general public beliefs and perceptions about the CJS. In this way, identification of points of similarity and difference could be highlighted, allowing for an analysis of whether general public beliefs and perceptions may, in themselves, become contributing factors in potential wrongful accusations and/or convictions of innocent people. In other

words, ‘ordinary’ members of the public, in holding certain beliefs and perceptions about the CJS, may be at risk of becoming wrongly accused/convicted persons by attempting to deploy such beliefs and perceptions as knowledge. (It goes without saying that those claiming wrongful accusation/conviction in the context of this study were, themselves, ‘ordinary’ members of the public before accusations were made and convictions obtained.) Also, if members of the public hold certain beliefs and perceptions, how would those beliefs and perceptions influence actions taken or not taken in relation to the accusation/investigation of others?

Therefore, the study design was required to incorporate methods of data collection both from wrongly accused/convicted persons and their families, and from a wider public where it was assumed the actual experience of wrongful accusation or conviction would be little known.

A total of 62 semi-structured interviews were carried out, covering a range of prisoners, wrongly accused/convicted persons at liberty, and campaigners, supporters, media personnel and others. In addition, a scoping survey collected completed questionnaires from 332 members of the wider public at locations across the UK, to test the types of beliefs and perceptions which may be held as factual knowledge. Both aspects of the study are discussed in further detail below.

Semi-structured interviews

Approaches taken

There was no recognisable or substantial political or public support for wrongly accused/convicted persons and their families. Small groups existed across the country, but they were, in the main, ‘stand alone,’ with little organised or structured interaction between them. (The groups operating under the umbrella of the organisation United Against Injustice demonstrated the beginnings of a recognised structure, but were still small in number, and spread thinly across England, with no presence in Scotland or Wales.) Based on an assumption, rooted in previous experience with wrongly accused/convicted persons and their families, that without the perceived support of a recognisable organisation clearly stating their cause, these individuals would be wary, suspicious and distrusting of strangers and, in particular, persons they may believe to be in some sort of position of ‘authority,’ a decision was taken to utilise semi-structured interviews (recorded), for the reasons explained below.

This approach allowed for the building of trust and for personal stories to be told, the interviews being flexible enough to adapt to accommodate sudden insights or realisations which may emerge (Wilson 1996, Scraton, 2007). The importance of allowing personal stories to be told was of high priority, as so much of the available data on wrongful convictions, as previously stated, was situated in the domain of the impersonal – statistical analyses, suggested ‘causes’ of wrongful conviction, and so forth. Only in the direct and personal experiences of those directly affected, might the rationales and beliefs underpinning actions taken or not taken, which may then have further influenced incidences of wrongful conviction, be found (Onwuegbuzie & Leech,

2007). It was further assumed that, because of their experiences, these people would be sceptical of suggestions that not only would they be able to tell their stories, but that their stories would be heard, and the semi-structured interview approach would allow for this scepticism to be overcome.

The aim to identify these experiences, and examine them in their 'real life' context, reflects another aim of the study; that the more accurately the 'personal troubles'²³ of these individuals could be recorded and explored, the greater would be the reliability of any 'troubling recognitions'²⁴ which may emerge. Also, the ability to compare these experiences with both official and popular discourses would be dependent on detailed accounts, with as few restrictions to content as possible (Robson 2002, Scraton, 2007).

Although the circumstances of every case will be different, it was envisaged that similarities in the process experienced by innocent individuals would emerge. Of particular interest was how beliefs and perceptions about the process, from initial interview through to conviction and beyond, influenced the decisions, actions and responses of the individuals concerned. The rationale underpinning semi-structured interviews as opposed to, for example, structured interviews or questionnaires, was that the similarities expected to emerge may only be identifiable within the *differences* of circumstance. It would be difficult, and perhaps counter-productive, to attempt to design structured interviews which could be applied with equal precision to accusations

²³ 'Know that many personal troubles cannot be solved merely as troubles, but must be understood in terms of public issues - and in terms of the problems of history making. Know that the human meaning of public issues must be revealed by relating them to personal troubles - and to the problems of the individual life. Know that the problems of social science, when adequately formulated, must include both troubles and issues, both biography and history, and the range of their intricate relations' (C. Wright Mills, 1959, p.226).

²⁴ 'The choice is between 'troubling recognitions that are escapable (we can live with them) and those that are inescapable...Informed choice requires more raw material: statistics, reports, atlases, dictionaries, documentaries, chronicles, censuses, research, lists... regular and accessible' (Cohen, 2001, p.296).

of murder, attempted rape, drug dealing and child pornography. It was feasible, however, for themes such as erroneous identification, misuse of police powers or inadequate defence procedures to arise in each of these circumstances, if the interview process was sufficiently flexible (Foster 1996).

Since it is impossible to predict who may or may not become subject to wrongful accusation and/or conviction, research is restricted to retrospective accounts, and the constraints and drawbacks of relying on retrospective accounts were noted. However, the potential insights gained from the semi-structured interview approach offered possibilities for understanding the impacts and effects of perceptions and beliefs held as knowledge on the processes of wrongful accusation and conviction of the factually innocent that may not be otherwise available for study.

Additionally, where family members were interviewees, the difficulties faced by the 'double life' situation of having, on the one hand, to carry on with the normal, day to day aspects of life, and on the other, dealing with a family member convicted of a serious crime, and the reactions of others to that circumstance, could be explored in depth.

The semi-structured interview offered the potential for understanding the interface of public perceptions and beliefs held as factual knowledge between families of wrongly accused/convicted persons, and the wider public. Whilst the wrongly convicted have, in essence, been removed from the public sphere, their families are required to continue living in 'society.' In effect, what is required of the families of wrongly convicted, factually innocent individuals is the need to assimilate two 'normalities,' as everyday

life, for them, must carry on ‘as normal,’ yet the new reality of a family member perceived by the wider community as ‘dangerous,’ ‘evil,’ wicked, ‘ etc must somehow be incorporated. Comparison of the experiences of the families of wrongly convicted individuals with survey results (see below) may have highlighted a relationship between perceptions and beliefs held as knowledge, and actions taken on the basis of those perceptions and beliefs, both for the family members themselves, and the wider public.

The choice of taped, semi-structured interviews for campaigners, supporters and others was based on similar reasoning, allowing for personal insights, accounts and motivations to be collected, examined and compared. It should be noted that the term ‘campaigners’ in this context refers to individuals who campaign against incidences of injustice in general, rather than as supporters of individual cases.

Methods

Building on previous experience, a core schedule was devised to facilitate interviews with different groups, which would maintain related lines of enquiry between groups, whilst, at the same time, remaining flexible enough to allow for additional information and insights to emerge within each group (Wilson 1996, Foster, 1996). This core schedule was adapted in minor ways to better reflect the different categories of experience – accused, convicted, family members or campaigners, supporters and others. (See Appendix I, ‘Core Interview Schedule.’)

With previous knowledge of the sometimes chaotic thinking and confused reasoning underpinning individuals’ attempts to recount their experiences, several ‘points of progression’ were identified in the process of wrongful conviction – first contact with

investigating police officers, beliefs and assumptions at that time, the progression of the investigation (giving statements, attending police stations for interviews, attempts to assist police by handing over, for example, mobile phones, computers, clothing, etc), experiences of arrest and detention, contact with legal teams, trial processes and so forth.

Interview schedules combined questions about factual matters (e.g. ‘Did you ever speak to the police without a solicitor present to advise you?’), questions about what interviewees thought, or believed, was happening, and invitations to provide examples and opinions of aspects of their experiences where actual events had differed from their expectations about what would or should have happened.

In this manner, interviewees were encouraged to consider not only the legal aspects of their experiences, but also the emotional impacts, and to reflect upon how beliefs they may have held as factual knowledge impacted on the various events, decisions taken (or not taken) and the steps attempted to remedy the situation. The design of the schedule, whilst attempting to lead interviewees through their experiences in a chronological order, was intended to facilitate as natural and fluent an account as was possible (and comfortable) for interviewees, as well as allowing for the introduction of details which were not covered by direct questions (for example, ‘Were there any occasions where events in the trial differed from what you had believed would happen? (If yes, invite examples)’). This also allowed interviewees to return to earlier questions (where, for example, the impacts of events in one sphere, such as police investigations, may not have become apparent until much later, such as at trial, or even post trial).

Pilot studies

On completion of the initial version of the Interview Schedule, 7 existing contacts, with whom relationships of trust had already been built, agreed to participate in test interviews. These were family members of convicted persons, and the details of their cases were known to me. Several valuable factors emerged from this process. To begin with, although we had discussed their experiences many times previously, the presence of recording equipment perceptibly altered the dynamic of communication. These volunteers reported feeling, and were observed to, demonstrate a need to add great detail to their answers. Because the interview was being recorded, there was a fear of ‘missing things out.’ Further discussion revealed that this fear was based in past experiences of recorded police interviews, where details had been omitted, or later presented in a manner in which the recorded information was used against the interviewee or their family member. Lack of ability or opportunity to ‘take the lead’ in those (police) interviews had resulted in significant questions simply not being raised.

A new approach was developed, where interviewees were reassured not only at the start of the interview, but at several points throughout, that they could add any detail, or expand on questions asked, to better reflect their own circumstances. Also, if they felt the questions asked had not covered everything they wished to add to their account, they could feel free to add those details, and to interrupt the interviewer at any point.

Secondly, all 7 of these volunteers (who were family members of 4 wrongly convicted individuals) reported feeling uncomfortable or uneasy about the fact that the interview was being recorded at all. Explanations ranged from ‘It took me right back’ (to police interviews) to ‘I know I can trust you with it, but what if someone else got a hold of it?’

It became apparent that such feelings would be heightened in individuals who had not met me, and did not know me in the way these volunteers did, and measures would have to be taken to allay those fears, although it was clear that they could not be resolved completely. Some of the volunteers offered me the opportunity to give their contact details to potential interviewees, should they need reassurance (in confidence) that I was 'safe' to talk to.

It also became apparent that the length of time originally envisaged for completion of interviews would have to be extended, so as to allow interviewees to tell their stories without feeling pressured, 'manipulated' or led. The decision to build in an initial, unrecorded meeting, in order to reassure and build trust and rapport further extended the amount of time to be allocated to each interview. The (semi) structure of the interview itself, however, and the order, pace and subject matter of the questions were all reported to be satisfactory, supportive of the story-teller and encouraging. One additional question was added concerning beliefs about appeal processes prior to the experience of wrongful conviction.

Finally, having suggested to volunteers that they could text or email me if they remembered later something they would have liked to include, and I would arrange a follow up interview, I received communications from 5 of the 7 volunteers, expressing their gratitude at having heard their own story 'told out loud' in a logical and chronological manner. There was a general consensus that the experience had brought some order to what had previously been chaotic thinking about their circumstances, as they responded to each new development as it arose. None actually added further information to the interview itself.

The information and insights gleaned from this pilot of the interview process were invaluable in refining the approach later taken, and I am eternally grateful to the volunteers for their patience and courage in assisting me with this aspect of the study.

Selection of participants

Three distinct groups were identified as potential participants - wrongly accused/convicted persons, family members of wrongly accused/convicted persons, and campaigners, supporters, journalists and others committed to raising awareness of incidences of wrongful accusation/conviction.

Access to potential participants in two of these groups (family members of wrongly accused/convicted persons, and campaigners/supporters/journalists and others), was dependent on word of mouth recommendations from existing contacts. Information concerning the nature and scope of the study, and an outline of what participation would entail, was passed from existing known contacts to others with whom those existing contacts had connections (either as fellow members of support groups, from personal involvement with cases similar to their own, or from other points of contact such as journalists who had produced articles about particular cases). These existing contacts were asked to pass on information regarding the study with a request that those interested in participating register their initial interest by email or text message, and a follow up call would be made to discuss the study in greater depth.

On receipt of initial messages of interest, a follow up call was made in which the nature and scope of the study was discussed in depth, along with details of participation, and assurances of confidentiality and anonymity. For those who expressed a wish to

participate, an appointment was made for an initial face to face meeting, both to build rapport and trust, and to explore areas and subjects which participants may not wish to cover in the interview situation.

The remaining group, wrongly accused/convicted persons, required a dual approach. For those in prison,²⁵ letters of introduction were sent, outlining the nature and scope of the study, and offering the opportunity to participate in writing, by means of a printed interview schedule. Whilst the majority of those contacted in this manner had been identified by family members who had already indicated the imprisoned person's interest in participation, some were identified by support groups/campaigners who intimated their belief that the imprisoned person may be interested in participating in the study.

For those at liberty, either because of acquittal at trial, or following release from prison, initial contact was obtained in the same manner as previously outlined – existing contacts passed on information and contact details. Those acquitted at trial are included in this study on the basis of their beliefs that the fact of their innocence should have been recognised during investigation, and therefore, no trial should ever have needed to take place – i.e. the accusation itself was wrongful, and should have been recognised as such.

Individuals who had expressed an interest in participating themselves became instrumental in passing on information about the study, and inviting others who may be interested to make contact. This type of snowball sampling was particularly useful, not

²⁵ Permission was sought from both Scottish and English Prison Authorities to interview prisoners, but was refused by both.

so much as a result of ‘*difficulty in identifying members of the population*’ (Robson, 2002, p.266), but to overcome suspicion and distrust of ‘outsiders.’

Data collection and recording

As previously discussed, initial contact with potential participants was obtained via existing contacts. Over an eight week period, introductory calls were made, details of areas of residence obtained, and a detailed ‘route plan’ devised to ensure efficiency of travel arrangements (to avoid, for example, having to return to visit the same area twice, or ‘doubling back’ to include an area which had already been passed).

A total of 80 notes of interest was received, broken down as follows:

Notes of interest, initial contact and completed interviews

	Declined Invitation to Participate	No further Contact after Initial Positive Response	Unable to Interview	Written Response	In Person Interviews	Phone Interviews *	Total Contacts
Prisoners	2	2		4			8
Wrongly accused/ convicted persons at liberty	1		3	1	5	(1)	10
Family Members		4	14	3	22	(10)	43
Campaigners/ others		2	1	1	15		19
TOTAL Contacts	3	8	18	9	42	(11)	80
TOTAL Interviews	0	0	0	9	42	11	62

*(participants previously unable to be interviewed.)

Reasons for non-participation

Confidentiality Concerns/Imminent Appeal Processes	2						2
Not Known		8					8
Other	1						1
Total Declining Interview	3	8					11

Reasons for inability to interview

Changed circumstances/unavoidable traffic delays			18 *(See below)				18
*(11 of the 18 were later interviewed by telephone)							
Total unable to be Interviewed			7				7

Reasons for non digital recording of interviews

Personal Preference				5			5
Refusal of permission to record (participant)					7		7
Background noise affecting recording					6		6
Equipment malfunction preventing recording					3		3
Total				5	16		21

A total of 30 individual ‘cases’ (accusations and/or convictions) was represented by either the accused/convicted person personally, or by family members.

Following an initial, unrecorded meeting in which the study was explained in depth, and any concerns of potential participants were addressed, the interview was conducted, utilising the Interview Schedule as a guide. Interviews covered specific areas of interest, although, as expected, interviewees who were family members or wrongly accused/convicted persons tended to need to relate the ‘whole story’ as they understood it.

The areas of interest covered, broadly, were experiences of police investigations, engagement with defence teams, trial processes, expert witnesses and evidence, and post conviction processes. These same core subjects were discussed with all groups.

All recorded interviews were stored initially on the digital recording equipment used at interview, which was pass-warded to protect against any possibility of persons other than the researcher gaining access. Individual interview recordings were pass-warded independently, and stored in allocated files on the recorder. As soon as possible, these interviews were then downloaded into a laptop, and from there, onto password protected discs which were stored in a locked cabinet. As the study progressed, files were removed from the laptop and stored on a removable, external drive designated solely for this purpose.

Non-recorded interviews were written up from notes, with identifying items removed in the write up, so as to preserve anonymity from the beginning. Original notes were again filed in a locked cabinet.

‘Written Interviews,’ which were completed by participants themselves, were copied, and all identifying features deleted from the copies, the originals being stored as above.

Processing and analysis

All interviews were transcribed, and identifying information removed. The data was then coded, using both key word and key phrase analysis, and context and content analysis processes (e.g. Silverman, 2006, Robson 2002) in order to highlight both commonly occurring comments, experiences, and processes, and also to highlight unusual or uncommon comments, experiences and processes.

Notes and reflection on interviews suggested several areas of comment based on emotions, thoughts, beliefs, and so forth, and, as this was a core objective of the study,

initial coding aimed to highlight and identify responses grouped respectively as ‘thoughts,’ ‘beliefs,’ ‘feelings,’ ‘claimed knowledge,’ ‘expectations’ and ‘trust.’ For each section of the interview process (experiences with police, legal representatives, preparation for trial, trial processes, expert witnesses and post conviction processes), the same categories were grouped, in order to analyse whether changes in core beliefs, expectations, etc, occurred, and if so, if it could be ascertained whether or not these changes were as a result of previous experiences, experiences at particular stages in proceedings, a combination of both, or other factors (Silverman, 2006)..

To this end, further contextual analysis was required for data in each category – to what were thoughts, beliefs, feelings, knowledge, expectations and trust attributed at each phase or stage of proceedings, and did these attributions suggest a causal link between different phases of proceedings, and changed beliefs, expectations, etc.

From these initial categorisations, comparisons were made between ‘thoughts’ and ‘beliefs’ on the one hand, and ‘expectations’ and ‘claimed knowledge’ on the other, in an attempt to determine in what ways, if any, each influenced the other, and whether ‘expectations’ and ‘claimed knowledge’ flowing from ‘beliefs and thoughts’ led to specific actions being taken or not taken (see next section).

‘Actual experiences’ were categorised separately, on the basis of physical actions, words spoken, information given or accepted, attempts to provide or receive information and other forms of communication. These were removed, in the first instance, from the emotional/thought processes accompanying them in reality, to highlight similarities and differences in the processes of accusation, investigation and

conviction between cases. For example, under the heading ‘Spoke to police- First instance,’ several categories emerged – attended police station voluntarily, police arrived at house unexpectedly, called the police on discovery of crime, etc, and from there, further categorisations became available – solicitor present, no solicitor present, instructions given by solicitors, no instructions given by solicitors and so forth. In this way, the actual stages and processes could be plotted, without reference to the thoughts or beliefs of the accused persons or their family members, to identify whether common practices were being undertaken by investigators, legal representatives, court procedures, etc, independently of the thoughts and beliefs of the persons who became the targets of accusations of serious criminal wrongdoing.

Against this data, it was then possible to analyse the thoughts, beliefs, claimed knowledge and expectations of accused persons and their family members about what was happening, in comparison to the actual processes and practices being carried out.

An example of this process emerged in the combination of belief amongst the wrongly accused and their family members that innocence would be self evident, a claimed knowledge that police investigations would examine every possibility, and the expectation that ‘other suspects’ would rule out the wrongly accused person, running alongside actual police investigations which failed to investigate other suspects, and which appeared to proceed on the basis that the accused person was guilty as charged, and the only evidence appearing to be gathered was that which supported that basis.

Analysis of changes in expectation, belief and trust at each stage relied not only on directly reported changes in belief, but on comments made throughout interviews – these were identified by comments such as ‘we’d learned by then’ or ‘we’d since found

out' or 'it wasn't until after that..'

Interviews with campaigners, journalists and others were broken down in the same manner, with extra categories for reported experience of others, as well as the experiences of the campaigners, journalists and others themselves.

Limitations, potential weaknesses and steps taken to reduce threats to results

Because of the retrospective nature of accounts from interviewees, it was considered likely that some accounts may not be factually accurate, or that the linear, causal relationship between events and changed opinions may not be correctly represented by interviewees. However, by interviewing a large number of participants from different perspectives (wrongly accused/convicted persons, family members, campaigners and journalists), patterns of experiences could emerge which would mitigate the effects of factual inaccuracies, especially in cases which were very complicated or in which interviewee failure to understand processes occurring at the time, resulted in inaccurate reporting of particular circumstances (Onwuegbuzie & Leech, 2007).

For example, one interviewee was adamant that an element of what she considered important evidence had not been raised at trial, whereas another member of the same family had documentation to prove that it had. The raising (or not raising) of that particular event did not significantly impact on any of the processes of the investigation/ trial/conviction, but the perception of whether or not it was raised was a factor in the overall impacts on this interviewee. Therefore, although the participant offering the information (that this element had not been raised at trial) was mistaken, the account remains valid for the purposes of this study, in that it demonstrates how

ignorance of the actual processes themselves may influence the beliefs, perceptions and expectations of those without the specialised knowledge required to properly understand and evaluate events.

Furthermore, because interviewees represented cases at all different stages of the accusation/investigation/conviction process, allowances had to be made for individuals in the earliest stages, whose beliefs and expectations, should they be interviewed in the same manner at a later date, may have changed significantly. However, the interviewing of individuals at the various stages of the process again allows the study to take into account changes over time (and events) as a trend or pattern within a large group of interviewees, as well as the experiences of individuals at each of those stages.

The difficulties encountered in obtaining access to wrongly convicted individuals, currently imprisoned, limit the study in terms of the scope of data concerning the lived experiences of those most directly involved, a factor which had been identified at an early stage as a potential source of rich data. Data in response to the research question, as far as that data concerns factually innocent individuals experiencing wrongful accusation/conviction, was therefore restricted in the main to those who had served sentences and were at liberty, or to those who had been accused, but not convicted. The inability to interview in a face to face setting, relying, instead, on written responses in the small number of cases where this option was taken up, means that even where direct access to wrongly convicted, imprisoned individuals was available, the data collected lacked the richness and detail obtained by interactive interviewing processes. A further potential weakness in data obtained from those at liberty is the impact of the psychological and emotional damage which results from wrongful accusations and

convictions ²⁶ and the influences of those on accounts given by these interviewees. However, the ability to interview campaigners with experiences of the long term effects of wrongful accusation/conviction provided the opportunity to balance, in part, the restricted data in this area.

Survey

Approaches taken

Existing data suggested that the general public was ignorant of the real workings of the CJS, but allowed for no real understanding of specifically where, and in what ways, this ignorance existed. Conversely, media reports and political discourse suggested a general public which clearly *believed* specific details regarding the CJS to be true and factual. (For example, policies aimed at ‘putting victims at the heart of the CJS’ and the many Victim Support Groups in existence suggest a public perception that victims were not being properly served by the CJS; changes in sentencing policies and public campaigns for harsher sentences for knife and gun crime appear to demonstrate a public belief that harsher sentences would somehow resolve problems associated with knife and gun crime, etc.) (e.g. Reynolds et al, 2009).

A scoping survey involving face to face interaction was considered the most likely route to securing a significant level of participation, based on the willingness of individuals to participate.

²⁶ The Guardian’s ‘Justice on Trial’ highlights many of the negative effects suffered by wrongly convicted persons after release, including Post Traumatic Stress Disorders, depression and anxiety, paranoia, etc.

The survey design aimed to clarify whether what appeared to be popularly held beliefs about specific aspects of the CJS, especially in relation to the processes which lead to conviction, may be, in fact, as widely held, as factual knowledge, as existing information seemed to suggest. To that end, the survey did not directly address issues of wrongful accusation or conviction of factually innocent individuals, although aspects of that subject were approached indirectly. Instead, the survey aimed to test the extent to which the general public may trust that the CJS was properly and appropriately investigating serious crime, and apprehending the perpetrators of such crime. Additionally, questions were included to regarding what legal rights and protections exist for accused persons, and to what extent beliefs about these rights and protections may be held as factual knowledge.

Although respondents remained anonymous, some demographic data was requested to allow an assessment of the representativeness of the sample. It was noted, however, that such a small sample could not be considered as representative, but rather the data would provide a contextual backdrop to the overall study.

Methods

The questionnaire was designed to address specific, rather than general, issues related to criminal justice processes, media representations and policing (for example Q: ‘The prosecution is bound, by law, to disclose everything in its possession to the defence, before trial’ A: True/False/Don’t know).

Some questions offer only true/false/don’t know options, where others offer a range of responses on a continuum from, for example, ‘strongly agree’ to ‘strongly disagree.’

The rationale for this difference is that on questions of criminal justice ‘fact’ – disclosure, admissibility of evidence, definitions of guilt or innocence etc, a true/false response should indicate a level of confidence in the respondent that the ‘knowledge’ held is accurate and reliable, whereas on questions of interpretation (e.g. ‘wrongful conviction of the factually innocent in the UK is a rare occurrence’), a broader range of response possibilities offers the potential to identify the range of beliefs and perceptions held, and the greater or lesser degree to which they demonstrate confidence in their accuracy or reliability. (See Appendix II ‘Questionnaire’).

Both types of question allow for comparison against known and accepted CJS practices and should, therefore, highlight similarities or differences in respondents’ perceptions and the actual processes and procedures employed within the CJS.

As the survey included a section investigating public perceptions regarding media influences on criminal justice matters, it was originally envisaged that results could be compared against analysis of media coverage of high profile cases, as well as the experiences of wrongly accused/convicted persons and their families who participated in this survey. However, the scope of the study altered over time, placing such a large area for analysis outwith the reach of the study, although this may form the basis of future research.

Pilot studies

It was important that the survey was not seen as an information gathering exercise about wrongful convictions, or prisoners claiming innocence, as this is an emotive issue and could have coloured responses to the actual questions. A small initial pilot (10

questionnaires, carried out by the student son of a friend) returned encouraging results, in that the questions were clear and easy to understand, although several respondents had asked, on completion, what the ‘right’ answers were, or expressed concern that many of their answers were ‘I don’t know.’

This information was then used for a larger pilot (40 questionnaires), carried out by four friends/colleagues, who were instructed to reassure respondents who expressed concerns about ‘I don’t know’ answers, that there was no requirement from them to answer definitively if ‘not knowing’ was the honest response. Although these volunteers mainly carried out the pilot survey amongst friends and colleagues, again, the results were encouraging in that participants had shown interest both in participating, and in the questions themselves. All four volunteers reported becoming engaged in discussion with some respondents following completion of the survey questions, on the wider issues raised by the questions, such as the implications of not knowing individual rights.

One question (regarding evidence being disallowed in court cases) was re-worded, as some volunteers had reported having to explain it to respondents, but in the main, the questions appeared to be clear and easily understood. The option to comment was retained, as this had been used by about one quarter of respondents.

Selection of participants

The survey was approached in a part ‘snowball sampling,’ and part stratified sampling approach. Beginning initially with two volunteers (personal friends/colleagues), an ‘on the street’ survey was carried out in Edinburgh and Aberdeen, stopping passers-by and

asking them to answer a short questionnaire.²⁷ This approach was extended to approaching small businesses where a period of waiting accompanied the business transaction – hairdressers and beauty salons, motor car repair outlets, equipment hire and rental businesses, etc - and asking permission to leave some questionnaires for customers to complete while they waited.

As the study progressed and travel across the UK was undertaken to interview participants in the semi-structured interviews, existing contacts were asked for assistance in extending the scope of the survey to cover other areas of the UK. A further four volunteers emerged from these requests, offering to conduct the survey in Ipswich, Nottingham, Newcastle and Kent. Similar approaches were used – some ‘on the street’ questionnaires were completed, some were distributed to local businesses, others were taken by colleagues to be distributed in workplaces and amongst workmates, and still more were collected ‘door to door.’ At this stage, telephone/email surveying was introduced by two volunteers (Nottingham and Newcastle) who had extensive access to telephone/email contacts.

Two more volunteers (again personal friends/colleagues) assisted in the later stages.

Data Collection and recording

A target of 400 respondents was set, and 360 completed questionnaires were obtained, as follows:

²⁷ Permission was sought to conduct surveys in a variety of shopping malls, train stations, and so forth, but these were refused on the grounds that the survey was not being conducted on behalf of a registered charity, or that there was no benefit to customers, but there may, in fact, be inconvenience to them.

Completed questionnaires

Total	Spoiled	Total for Analysis		Completed in Person	Completed by email/ phone
360	28	332		282	50

Processing and analysis

Completed survey responses were input into an Excel database on the basis of numbers indicated for each available response.

Each category of questions was analysed individually, and then in comparison to the others, to ascertain whether there were significant differences in attitudes/beliefs towards different aspects of the CJS (e.g. police investigation, the courts systems, the rights of individuals).

Although data covering gender, occupation and ethnic origin had been collected, analysis of results from within these categories was not carried out as it was beyond the scope of the overall study, although further analysis could form the basis of a future study.

Survey results were then compared against either factually correct responses (for TRUE and FALSE questions) or reported experiences (from interviewee data) to ascertain to what extent information held as knowledge by respondents differed from the realities of criminal justice processes, either as they factually and officially function, or as they were experienced by wrongly accused/convicted persons.

A further comparison between survey results, and beliefs and expectations reported by wrongly accused/convicted persons and their families, was carried out to examine

whether views held by wrongly accused/convicted persons and their families were broadly similar survey respondents' views, or whether there were particular beliefs and expectations in either group which differed significantly.

Limitations, potential weaknesses and steps taken to reduce threats to results

Potentially, a larger survey covering multiple locations may have returned a wider range of responses, and possible patterns of perceptions, beliefs and expectations emerging in different locations and areas across the UK. However, it was not possible, within the scope of this survey, to explore the greater possibilities inherent in the survey process; such a possibility may form the basis of a future study. It is also possible that a wider range of questions in each section (CJS, Police Investigations, and Legal Rights) would demonstrate areas of weaker or stronger beliefs, dependent on the precise elements of each section; again, for the purposes of this study, a general overview of public perceptions and beliefs, held as factual knowledge, in the context of a scoping survey, was deemed sufficient as a backdrop to the qualitative data obtained.

Survey results are drawn on where appropriate throughout the remaining chapters. (Full survey results are reported in Appendix III 'Survey Results.')

Ethical considerations

Semi-structured interviews

Because of the sensitive nature of the subject matter, and the manner in which the study was carried out, there were several ethical considerations arising throughout the process.

The term 'wrongly accused or convicted/factually innocent' required to be based on an acceptance of the claims of individuals and their families that this was, in actuality, the reality of their circumstances. The technical and practical difficulties of ascertaining factual innocence, and the differentiation of factual innocence and legal innocence, lay far beyond the scope of this study, in particular as the emphasis is on perceptions and beliefs of individuals without previous experience of dealings with the CJS in matters of serious crimes. The nature of the semi-structured interview, however, allowed participants to explain why they believed themselves or their family members to be factually innocent, in keeping with the overall aim of the study to identify beliefs and perceptions about the CJS, held as factual knowledge, upon which members of the public depended when faced with investigations into, and charges for, serious crimes.

Ensuring that potential participants understood that the study could not, in any way, assist individual cases was imperative, as many of these families are desperately seeking someone or something to assist in having their case re-examined. The decision to meet with potential interviewees in informal settings (unrecorded) prior to embarking on recorded interviews allowed these issues to be fully discussed, and any questions or concerns answered before consent was obtained. Although all participants accepted and understood that the study could not help individual cases, many expressed a sense of satisfaction that at least someone was 'paying attention' to the problem of wrongful accusation/conviction, and that a general 'story,' covering the important factors, would be 'told' (Smith & Wincup, 2000).

This perception of an 'official' study being important appeared to stem from frustration and anger that those in 'authority' had not listened, and were not listening, to the

experiences and concerns of wrongly accused/convicted persons and their families, generally, and again, the size, nature and scope of the study was fully explained, in particular, highlighting the fact that the study was not being carried out by or for a large scale ‘authority’ or organisation. These discussions were undertaken to ensure that participants did not mistakenly believe (or hope) that an organisation or authority in a position to examine claims of wrongful accusation/conviction, and to take action to remedy them, (such as the Ministry of Justice) was in any way involved with the study.

Many wrongly accused/convicted persons and their family members expressed concerns that their details would be anonymised, from simply stating that there was no need, as they had nothing to hide, to a more heartfelt explanation that anonymising the details was simply doing again what had already been done by the authorities – making those wrongly accused/convicted persons and their families ‘invisible.’ These concerns were fully discussed, and the need for anonymity explained in detail.

A further issue, concerning consent, arose with those interviewees who did want to remain anonymous, when asked to sign consent forms. Because the consent form requested a name and signature, some were extremely reluctant to sign, expressing concerns that their names would ‘still be in there.’ Further, those who had not wanted to remain anonymous, for the reasons given above, expressed surprise that their details would not appear anywhere in the study, but that they should identify themselves in writing for consent purposes. Therefore, as the study progressed, the signing of consent forms was gradually replaced by a declaration of consent introduced in the recorded interview, following the initial meeting.

The first and most immediately apparent ethical issue to arise in the interview process itself is discussed above; the distress caused to participants by returning to circumstances similar to police interviews. This was dealt with quickly as a result of generous feedback from early volunteer participants with whom rapport and trust had already been built, and did not pose difficulties once the approach had been changed. However, it was suggested to all interviewees in the pre-interview meeting that they arrange to have someone to talk things over with after the interview, should they need to do so. Reassurances were given throughout the interview process, and a short discussion after the interview ended addressed any remaining concerns or questions, with further assurances that contact with me could be initiated by interviewees at a later point, should they wish to add to, alter or remove any of the content of their interview.

Where more than one member of the same family was interviewed, great care had to be taken to ensure that nothing was disclosed from other family members' interviews. Participants would say, for example, 'You can ask my sister that.' The decision in these circumstances was simply to make a note, and if the sister raised the issue in question of her own volition, then no comment would be made. If the sister did not raise the issue in her own account, the information was not pursued. This may have implications for the reliability of the information obtained (in that it was not as 'complete' as it could have been) but the ethical consideration, in this circumstance, outweighed the desire to have further information. This was of particular importance because, in some instances, family members, although agreeing to participate in the study, no longer communicated with each other.

Security of interview recordings has been discussed previously. Interviews were

transcribed using initials only wherever names had been mentioned in recorded interviews. A personal preference for working with 'paper copies' rather than computer versions of interviews meant that transcribed interviews were printed out, then the printed copies stored in a locked cabinet. Again, given the manner in which the study was conducted (travelling in a camper van to keep costs down), security issues were ever present, should the van be broken into or stolen, although the locked cabinet had been built into the furniture of the van so as not to be conspicuous. The removable external drive was not left in the van at any time when it was unattended.

Some campaigners volunteered confidential, and sometimes negative, prognoses for individual cases. Extreme caution required to be exercised to ensure this information remained confidential, especially when interviewing members of these families for other parts of the study. The difficulties of knowing these prognoses, yet also knowing that the accused/convicted persons and their families, in ignorance of the potential hopelessness of their cases, continued to fight in the belief that the convictions could be overturned, raised a number of ethical and moral considerations: would it be possible to interview these individuals without conveying any hint that negative information had been obtained, and if it could, would it be ethical or morally right to conduct such interviews, in the knowledge that for many of these families, hope is often the only thing which keeps them fighting in the first place? Since there was no way of knowing from where, or about whom, negative prognoses may arise, any decision not to interview a family or accused/convicted person (for fear of inadvertently conveying that information) may have raised doubts or concerns with these individuals as to why, after expressing interest in participating, arranging initial meetings, etc, the interview was not then going to take place. It was decided, therefore, that even where negative prognoses

had been conveyed about a given case prior to interview, but after initial contact/first meeting, the interview would go ahead as planned. This was a stressful and emotionally difficult aspect of the study, particularly after interviews had been carried out – the ethical difficulties of knowing, yet having to appear to not know, required a great deal of reflection and emotional/ethical processing.

Similarly, discussions with legal professionals disclosed sensitive and confidential information, both about case details, and other professionals. Although legal professionals may have discussed participation in the study amongst themselves, and, indeed, some indications of this appeared in interviews and informal meetings, no confirmation or denial was offered, and no discussion of other named legal professionals as participants in the study was entered into. The disclosure of sensitive and confidential information about case details required careful attention to detail, to ensure that information was not disclosed to family members or accused/convicted persons where they, themselves, had not raised that information. A further ethical dilemma arose when, in a very few cases, it became apparent that legal professionals had information which the families or accused/convicted persons themselves did not know about. Although the study examines, in part, the relationships between wrongly accused/convicted persons and their families with legal personnel, should it report on instances where legal professionals had not disclosed information to clients, and the clients were unaware of this? If the study did report such instances, would it be possible to ensure that those affected would not be identifiable, and even if it were, would this be ethically or morally acceptable? After long reflection, it was decided that this information would not be reported in anything but the most broad and general terms, to ensure confidentiality and anonymity for all interviewees.

Because the study involved becoming immersed in many aspects of wrongful conviction of the factually innocent, it became increasingly important to remain aware of the dangers of inadvertent disclosure of information across confidentiality boundaries. Due to the number of cases covered by the study, great care had to be taken to ensure that details of individual cases were not 'mixed up,' especially where circumstances or details were very similar between cases. Likewise, terms of reference and language used had to be carefully chosen- prisoners were always referred to by their names, and the term 'the case' or 'your case' was used sparingly, to avoid appearing to de-personalise the experiences of interviewees. Where families were aware of, or in contact with, other families in similar circumstances to themselves, and made mention of those others, no confirmation or denial of knowledge or contact was given.

This was a delicate situation, as many of the contact details had been passed from family to family, and it was clear that many participants knew of others who had expressed an interest in participating, but it was explained to these individuals that no matter what *they* personally knew or believed, I could not enter into any discussions regarding others who may or may not be participating in the study. This was a boundary which had to be carefully managed, as the trust and confidence of all participants had to be both built and maintained, whilst at the same time, pointing out that there were specific areas which I could not discuss. All participants in these circumstances fully understood and accepted these explanations, and the reasons given.

Survey

Early enquiries had indicated a fairly large group of volunteers willing to assist in collecting survey data. However, the numbers available dropped significantly when

refusals of permission to collect survey data in shopping malls, train stations, and other public areas with large numbers of people, were received. Attempts were made to find other ways of collecting survey data, to avoid placing an undue burden on remaining volunteers, and it was during discussions forming part of these attempts that the idea of volunteers recruiting further volunteers emerged.

The suggestion of approaching potential respondents by going ‘door-to-door’ during the survey was made by a mature adult volunteer. This suggestion raised safety issues for the volunteers concerned, especially younger volunteers, and nuisance issues for the people whose homes were approached. After some discussion, it was decided that volunteers carrying out this exercise would do so in pairs. An introduction was agreed, and volunteers agreed to remain polite and respectful whatever the response to that introduction. There was also an agreement that after the initial introduction, no pressure or further persuasion would be used to entice members of the public to participate.

Researcher

Because of my long term involvement in a high profile case in Scotland, in which an extremely negative perception of the convicted person has existed for several years, research in Scotland, whether collecting survey data or organising and arranging interviews posed particular challenges. Initially, a decision was taken that I would not personally collect survey data in the local area (Edinburgh and Lothian), this being undertaken by four volunteers not known to be associated with me, so as not to ‘give away’ the connection of the survey to instances of wrongful accusation/conviction, as discussed previously.

Because of developments in the above case (with which I remained involved throughout the duration of the study), an internet ‘hate campaign’ emerged aiming to discredit me, personally, and the case in particular. Many lies were posted on several sites, calling my integrity and trustworthiness into question, which may have had some impact on those who had initially expressed an interest in participating in the study failing to respond to later attempts at contact. As a result of these events, and the unregulated manner in which sites were operated, the lies and malicious comments escalated fairly quickly into threats, both veiled and blatant. Threats were made to publish my personal address and telephone numbers, pictures of my home, and details of my daughters, and dishonest information was posted concerning my personal life. This culminated in physical threats (including death threats) made by people approaching me whilst in the street, and, in one instance, by a person arriving at my home to threaten me.

Throughout this period, the police in Scotland would not act, maintaining that no crime had been committed, even though in England and Wales, I had been made aware of similar circumstances where police had acted, and charges had been brought²⁸. Following the arrival of the person at my home, my daughter and I were forced to move out until proper security measures had been put in place (cameras and movement sensor lights) as this person had threatened to return should I continue my involvement in the case.

²⁸ E.g. <http://www.guardian.co.uk/uk/2010/sep/24/ukcrime-police>
Contact details forwarded by English colleague who had had action taken:
DC **** MSc CSTA CSTP
Forensic Computing & Internet Crime Investigations
Force Internet Crimes Investigation Team
*** & *** Constabulary

These events raised several issues regarding the whole approach to the study, and the effects of these events on my abilities to maintain an impartial and unbiased approach to data collection and analysis. Of particular concern were dishonest claims that I had previously misled individuals whose cases were highlighted in a book I had written, by leading them to believe I was collecting their stories for a PhD study. Because of my concerns about this aspect of the hate campaign, I had retrieved all the written consents of the people whose stories I had previously covered, but realised that to show them to individuals who may have expressed doubts about participation in this study could have been construed as attempts to influence decisions on whether to participate or not, so a decision was taken that should anyone wish to withdraw, on the basis of internet claims, then that decision would be respected without question. No-one who agreed to participate in the semi-structured interview part of the survey asked to be removed, and feedback from those who had seen the internet claims was positive and encouraging, with assurances that most people knew that the claims were dishonest.

However, such experiences also allowed an insight into the experiences of wrongly accused/convicted persons and their family members, where the case has been the subject of high profile media coverage; the inability to prevent such things being disseminated publicly, and the lack of redress for such a situation are two common causes of concern and anger for these people. Also an insight into how some members of the public can be convinced that what they have read or heard about high profile cases in the media is factually correct proved invaluable in understanding the effects of such responses on innocent individuals and their family members.

The potentially negative impacts for the study (access to wrongly accused/convicted persons and their families, campaigners, etc) were greatly eased by existing contacts, with whom relationships of trust and respect had previously been built, making contact with potential participants, reassuring them that the ‘hate campaign’ was malicious and dishonest, and that I was trustworthy, with no ‘ulterior motives,’ as had been suggested. It was as a result of these people’s kindness and integrity that the part of the study covering Scottish cases was able to be conducted to the extent it was, and the effects of the ‘hate campaign’ so successfully minimised.

Clearance for the research proposal was received from the Ethics Committee of the Department of Applied Social Science, University of Stirling, and the study was carried out within the Code of Ethics of the British Society of Criminology (see Appendix V).

Conclusions

The ability to obtain such richly detailed accounts of the experiences of so many families involved with wrongful accusation gives the study a basis of information not previously available elsewhere. None of the interviewees reported ever having been asked to participate in such a study, even though many had written to MPs, The Home Office, and other authorities, requesting that the subject of wrongful accusation/conviction, and the impacts thereof, be properly examined and addressed.

The processes of overcoming obstacles to access, consent, trust, suspicion, and fear all raised important insights which, themselves, may form the basis of future studies, and also highlighted the difficulties inherent in obtaining data on this subject. One particular challenge was the number of new cases emerging during the course of the study, as the

limited scope of the study meant that only a finite number of individuals could be interviewed, but contact details were still being passed on; it is almost impossible to follow up every contact to advise that no more participants are being sought, as it was not known to whom contact details had been passed. However, attempts were made to disseminate this information as widely as possible, and every new contact received a response as soon as possible, thanking them for their interest, but explaining that the study had reached the maximum number of participants possible within its scope. This ‘new cases’ data, however, demonstrates, in itself, that the numbers of individuals claiming wrongful accusation and/or conviction would appear to be both significant, and growing.

These approaches to data collection and analysis covered a broad range of data on several aspects of perceptions and beliefs about the CJS system, allowing the original research question, and the sub-questions flowing from it, to be explored in depth, and from several different perspectives and approaches (e.g. wrongly accused/convicted persons themselves, the wider public, personnel within the CJS, media coverage, etc.).

For clarity and ease of understanding, the following definitions and terms are used throughout the remaining chapters:

‘case’ – where reference is made to a case or cases, this refers to an accusation and/or conviction which has been covered by this study, regardless of how many individuals were interviewed in relation to that case. A total of 30 ‘cases’ were included in this study, in that either the accused/convicted person him/herself, or a family member, was

interviewed, although there were 46 individuals falling into these categories interviewed.

‘Group One interviewee’ – wrongly accused/convicted persons who participated in semi-structured interviews as part of this study.

‘Group Two Interviewee’ – family members of wrongly accused/convicted persons, individuals who participated in semi-structured interviews in their own right, as part of this study.

‘Group Three Interviewee’ – campaigners, journalists, innocence project students, legal personnel and others who participated in semi-structured interviews as part of this study.

‘respondent’ – this refers to those who completed survey questionnaires.

These distinctions are made to avoid confusion, as the survey, although questionnaire based, was carried out in an interactive manner between volunteers collecting survey data and those who completed questionnaires, as opposed to, for example, postal or internet questionnaire based surveys, and to provide an ‘easy reference’ distinction between different groups of interviewees who participated in semi-structured interviews.

Where there are differences between Scots law and the law in England and Wales, these are highlighted in footnotes throughout this study.

CHAPTER FOUR

Police Investigations

Introduction

‘Criminal justice systems depend on public confidence for their effective operation. Without widespread belief in their fairness and effectiveness, they would eventually cease to function...The rule of law requires public consent, and governments ignore the crisis of confidence in justice at their peril’ (Indermaur & Hough, 2002:11, p.198).

The above quote emphasises the need for criminal justice systems to be believed to be fair and just, in order to maintain public consent to be governed by the ‘rule of law,’ although a clear consensus on what is meant by the term does not exist, leading Lord Bingham to suggest *‘...it is tempting to throw up one’s hands and accept that the rule of law is too uncertain and subjective an expression to be meaningful’* (Lord Bingham, 2010, p.6).

This chapter identifies the beginning of the processes by which wrongful accusations and convictions occur, examining the interplay of common beliefs and perceptions about police investigations, and the actions taken by police investigators. A number of factors which maintain and reinforce trust in policing as being “fair” and “effective,” alongside self-identifications of innocent individuals as law-abiding citizens (and the corresponding expectation that being law-abiding is a protection against wrongful accusation), are highlighted in comparison to actual police practices, and the largely unaccountable nature of policing. The interaction of two different understandings of

common term and phrases (e.g. witness and suspect), is investigated, in order to demonstrate the ways in which police investigations, themselves, shape and influence the direction of investigation, and the decisions and actions of those subject to investigation, where the beliefs and perceptions of those individuals differ markedly from those of the investigators.

The first step in the process which leads to wrongful accusation and/or conviction of factually innocent individuals is an investigation by police teams believed to be operating from a basis of fairness and effectiveness. However, there are vast differences in what constitutes ‘fairness’ and ‘effectiveness,’ dependent upon the objectives of those involved, and it is here that the first indicators of the effects of the gap in perceptions between members of the public and those working within the Criminal Justice System (CJS) emerge.

The prevalent perception that wrongful conviction of the factually innocent is a rare occurrence has been challenged by research, but that research focuses predominantly on statistical analyses of the extent of the problem, or on structural and institutionalised processes within the socio-legal arena, and the potential remedies therein. Concentration of research on the concept of ‘suspect communities²⁹’ (e.g. Peirce, 2010), supports the impression that distinct and recognisable groups become the target of police attention in relation to specific threats, reinforcing general perceptions that ‘ordinary people’ are not at risk of wrongful accusation or conviction.

²⁹ The term “Suspect Communities” was introduced by Hillyard in his 1993 book “Suspect Communities: People’s experiences of the Prevention of Terrorism Acts in Britain.”

The lack of acknowledgement of those most affected, and the official denial of their existence heightened the isolation and perceived helplessness of wrongly accused/convicted persons and their family members in this study, who were struggling to have those convictions re-examined and factual innocence recognised. Many believed they were ‘the only ones,’ which is hardly surprising, since they shared the same perceptions as the wider public that wrongful conviction of the factually innocent is extremely rare. Until and beyond the moment of accusation, these people had no contextual framework within which to consider the circumstances in which they found themselves, and so resorted to attempting to ‘make sense’ of events within a contextual framework which was no longer appropriate. Unable to comprehend that the fact (to them) of their innocence was not accepted by investigators, they continued to work from a basis of attempting to prove or demonstrate their innocence, remaining unaware that the proof or demonstration they provided was, in fact, irrelevant to investigators, who were working to a different agenda.

Unlike individuals who could readily identify themselves as members of ‘suspect communities’ and rationalise their experiences from that perspective, or from the experience of those thrust into extraordinary, but numerically significant, circumstances, the individuals and their families who participated in this study considered themselves as mere blips in a system which has somehow gone wrong, or has acted upon erroneous assumptions or processes, and that the error will be rectified quickly; it is from that basis which they proceed.

Although ‘.... *the wrongly accused and the abused continually reiterate their desire for truth, their demands for accountability, and their need for acknowledgement*’ (Scruton,

2007, p.235), the sense of isolation and uniqueness emanating from the circumstances of wrongly accused/convicted persons meant, until recently, each voice believed itself to be, if not the only one, then certainly only one of a tiny few.

None of the interviewees experiencing wrongful accusation and/or conviction of themselves or a family member in this study had ever been involved in a police investigation into a serious crime before. None had ever been arrested or charged for a serious offence. Yet the vast majority (86%)³⁰ had been convicted of the most serious crimes of murder or rape/serious sexual crimes.

In keeping with Foucault's concept of self regulation, the process requiring both acceptance and participation by the populace, participants strongly identified themselves as decent, law abiding, responsible citizens, and held deep beliefs that this (a) would and should protect them from wrongful accusation, and (b) would be recognised by authorities as placing them outwith the 'type' of individual who would generally be considered capable or under suspicion of such activities.

Most also perceived this 'type' in terms of Garland's 'criminal.'³¹ This stereotypical image of 'the criminal,' whilst heightening their shock and disbelief at being accused of such crimes, at the same time reinforced a belief that such a vast difference in perceived 'type' would be self evident to all. Those convicted of particularly brutal or gruesome murders, or of sexual offences against children, and their family members, referred variously to the real perpetrators as 'animals,' 'sick,' or even simply 'the sort of person

³⁰ Of the 30 cases covered by this study, 24 persons were convicted, one is on remand awaiting trial, one has not reached the stage of charges, one had all charges dropped before trial, and the remaining 3 were acquitted at trial. Of the 24 convicted persons, 21 were convicted of very serious offences.

³¹ ...'profoundly antisocial... with few redeeming factors and little social value... barely human, their conduct being essentialised as 'evil' or 'wicked' and beyond all human understanding' (Garland, 2006, p. 135).

who can do something like that,' indicating both their view of the 'criminal' type, and their perception of their obvious difference from that type.

This rationalisation underpinned many of the initial steps taken (or not taken) by both the accused themselves, and their family members. But it was rooted in a much deeper belief system which many found difficult to articulate - an absolute trust in the honesty and integrity of the entire criminal justice system, unquestioned beliefs regarding concepts of 'truth,' and 'common sense,' the perceived regulation, fairness and thoroughness of police investigations and procedures, a reliance on both a recognisable and defined understanding of what constitutes 'evidence' and the manner in which that evidence would be utilised, and a perceived structure to which the entire justice system would adhere.

For many, at least initially, there was little sense of a personal need to take specific actions to ensure specific outcomes. This was not born out of complacency, but rather a sense of safety and security that what needed to be done would be taken care of by a fair and just 'them,' whether that be police, solicitors, experts or judges. Many references were made to what Group One and Two interviewees believed would be 'obvious' to 'everyone,' whether that indicated points of evidence, other potential suspects, procedures, dishonesty in courts, or blatant breaches of the rules, with the assumption that such obviousness would, in itself, be enough to have the matters raised by it addressed.

At each stage of the process, from initial accusation through police investigation, arrest, charge, bail or remand, engagement with solicitors in preparation for trial, trial itself,

conviction and post conviction, the emphasis of accused/convicted persons and their family members remained on factual innocence; an expectation throughout that factual innocence would be recognised, and a belief that if factual innocence could be officially recognised, the situation would be resolved, and the charges dropped. None had any concept of a parallel process with rules vastly different to those they believed were being followed, and one in which factual innocence is of little significance; *‘openly offered meaning is normally regarded by investigators as being actively misleading – resistant to the production of knowledge that they seek- and so they close off meanings that are offered to them’* (Green, 2008, p.11).

The strongest beliefs and perceptions held by participants about the justice system in general, and investigations into serious crime in particular, were

- That police officers were honest, trustworthy, open and ‘doing a good (and sometimes difficult) job’
- The role of the police was one to be respected
- The purpose of police investigations was to examine all factors and uncover the truth about what had occurred. Such investigations had a recognisable and formal structure.
- Factual innocence was important to investigators, and would be self evident. No evidence could be produced against the accused, as they had not committed the crime. This ‘lack of evidence’ would, in itself, be evidence of innocence
- Police officers would be able to recognise reliable, honest witnesses and equally, unreliable and dishonest witnesses. Police officers would always favour reliable, honest witnesses

- Police officers would not deliberately mislead or trick accused persons or witnesses, or deliberately provide false or inaccurate information
- Witnesses in investigations involving traumatic or tragic circumstances would be treated with respect and compassion by police officers
- Innocent people had nothing to fear by speaking openly with investigating officers
- Witnesses and innocent individuals had no need of legal advice from solicitors, on the basis that they had done nothing wrong.
- Police officers would advise people of all their rights, at every stage of the investigation
- Solicitors were on the client's 'side' and would always give advice in the client's best interests. They would fight to 'prove' their client's innocence.
- Solicitors believed their clients, and would be honest with their clients.

On the basis of these beliefs, many accused persons and their family members took actions, failed to take actions, or were involved in taking actions they did not understand, all of which fed into the strength of the allegations made against them, as discussed below.

Dependence on Investigating Officers for Information and Guidance

Only 3 out of 30 of those accused had any idea that they might be being considered as suspects rather than witnesses in the initial stages of the investigation. Of those who did expect to be considered as suspects of a sort, all believed that they were being suspected of either very minor or peripheral involvement, and had no idea that they were the central suspect for the main, and most serious, offence. In many cases, it was

reassurances from police investigators which helped maintain the illusion that these individuals were not the central suspect.

For example, a relative of one convicted person, whose girlfriend had been found murdered said:

‘The police called me at home and said, ‘there’s nothing to worry about, but we’ve arrested *** on suspicion of murder’... I just thought, they’ve made a huge mistake... it’ll all just come right, the solicitor will go down there, they’ll go through a few things and he’ll be released.’

(family member, accused convicted, sentenced to 22 years.)

Another relative in the same case rationalised the same information:

‘We all just thought it was either a mistake, or just one of those things they do in those circumstances... arrest the boyfriend first, and when they realise it wasn’t him, they let him go and that’s the end of it. They sort of made us think that way... when they said, ‘You’ve got nothing to worry about but ***’s been arrested on suspicion of murder’...what is anyone supposed to make of that?’

(family member, accused convicted, sentenced to 22 years.)

The extent to which these individuals placed their faith and trust in the police to recognise their innocence is well illustrated by one participant who, in spite of being told by a police officer over the phone ‘I’m going to *arrest* you, interview and release

you' (emphasis added), but not being told why, still went to the police station voluntarily, without even first contacting a solicitor for advice or guidance.

The rationalisation for this course of action is one which is common to all Group One and Two interviewees:

'If you've not done anything wrong, you've got nothing to worry about. We were so shocked, and couldn't believe quite what was happening, that we just went along with it- we didn't know how to argue with it... it doesn't actually cross your mind to question a police officer.'

(family member, accused acquitted.)

The belief that having done nothing wrong would be enough, in itself, to ensure that they were fairly treated and that their innocence would be immediately apparent was a deciding factor in actions taken or not taken in 89% (or 26 out of 30 cases) covered by this study. Agreeing to house searches without waiting or checking for search warrants, speaking with police officers without legal advice, handing over personal belongings, speaking to individuals who introduced themselves as plain clothes officers without asking for official identification, signing statements without reading them, and, in the case of family members, giving statements without understanding the consequences,³² are just some of the actions taken on the basis that, as the accused had done nothing wrong, and knew this to be so, there was nothing to be concerned about.

³² In particular, that statements may be used against the accused person, and the family member deemed to be a prosecution witness on the basis of statements given.

Others include changing statements voluntarily, signing agreements or acceptances, accepting police assurances that legal representation had been organised, and allowing 'liaison officers' full access to homes and family members.

Several Group One and Two Interviewees expected that the police 'should have told them' about their rights, and about the consequences of taking particular actions. A common complaint, arising in 13 out of 30 cases, was that a family member, having given a signed police statement, was told after signing that their statement made them a prosecution witness. This caused extreme distress, although not initially, in many cases, because so many individuals in these circumstances did not even consider that these events would ultimately lead to a trial. It was only much later that they realised the significance of being considered a 'prosecution witness.'

Another common complaint covered the need for solicitors. Most of the family members interviewed for this study reported that they did not believe they needed legal advice as they were 'only witnesses,' yet, in 14 out of 30 cases, family members reported later discovering that information they had volunteered in statements, believing they were helping the police eliminate their loved one from the enquiry, so that the search for the real perpetrator could begin, was used against their loved one. Several Group One and Two interviewees in this study reported asking the police if they, or their loved ones 'should have' a solicitor, and police responses, that it would be 'taken care of' or that a 'duty solicitor' would be arranged, being accepted at face value. The Scottish cases were all interviewed initially without solicitors present in 'Section

14' interviews³³, and were told either that they were not entitled to have a solicitor present, or that they did not need one, as they were only being 'detained.'

The content and accuracy of statements written on participants' behalves by police officers was another area where, retrospectively, participants felt they had been fooled or tricked by investigating officers who were operating within a hidden agenda, of which the families and accused persons knew nothing. Slight changes of wording which resulted in significant changes of meaning and emphasis featured strongly in the list of concerns, but the taking of statements in situations of extreme trauma and distress was, by far, the single biggest concern, as far as statements are concerned.

There are two aspects to this. The taking of statements from family members as witnesses, and the taking of statements from 'suspects' (who do not know they are suspects) in police stations. Both aspects include, in many instances, situations of distress, confusion, trauma and fear. One Group Two interviewee reported that, on receiving a hysterical telephone call from her mother, she arrived to find several officers searching every room in the house, whilst two sat either side of her mother:

'...she was in her dressing gown. She didn't even have her teeth in. She just kept saying, 'What's going on? What's going on?' and she was crying. They wouldn't tell her... by then, they'd been asking her questions and writing down answers...they kept shoving the thing they'd written down in her face, going, sign it, sign it, sign it... meantime there was another cop pulling towels out of cupboards and just throwing them on the floor... there

³³ Under Section 14 of the Criminal Procedure Scotland Act, 1995, suspects could be detained and questioned for up to six hours without access to legal representation or advice, although this situation was deemed unlawful by the UK Supreme Court in October 2010, see *Cadder v HMA* [2010] UKSC 433.

was just this massive invasion of them...' [After going upstairs to check on another family member, this interviewee returned downstairs]: 'by the time I got back down to her, she'd signed. She couldn't even read what they'd written.'

(family member, conviction overturned on appeal.)

This was not an isolated case. In 7 out of 30 cases covered by this study, an early morning awakening with large numbers of police officers suddenly swarming into the family home was reported, and in 70% (or 21 out of 30 cases,) family members (including the accused) reported not being able to find out what was going on, despite asking the officers involved directly and repeatedly.

Another Group Two interviewee describes police officers arriving, and asking to come inside, but refusing to say what was going on. Immediately assuming something had happened to a family member, she became extremely distressed. For several minutes, questions were asked, before she was instructed to call her partner and ask him to come home. In all, for around 20 minutes, this participant was allowed to become increasingly hysterical, believing that a family member had had a terrible accident. Her partner was arrested when he returned in response to her call:

'I hadn't been asked to give a statement, I was in no way in a fit state of mind to give a statement and there was nobody else present when we were having the conversation... it was just her [police officer] and me...she just asked me for phone numbers for the family... ...I'd be the first to hold my hands up and say I did not read what was written, I doubt if I even could

have done, my eyes were that...but I was asked to put my signature to what she'd written..it wasn't until I was told in that first meeting [with the solicitors]... it meant effectively, I was on their [the prosecution's] side.'

(family member, accused convicted, 11 year sentence.)

One Group Two interviewee, having awoken to a commotion downstairs, reported:

'My daughter had come downstairs and saw this struggle. She was screaming, 'leave my dad alone,' and she threw a cup. A policeman chased her upstairs and threatened to arrest her. She was 12 years old... they took him away, and they wouldn't tell me what was going on.'

(Family member, accused convicted, 14 year sentence.)

The procedures employed for questioning suspects (in this case, individuals who believe they are witnesses rather than suspects) were a cause for grave concerns:

'When *** came out of the custody suite just over 6 hours later his appearance... he was severely dehydrated, his eyes were black, like panda's rings, he was traumatised, he was shell shocked, he was terrified, and in such a state of deep distress, he was shaking, and it took nearly two hours to bring him out of crying, and to try to get some sense of what was going on... this was torture... what *** endured in that custody suite was torture. They deprived him of his sense of time, they deprived him of food by taking him out of the custody cell when dinner was being served, and he hadn't eaten since 6 o'clock that morning... and his meal was put in his

cell for when he returned so he went into interview being severely dehydrated, he was hungry, his sugar levels were low, he was in a state of shock, he was disbelieving, this man was not fit to give an interview, he was a bumbling fool in the interview, and they used that against him... I had to take him to the doctor the following morning. The doctor immediately diagnosed him with post traumatic stress.’

(family member, accused, acquitted.)

Other interviewees in Groups One to Three report similar experiences; disorientation, extreme trauma, bullying, humiliation and domination by police officers, interrogation tactics designed to confuse and distress. These interviewees all believed that they were being questioned as witnesses, even though, in most cases, they had been cautioned. Some perceived the arrest and caution as ‘just something they have to do,’ never believing that they were genuinely being treated as suspects.

Clearly, the perceptions and expectations held by Group One and Two Interviewees regarding police and policing were far removed from the realities they encountered, leaving them unable to adequately evaluate or respond to the circumstance in which they found themselves.

Trust and Confidence in Police

Trust and confidence in police and policing (e.g. Bradford, 2011, Goodin, 2010a, Tapper, 2009), rooted in concepts of ‘common sense’ understandings and representations of policing in the media (Reiner, 2010), is both an essential element in concepts of policing by consent, and of public expectations of ‘proper conduct’ by the

police (e.g. Goldsmith, 2010). Where individuals have never come into direct contact with police investigations into serious crime, there appears to be no reason to question those ‘common sense’ understandings, representations and expectations.

Beliefs and expectations about the police, where they were actively considered at all before wrongful accusation or conviction, were rooted in a general trust that the police would ‘do their job,’ that job being to properly investigate serious crimes, recognise the innocent and ‘catch criminals.’ Informed by a media which emphasised political claims that the justice system was being ‘rebalanced in favour of victims’ (which many of the participants understood themselves to be), to be ‘tough on crime and tough on the causes of crime,’ these beliefs led to an expectation that police investigations would focus strongly on finding the real perpetrator and ‘solving’ the crime.

Concepts of what policing is, and should be, have altered over time, although the expectation that police will uphold the law, protect the public, and ‘catch criminals’ has been a common theme throughout.

Home Office research, following a number of incidents during the 1980s³⁴, is claimed to have ‘debunked and demythologized the ‘reality’ of policing as it was portrayed by the police; it presented a picture of police work which differed considerably from the public image’ (McLaughlin & Murji, 1977, p.88) and yet, 30 years later, public images of the ‘reality’ of policing appear to have remained remarkably unchanged.

³⁴ The Brixton riots in 1981, police behaviour during the Miners’ strike in 1984/85, high profile miscarriages of justice, such as The Birmingham Six and The Guildford Four, amongst others.

Throughout the 1990s and early 2000s, a number of changes were introduced to counter the decline in public confidence in the police,³⁵ yet, by 1999, Her Majesty's Inspectorate of Constabulary (HMIC) stated that

'The increasingly aggressive and demonstrable performance culture has emerged as a major factor affecting integrity, not least because for some years there has been an apparent tendency for some forces to 'trawl the margins' for detections and generally to use every means to portray their performance in a good light (Martin, 2003:8, p.162).

In spite of this, the Labour government, in 2002 introduced The National Policing Plan in which *'the central message is the need for police to drive up performance and to set clear objectives and performance targets when drawing up their own annual plans'* (Martin, 2003: 8, p.172).

None of these directly addresses *how* police performance is to be driven up, or how the setting of performance targets impacts upon police procedures and behaviours, outside the general HMIC observation of the 'apparent' tendencies of 'some forces.'

However, the attacks on US targets on September 11th 2001, and the London bombings of July 7th 2005, presented a context in which calls for 'tougher policing' and extensions to the law to deal with the 'terrorist threat' were not only linked, but portrayed by the media, politicians and police as the 'common sense' response.

³⁵ For example, The Police and Magistrates and Court Act 1994 (PCMA,) the Posen Enquiry, (Home Office 1995b,) and the setting of 'Key Objectives' for police against which performance could be measured.

Reiner points out that *'the centralizing, managerialist, 'businesslike' micro-management of policing initiated under the Tories continued with a vengeance under New Labour. So, too, has the pluralisation of policing, with an increasing role for the private sector and for 'responsibilized' citizens'* (Reiner 2010: xii)

Although the introduction of the Police and Criminal Evidence Act (1984,) the Criminal Procedure and Investigation Act (1996,) and the Criminal Justice Act 2003 all appear to build in safeguards against behaviours within the CJS which may lead to injustice, on closer inspection, these safeguards can be circumvented without necessarily involving any wrongdoing. In an amendment to Code C of PACE in 1990, the 'rights of suspects to legal advice' are addressed.³⁶

But the reference to 'suspects' is the crucial issue. It is for the police to decide at what point a person has become a 'suspect' rather than a witness, and it is only at the point where a person is identified as a suspect that the right to protection under Code C becomes active.³⁷ That police officers will attempt to maintain 'witness' status for an individual for as long as possible, whilst to all intents and purposes, treating that individual as a suspect, was borne out in the experiences of several Group One Interviewees – one, for example, reported being told by police following a 10 hour initial interview, 'It's just as well you were in as a witness. If you'd been a suspect we couldn't have kept you this long, and you'd have had to have breaks and everything...' The individual was later arrested, charged and convicted.

³⁶ This amendment *'requires that suspects should be reminded of their right to legal advice before any and every interview, any detention review, any identity parade or the provision of any intimate sample. It specifically states that no attempt should be made to dissuade a suspect from obtaining legal advice.'* <http://hansard.millbanksystems.com/lords/1990/dec/13/police-and-criminal-evidence-act-1984>

³⁷ There is no such protection in Scotland, as PACE does not apply in Scotland.

Similarly, both CPIA (1996) and The Criminal Evidence Act 2003³⁸ covered issues of police disclosure; in particular, police responsibility to disclose any records which might support the defence case. But this may, in fact, have made matters worse, by encouraging police not to record information which may be supportive of the defence case,³⁹ on the basis of police confidence that their chosen suspects are, indeed, guilty.⁴⁰

Clear examples that circumvention of PACE, CPIA and The Criminal Evidence Act 2003 are commonplace arose from Group One and Two Interviewees, as did evidence of police investigators being carried along with the ‘momentum of suspicion ... and blinkered determination’ to which Peirce refers.

Several Group One and Two interviewees spoke to police officers without solicitors present, on the understanding that they were being interviewed as witnesses. The sister of one such person, who gave interviews totalling 19 hours to police before he was arrested, said:

‘I asked to speak to *** and they said they wouldn’t interrupt him as it might interrupt the flow of what he was remembering. I can’t remember how long it was (an hour perhaps) before I started to get very worried and

³⁸ PACE, CPIA, and The Criminal Evidence Act 2003 apply in England and Wales but not Scotland. Until 2005, disclosure in Scotland was dependent on the defence supplying a statement of reasons for requesting the release of evidence, and the relevancy of the request. This was changed in 2005, following Two Privy Council decisions, requiring that ‘any evidence which would tend to undermine the prosecution case or assist the defence’ should be released.

³⁹ ‘Parliament has thus endorsed selectivity and closure practiced by police investigators... non disclosure of evidence that appears to defendants to be of significance is not necessarily due to malpractice by officers who make prior assumptions that their suspects are guilty’ (Green, 2008, p. 16).

⁴⁰ Human Rights lawyer Gareth Peirce, commenting on what she refers to as ‘The Framing of al-Megrahi,’ the so-called ‘Lockerbie bomber,’ points out that: ‘Fabrication demands outright dishonesty. However, it is not always necessary, or necessary in every aspect of an investigation: the momentum of suspicion, combined with a blinkered determination to focus on a particular thesis and ignore evidence pointing to the contrary, is a certain route to achieving the desired end’ (Peirce, 2010, p. 33).

asked the detective on the desk if I could call a solicitor for ***. He told me that it wasn't allowed for anyone to call a solicitor for anyone else. I was naive enough to believe it.'

(family member, accused convicted, sentenced to 18 years.)

Another family told of their shock at discovering the existence of witnesses, who had seen the claimed murder victim, alive and well, after the supposed time of death, but who were not asked to give statements to the police. Clearly, if such statements did not exist in police files, then they could not be disclosed to the defence.

The Role of Victims

The existence of such apparently clear safeguards not only feeds public perceptions that the CJS is fair and properly regulated, but, in more recent times, has become a supporting feature in claims that criminals have more rights than victims.

Public perceptions and government policy have continued to shift in a more punitive, retributive direction, with concepts of the rights of 'victims' and 'offenders' increasingly portrayed as being in direct opposition – victims should have more rights, offenders should have less, victims' rights should come first before any consideration (if at all) should be given to offenders rights. The centrality of the role of the victim was first specifically included in public policy in the Government's White Paper 'Justice for All' in 2002, with a claim that reform would put victims and witnesses at the heart of the criminal justice system, and re-balance the system in favour of victims of crime. Eight years later, Helen Newlove, the widow of Gary Newlove, a murder victim, was given a peerage after almost three years of campaigning against binge drinking and

‘gangs,’ a high profile ‘cementing’ of the role of victims ‘at the heart of the justice system.’

The definition of ‘victims,’ however, remains reserved for a particular type of ‘victim’: one of the youths convicted for Mr Newlove’s murder is 16 year old Jordan Cunliffe, who suffers degenerative eye condition ‘Keratoconus’ which renders him virtually blind⁴¹. The prosecution, under Joint Enterprise doctrine, holds that Jordan should have ‘known or reasonably anticipated’ that the boys he was with that evening were likely to kick Mr Newlove to death (it is agreed that Jordan took no part in the attack) and he should have done something to stop them. The campaign to highlight the conviction of an innocent, disabled youth has received virtually no mainstream media coverage, and for almost two years, from before trial to after the first appeal, the media were banned from reporting on Jordan’s disability.

Jack Straw, in a speech on prison policy to the Royal Society of Arts, in October 2008, said it was time to reclaim the ‘unfashionable’ language of punishment and reform and make clear that the justice system is there to serve victims and the law-abiding majority first (Guardian.co.uk 28th October 2008), reinforcing the increasingly popular belief that not only should the rights of victims come before the rights of criminals, but also, emphasising the *‘lack of balance and mutuality [which] shapes the relationship between offender and victim that penal policy projects . The interests of victim and offender are assumed to be diametrically opposed...The standard response to those who campaign for prisoners’ rights or better treatment for offenders is that they should direct their compassion and concern towards the innocent victim, not the guilty*

⁴¹ <http://caseblog.wronglyaccusedperson.org.uk/justice4jordancunliffe/>

offender....As the offender's perceived worth tends towards zero, victims' interests expand to fill the gap' (Garland, 2001, p.180-181).

From the particularly high profile Newlove case can be seen the wider consequences of ever increasing demands for the 'rights of victims' to be the first and main consideration in concepts of 'justice.' Once labelled an 'offender' (and frequently, even a 'potential offender'), basic rights are stripped away, the justification for this stripping away being that the person so labelled has relinquished his rights by 'choosing' to offend. The stripping away of rights has become increasingly enshrined in legislation,⁴² as has the willingness of successive governments to introduce new legislation, in apparent attempts to be seen to being 'tough on crime.'⁴³

Yet in both England and Wales, and Scotland, the decision regarding whether or not to seek a prosecution (taken by the CPS in England and Wales, and the Lord Advocate and the PFs office in Scotland) is supposed to be taken on the basis of evidence and public interest alone – the English version states that these decisions 'are not affected by bias or by improper pressure from any source,'⁴⁴ the Scottish version 'requires prosecutors to 'perform their duties without fear, favour or prejudice'⁴⁵.

⁴² Peirce, discussing events post 11th September 2001, states '*We could never have envisaged that the history of the new century would encompass the destruction and distortion of fundamental Anglo-American legal and political constitutional principles in place since the seventeenth century. Habeas corpus has been abandoned for outcasts of the new order in both the US and the UK, secret courts have been created to hear secret evidence, guilt has been inferred by association.... and vital conventions consolidated in the aftermath of the Second World War... have been deliberately avoided or ignored'* (Peirce, 2010, p. vi).

⁴³ In the ten years to 2007, in England and Wales, 29 Criminal Justice acts had been introduced, and more than 3000 new offences created, and in the year 2006 alone, '*nearly 5000 pages of primary legislation... were enacted with in addition some 11,500 pages of subordinate legislation made by ministers'* (Bingham, 2010, p.40). Furthermore, the provisions of the Criminal Justice Act (2003) have been described by senior judges as '*"labyrinthine"... 'astonishingly complex'... and 'deeply confusing''*' (Bingham, 2010, p.40).

⁴⁴ 1.5 It is essential therefore that the prosecuting decisions in these cases are taken in accordance with the best and most appropriate practice. Moreover, it is important that their decisions to prosecute or not to prosecute are reasonable and accurate; that they have been taken objectively on the basis of the best evidence by an independent person with the required degree of expertise and experience; and that they are not affected by bias or by improper pressure from any source.<http://www.cps.gov.uk/publications/others/agdeathscust.html>

Safeguards and Accountability

Much of the justification for these changes has been the ‘War on Terror,’ and the impression presented that such treatment is reserved only for individuals suspected of being actively involved in terrorist plans or activities. Yet processes bearing striking similarities to those apparently reserved as ‘anti-terrorist’ approaches appear in cases which could not, by any stretch of the imagination, be considered connected with terrorist activity, and against people who have no connection of any sort with terrorist groups or activities⁴⁶. It is against this backdrop of increasingly punitive approaches, public perceptions of dangerous criminals, and a vastly altered legal apparatus, that individuals attempt to understand and make sense of events as wrongful accusations, prosecutions and convictions unfold.

Unable to formulate any explanation for events which bear no similarity to those expected, or believed to be ‘the norm,’ individuals attempt to incorporate these events into existing beliefs and perceptions, creating rationalisations which only later, in possession of the ‘missing’ information, are seen as illogical and flawed, but which, at crucial times, form the basis for actions and decisions with irreversible consequences.

Initial engagement of Group One and Two Interviewees, with investigating officers, produced a range of similar experiences which were in direct opposition to the beliefs

⁴⁵ The International Association of Prosecutors – *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, which the Crown Office and Procurator Fiscal Service adopted in 1999, states ‘the use of prosecutorial discretion... should be exercised independently and be free from political interference’ and requires prosecutors to ‘perform their duties without fear, favour or prejudice.’ <http://www.copfs.gov.uk/sites/default/files/Publications/Resource/Doc/13423/0000034.pdf>

⁴⁶ For example, one of the cases in this study includes a description of interrogation techniques including sleep deprivation, long periods of interrogation without breaks, food or refreshment, what the accused person believed to be ‘detention’ of some 17 hours in total, all of which were able to be carried out because the person involved was classed as a “witness” by police investigators, and therefore not a “suspect” as defined, and protected, by PACE. The crime was the murder of the (eventually) accused person’s wife, with no suggestion of any terrorist activity or involvement.

and perceptions held; claims of dishonesty and disrespectful treatment by police officers, refusal of officers to recognise honesty or 'reliable witnesses,' favouring, instead, what were considered by interviewees to be 'obviously' unreliable or dishonest witnesses, misleading or false information, and trickery, all of which ended up being used to secure convictions.

These tactics, as has already been observed, are recorded in cases involving 'suspect communities' and in large scale incidents, but the experiences of Group One and Two interviewees suggests a far more widespread and routine application.

Lack of accountability, and the obstacles faced by those trying to have police misuse of powers addressed were two themes which arose repeatedly.

Initial contact with police; persons deemed to be, and believing themselves to be, witnesses

One of the most shocking discoveries for family members was the sense that the police appeared to suspect them of dishonesty. In 36% (or 11 out of 30 cases), family members reported feeling that the police clearly did not believe what they were telling them, or that they were made to feel guilty for not providing the information that the police were obviously seeking. Others reported police officers reading back statements where the meaning or emphasis had been changed to make the statement sound more critical of the accused, or more in line with the accusations made, and the difficulties experienced when trying to have those statements amended to more accurately reflect what had been said:

‘I was questioned half an hour after they’d come and taken my husband away and they took a statement...I was saying I couldn’t understand what was going on... I couldn’t see why my daughter would lie, but at the same time, I couldn’t see why my husband would lie. I was in the middle... I just didn’t know anything, but I wasn’t happy with the wording- they made it sound detrimental to ***, so I made them change it. Looking back, it made it look even worse- the statement wasn’t explained how I’d explained it, there were things missed out that I was trying to say.’

(family member, accused convicted, sentenced to 14 years.)

The most commonly reported concerns regarding initial contact with police as witnesses were lack of information, lack of compassion from investigating officers, and what later became apparent as blatant dishonesty. Many interviewees reported feeling that the lack of information was a deliberate ploy to isolate both the accused from their sources of support, and the family members from each other, and from the wider public. ‘Off the record’ comments and conversations were perceived as threats of negative consequences for family members for failing to provide the information sought, or for ‘interfering’ in the police enquiry by asking questions or being ‘difficult,’ when, in reality, the individuals concerned were immobilised by the lack of information, and unable to figure out what was ‘required’ of them. Questions of no apparent relevance to the investigation caused distress and confusion amongst witnesses. Female partners reported feeling humiliated and degraded by questions of a sexual nature which

appeared to them to have no relevance whatsoever to the enquiry, or to the nature of the crime.⁴⁷

Lack of information, dishonesty and insensitivity by police in large scale incidents are documented in accounts of tragedies such as Hillsborough and the Dunblane Shootings (e.g. Scraton, 2007), but what emerged from the Group One to Three interviewees was an apparently routine, generalised use of these approaches.

The mother of a minor, held by police in extremely traumatic circumstances, was unaware of his whereabouts, or the trauma which had occurred (the discovery of a murder victim). Her repeated attempts to reach him on his mobile phone were known to police, who were in possession of the mobile phone, but ignored for 90 minutes, after which she was simply told to make her way to the local police station. On arrival, she found her son had been stripped naked, searched, and placed in a paper suit, without any responsible adult present, even though police officers knew she was on her way to the police station.

Another was told that her son had been arrested, (but not what he had been arrested for) and she would have to ‘go into protection.’ She was removed from her home, taken to a hotel, and left there, without explanation. Three days later, two officers turned up and told her she was to be moved, along with her daughter and daughter’s family and

‘just as an afterthought, he turns around and tells me, “by the way, the arresting officer was absolutely furious with your son... and gave him

⁴⁷ Several of these did not want this recorded in interview for this study, but volunteered the information afterwards, agreeing that it could be used. There was a tendency not to want these details ‘recorded,’ in part because of a feeling that ‘people’ would think they were being over-sensitive, were over-reacting, or that it would seem ‘stupid.’

dog's abuse because he told us about the murder but he didn't tell us he was effing there." And I'm standing there thinking, what am I listening to here? What's going on? [Police Officer] "So just in case you hear he's been shouted and bawled at, oh, and by the way, it's in the papers, it's public knowledge now, so I'm just telling you before you turn on the telly or open the papers," then took great joy in taking the Sunday Mail and opening it and saying, "there you go, there it's there."

(family member, accused convicted, sentenced to 30 years.)

These are the more dramatic examples of police refusing to offer information to families; many are much more mundane and routine, although the effects clearly are not. One woman was awoken at 7am to find a large number of police officers surrounding the house. Locked in the sitting room with two officers who refused to tell her what was going on, she noticed a camera filming through the living room window as other officers went upstairs. She was told the cameras were for 'training purposes' although she later discovered, in fact, that a documentary was being made for airing on general television. She only found out that her partner of 24 years had been arrested for rape because he shouted through the door as he was being taken away. It would be another 48 hours before she learned any more. Relatives reported that they were either told officers were not at liberty to divulge information, or that matters could not be discussed with family members because they were 'witnesses.'

The practise of getting close relatives to sign statements very early in the proceedings, which would render those relatives 'prosecution witnesses,' was widespread. Only one interviewee (family member) in this study refused to give a statement to police in these

circumstances; she had come to the attention of police relatively late in proceedings, and had taken legal advice. She says:

‘They asked me to give a statement that would help ***, they called it a character statement, and it turned out it would have been a witness statement, but I didn’t know that until I spoke to ***’s legal advisor, and he told me not to do it... what they had called it was not what it would have been... and they told me that it was to help ***- they were very clear on that – ‘You would like to help your brother, wouldn’t you?’

(Family member, accused convicted, conviction overturned on appeal)

Many interviewees spoke of what they believed retrospectively to have been cynical and deliberate actions on the part of police officers to both manipulate and capitalise upon the shock, trauma and distress of the situation, asking people to make decisions and give information in circumstances where they were barely able to think. The later realisation that their vulnerability had been exploited in this way was a source of intense anger and bitterness. A common comment was that the police ‘don’t care,’ revealing an underlying presumption that the police would, and should care, and show compassion and understanding in such traumatic circumstances.

Alongside this manipulation of immediate family were several accounts of police directly influencing the wider public. Accounts of police carrying out door-to-door enquires and telling the occupants ‘we are 100% sure he did it’ were common place, as were suspicions that the police themselves were behind rumours which spread quickly through communities. Where immediate family members could not be accessed during

the initial stages of accusation, perhaps because they were away at the time of the initial arrest, the approach of the police appeared to be to create doubt in the minds of those family members as to the accused person's innocence.

About to embark on a two and a half hour drive to visit her partner on remand, this interviewee received a telephone call from investigating officers:

'they said, 'Well, it's really vital, we need to speak to you before you see ***,' and I thought it was going to be something positive... they'd found some evidence that *** didn't do the crime... [police officer] said, 'Do you know your boyfriend is a killer? He's a killer, a killer, he killed his wife and buried her body.' I said 'no, no, he's not a killer, I don't believe you,' and he said, 'You know he's going to go down for this? He's going to get thirty years, do you want to be going around Category A prisons...for thirty years? Do you realise when he gets out in thirty years, you will be sixty?'

(family member, accused still on remand, awaiting trial.)

The same officer, unable to get the participant to back down and accept that her partner was the killer portrayed, was then reported to have resorted to threats:

[Police officer] 'I don't want to come down and arrest you.' I said, 'Why would you arrest me?' and he said, 'Because you've been sending threatening messages, we've got statements.'... and I haven't, god's honest truth I have not sent no-one threatening messages. I wouldn't even, I said to him, 'I wouldn't even know how to threaten someone.'

One family reported a combination of misleading information, dishonesty, coercion and threats in quick succession, long before the accused was ever identified as a suspect:

‘They brought us back from the station. We were exhausted, in total shock, we just couldn’t believe it. We’d been there all night, but there was nothing we could tell them... my son found the body, that was really it... Over the next few weeks, it was like a nightmare. The liaison officer was the worst. She kept telling us ‘it’s just procedure, it’s just procedure.’ That was their favourite – everything they did was just procedure. When they descended on us at 7 o’clock in the morning, this female cop, she kept barking at me, stand up, sit down, go over there, get over here. I hadn’t a clue what was going on, but I thought, well, we’ve got nothing to hide – let them get on with it...they weren’t going to find anything, cos there was nothing to find. I found out later they waited until we were out of the house, and then they searched it. They questioned my other son – they told him, we’ve got people telling us this and that – trying to make him think his brother was lying...We didn’t know what to do. I asked them, is *** a suspect? No, they said, this is just procedure. But they were telling his brother, if we find out you’re lying ... that’s really serious... you’ll go down for it.’

(family member, accused convicted, sentenced to 20 years.)

The trauma of having family members arrested and charged, with no warning or inclination of what was about to happen, was compounded by the behaviour of the police officers involved. Most interviewees in this study reported trying initially to

rationalise these behaviours – from believing that ‘this is just the way these things are done’ because they had had no previous experience of those circumstances, to believing that the police were acting on mistaken beliefs about the guilt of the accused, and once that mistake was recognised, everything would be resolved. Most Group One and Two interviewees, at that stage, were not openly hostile towards the police, nor had they lost faith and trust in the police as a whole. The strength of their commitment to the belief that innocent, law abiding citizens had nothing to fear from police investigations was enough to over-ride and rationalise their early concerns. Early misgivings were allayed by the absolute belief that the police did not ‘do things like that’ to ordinary members of the public, even though many conceded that they could understand and condone such behaviour when ‘proper criminals’ were involved. Several expected an apology, or at least an explanation, once the ‘mistake’ had been realised.

One woman, following her father’s arrest, was visited by what she called ‘the dodgiest officer on the planet’ who wanted to interview her children alone. (The woman’s father had been arrested on suspicion of sexual abuse of a minor.) As she tried to find out what he was going to ask (the children were very young, and unaware of sexual terms) she reports that the officer said, ‘If you don’t let us interview the kids, it’ll be your fault when your father goes to jail.’ She says:

‘It was blackmail, pure and simple, but I wasn’t having that...we were all treated like we were scum. I would never have believed they could put kids through what they did...they treated every one of us like criminals. Ordinary, decent people shouldn’t have to protect themselves from this

sort of thing – it’s crazy. When it’s just you and your family, you don’t know what to do.’

(family member, accused convicted, conviction overturned on appeal.)

Initial contact with police; individuals believed by police to be suspects

If the experience of contact with police in the investigation of crime came as a shock to family members of individuals accused of crimes they did not commit, the experiences of the accused themselves were utterly alien. Many had never shared with their families the extent of the distress, humiliation and degradation suffered at the hands of investigating officers in the early stages of the investigation.

The most commonly reported concerns were isolation, disorientation, bullying and dominance, and an inability to be heard. These experiences were doubly shocking in that the accused were trying their best to assist the police, believing initially that their innocence would be ‘obvious’ and that, if it was not immediately obvious, a logical explanation would suffice. Interrogation tactics, considered by many to be ‘over the top’ for the circumstances, were reported in several cases.

Initial contact with the police in half of the cases covered by this study (as reported by Group One and Two Interviewees), was based on police re-assuring the accused that there was nothing to be concerned about, and that their arrest was simply a formality to assist in the investigation. Individuals who were told this reported that they accepted it at face value as true.

Group One and Two Interviewees reported that those arrested for the most serious crimes (murder and sexual assault) were arrested without warning or inclination that they were considered suspects. Some 59% (or 18 accused persons who were actually arrested) were reported to have believed they had been treated as witnesses for some time before arrest (from days to several months) and were also reported as having been lulled into a false sense of security in that their prior dealings with police investigators had convinced them that the police knew they were innocent. For the remainder, the arrest came literally ‘out of the blue.’ Those who were bailed, however, maintained a strong belief that bail was an indication that their arrest had been either a mistake or a formality, on the basis that the police would not leave people they genuinely believed had possibly committed such serious crimes at liberty in the community.

Interrogations largely appear to have followed the processes of selection, closure, resistance, exercise of power and interpretation outlined by Green (2008). Other acknowledged interrogation techniques (e.g. Peirce, 2010) were claimed to have been employed – sleep deprivation, food deprivation, removal of points of reference (time, recognisable surroundings, isolation, long periods of separation from others, and so forth), many of these being deployed even in relatively short duration interrogations (up to six hours). The result was to compound the sense of disbelief and trauma, but few individuals in these circumstances had any awareness of how the outcomes of those interrogations would be used, believing, instead, that this was still a terrible mistake which would be rectified. Most had no idea that what they had said would be presented in ways far removed from the meanings they intended.

Part of the reported experience of arrest, prior to interrogation for those remanded, was a humiliating and demeaning stripping and photographing of their naked bodies. Still trying to rationalise events, those who suffered this experience were at a loss to understand why it had been done:

‘the medical was the hardest because I had to stand there naked and have photos and swabs taken, but after two and a half days... they released me on no conditions bail and said thanks for the help. I thought that was that.’

(Accused, re-arrested 3 weeks later, sentenced to 20 years.)

This interviewee was 22 years old at the time, and a missing person enquiry had been turned into a murder enquiry, although no body had been found, and there had been a delay of 5 days before the ‘victim’ had been reported missing. The interviewee did not, at that stage, believe that he was suspected of murdering the girl, even though he had been arrested on suspicion of murder, believing instead police reassurances that he was ‘just helping with enquiries.’

An even younger participant had not even been arrested when he was stripped, photographed and swabbed. Following the discovery of a murder victim, he reported that he was immediately isolated from contact with anyone other than police officers, taken to the police station, and told to strip, whilst two male officers looked on:

‘I didn’t even know what I was doing. It was the worst... I couldn’t think about anything...my mind just wouldn’t work. They were stuffing my things into bags, then one of them said, ‘You’re supposed to be wearing

gloves' so they took them back out of the bag, put gloves on, and put them back in. It was cold. I was shivering. I'd been shivering since we found her... They just pushed me where they wanted me to go. Taking the pictures, that was bad. I couldn't cry, I couldn't do anything. I think that was when my mum arrived.'

(Witness, later accused, convicted, sentenced to 20 years.)

The use of interrogation techniques, coupled with the obvious trauma of the accused person, led to individuals feeding into the allegations against them. One convicted person explains:

'I was answering anything and everything they asked as a witness due to shock, stress, withdrawal from alcohol (I never went more than three hours without alcohol) and being drunk at the time. I did say some things that were not true. Some of them out of embarrassment and because I couldn't see how it could possibly help. Then when it came to being interviewed as a suspect, I stuck to what I had said originally as I didn't want to appear to be a liar, plus it still couldn't assist them in the investigation.'

(witness, later accused, convicted, sentenced to 18 years.)

Another had just qualified as a medical doctor. Following a night out drinking, he was arrested the next day on suspicion of having caused a serious road traffic accident. He had left his car at a friend's house, and had been surprised when his flatmate returned from a trip to the shops to say the car was parked outside with a broken windscreen.

Taken in for questioning, he was at a loss to explain how his car had been returned, and where the missing spare key had gone. His mother reports:

He said, 'All the way through the training at medical school, [we're] told to tell the truth' ... and doctors should tell the truth. So he thought he would tell the truth and that would be it. They would realise it wasn't him... I think perhaps *** sometimes had doubts in his mind, you know... the police were saying to him all the time, you did this, you did this. You know, you can imagine, if you've been out for a drink and you've had a good drink...he told the police 'I don't think I drove the car...I've no recollection of driving the car...' [Speaking of the judge later], this woman says, 'he saw that comment and that was it... didn't listen to any of the evidence that proved it weren't him. It was enough for him that he owned the car, he was there and someone had to be punished for it.'

(family member, accused convicted, sentenced to 12 months, appeal pending.)

Some Group One and Two interviewees believed that officers had recognised their innocence, and the interrogation 'had to be seen to be done' to prove that innocence. As a result, they spoke freely and openly, unaware that they were helping police to build the case against them:

'they would let me start telling them everything I knew, then after a couple of interviews, they would stop me then end the interview and let me go back to the cell, and when we went back, they would make me start from

the beginning and every interview, they would tell me about a new bit of circumstantial evidence they had. I later got told at the trial they done this to try and make me slip up on statements and drip feed me the circumstantial evidence to knock me off track and to see if I would change my version.’

(accused, convicted, sentenced to 20 years.)

The combination of trust that police officers would behave honestly and investigate ‘properly,’ with the knowledge that they were not the perpetrators of the crimes in question, led accused people to volunteer information and belongings in circumstances where they believed such information and belongings would be dealt with professionally. The most common items which later became ‘evidence’ against the accused were mobile telephones and home computers/laptops. Almost the entire case against one participant rested on evidence of texts apparently read and responded to by the accused. It would later emerge that there was no record of when, and by whom, text messages had been opened. The phone in question had been handed over to police officers almost immediately the body had been found. In another case where text messages featured significantly, it became apparent that messages had been sent from the handset after it had been handed into the possession of the police. Similar accounts emerged regarding information produced from home computers and laptops. The difficulties faced by these people in having such practices recognised after conviction, are discussed in Chapter Seven ‘Post Conviction Processes.’

The extent to which the innocent will hand over all and any articles which they think may assist the police (and which often later are used as ‘evidence’ against the accused)

is perhaps exemplified by a family member of an accused person who had volunteered information that he was a keen photographer, and had handed over every camera and roll of film he possessed, along with his personal computer:

‘They went to go out the door and I said... but you haven’t gone anywhere other than the loft, where ***’s computer is, and she said, Yes, we’ve got that ... I said I’ve got a computer in the lounge, I’ve got cameras.... they looked at each other in dismay and said, right, well we’d better take that as well.’

(family member, accused convicted, sentenced to 11 years.)

The expectation that police would take video equipment and computers was virtually universal. One interviewee, whose partner had been accused of historical sex offences some 16 years earlier, was quite resigned to the fact that the police would take all of the computers in the house, even though she could not see the relevance of those bought in the last three years:

‘What did they hope to find that could prove something that happened 16 years ago, when the computer they took didn’t even exist until 13 years later?’ she asked.

(Family member, accused convicted, sentenced to 12 years.)

This resort to ‘logical progression’ rationalisations in order to interpret and understand events in itself caused accused persons and their families to take actions (or attempt to do so) or not take actions which, to them, seemed to make commons sense. Unaware

that investigators were not ‘playing by the same rules,’ many ‘turned detective,’ following what they perceived to be logical lines of thinking, piecing together what they believed to be a ‘bigger picture,’ at the same time believing that bigger picture to be the same as the one being pieced together by investigators.

Where it was discovered, for example, that witnesses believed by families to be helpful to their case (because their testimony supported the innocence of the accused) had not been interviewed by investigating officers, family members encouraged these witnesses to contact the police directly. There was a clear expectation that those testimonies would be taken seriously, and given ‘due weight’ in consideration of the evidence for and against the accused person. The reported experience either of having those witnesses told that their testimonies were not required, or of the families themselves being approached and admonished for ‘interfering with the investigation’ by approaching potential witnesses was one which surprised, confused, and ultimately angered accused persons and their family members. Initially, it did not occur to them that this was an indication that the investigation had begun to take a particular direction – once again, there was no contextual framework in which to consider the implications of investigators’ reactions to the new information they (the accused or their families) had brought to light.

A sixteen year old, charged for a murder in which the murder weapon was a knife, took police officers to where he had thrown away a blunt gardening knife a few days previously, in the belief that this would ‘prove’ he was not the killer, as the knife could not possibly have any evidence of the murder victim on it. The boy had no way of considering the possibility that the knife would be used to exactly the opposite effect –

to claim that he was ‘in the habit of carrying knives.’ Had he not taken the police to this knife voluntarily, it is highly unlikely it would have been discovered at all, and this claim could not have been made. Further, he later explained that he had been afraid, if the knife had been discovered, that it may be claimed that he was trying to ‘hide’ the fact that he occasionally used knives for gardening work, and that would ‘look suspicious.’ In his efforts to be open and transparent, this youth handed the means of his eventual conviction to the police.⁴⁸

Beliefs and expectations about how the police should behave in serious crime investigations were based largely on fictional media representations with 40% (or 18 out of 46 Group One and Two interviewees) reporting learning about police procedures from these sources, and over 70% (or 33 out of 46 of the same groups) indicating a belief that there had never been any need for them to know otherwise.

Against these beliefs and perceptions is an apparatus which reinforces, condones, and justifies the tactics used by investigating officers (Reiner, 2010, Peirce, 2010, Punch, 2009). ‘Policing by consent’ is held to be a fundamental factor in democratic societies, yet definitions of what constitutes ‘policing’ are vague and difficult to articulate, even when there appear to be clear rules and guidelines. The ‘terrorist threat’ has been utilised to ramp up public fears about violent crime in general, and the raft of legislation introduced in response has had far reaching consequences.⁴⁹

⁴⁸ This boy had told his solicitor about the knife, and about his concerns, and it was on the solicitor’s advice that he took police to where he had thrown the knife away.

⁴⁹ The Regulation of Investigatory Powers Act 2000, for example, allows that ‘*more than 650 public bodies are empowered to obtain communications data, including all 454 local authorities in the country. They may exercise this power for the purposes of preventing and detecting those suspected of crime...*’ (Bingham, 2010, p.156). Furthermore, ‘*the UK has been said to have more than 4 million cctv cameras, the largest DNA database in the world, and...there are more than 1000 laws and regulations which permit officials to force entry into homes, cars and businesses,*’ but ‘*the main reaction by the public to this steady encroachment by the state into what had been regarded as the private domain of the citizen has been one of apathy....[this] may be because the end (preventing terrorist violence, catching criminals) justifies the means ; it may be because most people are unaware of what is*

Peirce, points out that *'reactions of decency and humanity can be invoked without the necessity of legal explanation'* when a country's willingness to resort to torture is exposed but *'less likely is any instinctive reaction to evidence of the destruction of concepts of procedural fairness'* (Peirce, 2010, p. viii).

At the heart of this encroachment of surveillance on the one hand, and erosion of rights and concepts of procedural fairness on the other, are specific areas of legislation which actively encourage and endorse the types of police behaviours identified in this study:

'Under sections 36 and 37 [of the Criminal Justice and Public Order Act 1994] inferences about a suspect's involvement in crime can be drawn from his or her failure to give a satisfactory account during an interview for incriminating marks, objects or substances on or in the possession of the suspect, or for his or her presence at a particular place⁵⁰' (Green, 2008, p.22).

Police interview techniques which create the circumstances in which objects, marks or substances are considered 'incriminating' from the police viewpoint, make it impossible for suspects to provide 'satisfactory' accounts, if the objects, marks or substances have a totally innocent explanation from the suspect's viewpoint, especially when in the culture of police investigators

happening; or it may be because, surveillance being covert, no-one knows they are being watched, their movements recorded, their communications intercepted or monitored' (Bingham, 2010, p. 157).

⁵⁰ In England and Wales. There is no right to draw negative inference from silence in Scotland as yet.

‘there is never any question that what is simply offered by suspects as accounts and explanations of events which are the subject of police investigations, can be accepted as true, and any interview in which the suspect denies or offers a defence to allegations is based on an assumption that the interviewee is concealing the truth’ (Green, 2008, p.23).

Indeed, a retired senior police officer who participated in this study stated, ‘You come up in this culture where you believe...you take it for granted that you’ll get support from your colleagues, you take it for granted that crime is wrong, **you take it for granted that people who are accused are guilty**... that’s the sort of culture you’re brought in – it’s certainty...’ (emphasis added).

The majority of Group One and Two interviewees did not belong to recognisable groups traditionally at risk of being targeted in police investigations – only 5 out of 30 accused persons displayed characteristics which are generally supposed to contribute to wrongful accusation or conviction – teenaged males, learning disability, homelessness and former drug addiction being those factors (e.g. Reiner, 2010). The remaining 83% (or 25 out of 30 accused persons) were all either in full-time employment or retired, with occupations ranging from medical doctor, policeman and businessman to bookbinder and lorry driver. Although almost all of the accused/convicted people referred to in this study were male (there was only one female), more than 80% were married or in long term relationships, and so did not fall into the category of ‘loner’ or ‘oddball.’⁵¹ Similarly, the family members whose experiences are also documented

18. This is higher than the average for the general prison population, in which only 55% report having been married or living with a partner before imprisonment. Also, all of the Group One interviewees remained in close contact with spouses and families, as opposed to the 43-48% of the general prison population (both remand and convicted) who have lost all touch with spouses and/or families

came from what they considered ‘respectable’ or ‘professional’ backgrounds – senior nursing personnel, business owners, mental health professionals, publishers, teachers and so forth. Therefore, the explanation for investigations coming to focus on them, and the treatment experienced by them from police officers, cannot be that police investigators were acting upon these types of stereotypical assumptions.

Although official denial can prevent information about these processes and procedures routinely adopted by investigating officers becoming known to the public, it cannot account for their existence in the first place. Some interviewees made reference to the high profile miscarriage of justice cases of the 1980s and 1990s, with the expressed opinion that such things had been stopped, and could not happen in current times. Yet a combination of extraordinary powers⁵² becoming routinely used (Lord Bingham 2010), and weakened safeguards over the abuse of police powers⁵³ (Reiner 2010) leaves wide open the potential for innocent individuals to be wrongly accused and convicted.

Over 70% (or 33 out of 46 interviewees) of Group One and Two Interviewees, reported an initial belief that ‘exercising their legal rights’ – even from the earliest stages of having a solicitor present during interview, was either not something they considered particularly important, because they or their loved ones were innocent, or dependent on police advice as to whether or not a solicitor was necessary. There was also a significant belief that demanding access to a solicitor would be seen as a sign of guilt, in that

http://www.gos.gov.uk/497296/docs/219643/431872/468960/SEU_Report.pdf

⁵² ‘this... is part of a repeated pattern: extraordinary powers, first exercised only against non citizens, on the grounds that they do not enjoy the constitutional protection extended to citizens, and arousing little protest because applied to non citizens only, are then extended to citizens also’ (Bingham, 2010, p.151).

⁵³ ‘Since the early 1990s, pressures towards more police malpractice have intensified greatly with the new political consensus about tough law and order. At the same time, concerns about police abuse have been relegated in priority compared to the new imperative of crime control... this has resulted in a vast expansion of formal police powers and a dilution of safeguards over their abuse’ (Reiner, 2010, p.211).

innocent people should have no need of legal representation, since they had done nothing wrong in the first place.

The total loss of faith and trust in the police as a result of these experiences, not only for accused persons, but also for their family members is significant. Every Group One and Two interviewee, without exception, when asked to compare their thoughts and beliefs about the police before and after the police investigation in which they were involved, reported having no faith or trust whatsoever in the police, as a direct result of their experiences. A significant number of family members (over 50% or 18 out of 35 persons interviewed) also reported that, should they need the police for anything, they would either not call them, and try to deal with matters themselves, or, if they did call, would not trust or believe that their concerns would be properly dealt with.

Campaigner Kevin Blowe, writing for the independent magazine Red Pepper, suggests that increased police influence on policy making, means that

'The left's traditional view that the police are just the arm of the state is now far too simplistic; the last decade has seen the police emerge as a powerful political player in its own right. It is as innately conservative and as ready to use physical force as ever but more influential, more independent and more difficult to hold to account, a kind of Fifth Estate that in the short term is almost impossible to reform' (Red Pepper, July 2009).

Lord Bingham's observation that extraordinary powers intended for non citizens eventually become used against citizens finds echoes in Peirce's suggestion that by invoking concepts of 'security' – such a *'dramatic yet ill defined concept that those in power are able to muzzle criticism and prevent debate by invoking it,'* and because *'those in power draw on traditions of deference and non-partisanship when it comes to national security, allowing governments to avoid provision of any reasoned justification when it is said to be at stake... [t]here is a dangerous circularity to the entire process. Deference is fed in part by ignorance, and ignorance is fed in turn by claims that secrecy is essential. The public receives only the barest of justifications, to be taken on trust, while the government machine ignores or short circuits normal democratic processes'* (Peirce, 2010, p.10).

Responses to a number of high profile incidents involving apparent misconduct by police have, in the main, failed to hold police officers accountable (the death of Christopher Alder in police custody, the death of Ian Tomlinson at the G20 protests, and the overturning of the conviction of Sgt Mark Andrews for the assault on Pamela Sommerville in police custody, for example). If accountability cannot be had in such high profile incidents, then it is reasonable to conclude that accountability for police behaviours in apparently routine investigations and interactions will be even more difficult to achieve, and the justifications for this lack of accountability remain shrouded in loose associations between notions of policing and 'security.'

According to Punch (2009, p.33),

'if the accent is placed on....the abuse of authority by enforcers of the law to break the law, and then on police officers' ability to use their special status to avoid detection and investigation, we are speaking of abusing the office to commit crime and entering a criminal conspiracy to avoid detection... This takes us primarily into the group of offences such as 'process corruption' to fix cases and achieve convictions by illegal means which may be done for a variety of motives such as so-called 'noble cause corruption...'

Conclusions

Prior to the events of September 11th 2001, a number of scandals involving police misconduct had seriously undermined public confidence in the police, and a number of reforms were implemented, both as clear attempts to re-build confidence, and to 're-brand' policing in terms of efficiency, performance and 'best value' (Martin, 2008:8).

Following 9/11, against a backdrop of fear and an increasingly punitive approach to crime and criminals, reform of the CJS under New Labour began to be introduced at a time *'when 'terror' becomes an imaginary of extraordinary resonance, which can bring about, among other effects, responses by governments of democracies, supported by large numbers of the population, which are contrary to their liberal democratic traditions and values'* (Hudson, 2009, p.703).

Increased police powers and discretion were introduced alongside the portrayal of policing *'under continuous improvement, and meeting efficiency and savings targets'* (Martin, 2008, p.173) giving the impression of a more accountable police.

Bradford refers to two contrasting accounts of trust and confidence in the police: on the one hand, declining deference towards the police and the changed economic climate may have created challenges for the police, yet on the other, these changes have *'triggered growing, or at least sustained, identification with the police, particularly among those who turn to it as a symbol of stability as much as law and order in an increasingly disorientating and apparently threatening world. This account finds resonance with studies that have highlighted the extent to which support for the police is as bound up with concerns about disorder and social cohesion as it is with crime per se'* (2011, p.180).

Additionally, *'the news media present a picture of crime which is misleading in its focus on the serious and violent, and the emphasis on older, higher-status offenders and victims. Reporting also exaggerates police success in detection. The corollary of this is a presentation of the police that is, without doubt, favourable. The police are cast in the role they want to see themselves in – as the 'thin blue line' between order and chaos, the protectors of the victimised weak from the depredations of the criminally vicious'* (Reiner, 2010, p.180).

The 'everyday' approach to routine crime encourages a mindset which encourages active steps towards protection against crime – an identifiable indicator of 'responsibilised' citizens, creating the obvious risk that the very act of taking precautions and attempting to reduce risk may feed into the more punitive 'dangerous others' approach. Garland states:

'For some the crime problem has become a source of anxiety and frustration, an urgent daily reminder of the need to impose control, to take care, to secure oneself and one's family against the dangers of the modern world. Anxieties of this kind are often mixed with anger and resentment and, when experienced en masse, can supply the emotional basis for retaliatory laws and expressive punishments' (Garland, 2006, p.155-6).

This reinforcing of public perceptions of crime, of government policies designed to tackle crime and criminals in a 'tough' manner, of the imminent threat of terror or violent crime, and of a police force better managed, more accountable, and the protective 'thin blue line' between order and chaos, allows for harsher treatment of 'them' – the 'criminals,' 'terrorists,' 'dangerous (or different) others,' and for the introduction of processes, rules or laws seen as necessary to deal with those threats.

That acceptance of Hudson's 'ticking bomb' scenario⁵⁴, representing, as it does such an extreme departure from previously agreed principles and values – *'the ticking bomb is the core of a liberal ideology that allows the unthinkable to be thought and to be approved by the highest ranks of lawyers and politicians, as well as the public'* (Hudson, 2009, p.708), demonstrates the extent to which rights and protections can be undermined and eroded where the 'right' justification is seen to be present, leading critics to argue that *'once it [torture] becomes legally recognised and bureaucratized, its use will spread, possibly from terrorism contexts to more everyday criminal contexts'* (Hudson, 2009, p.708). It is therefore reasonable to assume that departures

⁵⁴ Describing the 'ticking bomb' scenario to demonstrate the acceptance of 'lesser evils,' Hudson notes: *'The 'ticking' bomb scenario is the epitome of the permissible use of torture according to the lesser evil ideology. If a captive is thought to have information about an imminent terrorist attack that may result in multiple deaths or injury, then, the argument is, the absolute ban on torture must give way to the duty to prevent further injury, especially if the casualties may be many and are likely to be innocent citizens'* (2009, p.706).

from other, lower level, accepted rights and protections can, and will, be justified in the same ways.

Awareness within police organisations of the need to maintain public confidence and trust, and of the ability of police organisations to control how police are represented publicly⁵⁵, creates a situation whereby the police themselves are instrumental in shaping public beliefs and perceptions:

‘The appearance of ‘normal policing’ can be pursued by ensuring visibility of positive acts and achievements and equally by concealing negative instances. Maintaining silence and preserving secrecy, while having a justifiable role in certain aspects of policing (e.g. conducting lawful covert operations) are also familiar protective practices against public embarrassment and formal accountability’ (Goldsmith, 2010, p.915).

Punch (2009, p. 191) points out that these circumstances may lead to instances where *‘if the wider environment and/or the organisation itself are dirty, deeply devious and consistently corrupt, or they sponsor dirty means for gaining espoused ends, then the ‘dirt’ is institutionalised.’*

Many of the tactics and techniques which appear to have been employed by police officers in the cases which form the basis of this study were not wholly ‘dirty’ or

⁵⁵ police visibility, *‘as a critical component of how they appear to the public, invites assessments of the propriety (or rectitude) of their behaviour, and thus plays an important role in determining public reactions to the police’* Goldsmith 2010, p.914) and *‘these visible markers [uniforms, marked vehicles] drew attention to their presence and signalled their lawful authority to those with whom they came into contact’* (Goldsmith 2010, p.914) demonstrates that this visibility can be manipulated: *‘Police organisations ... have a clear interest in how their personnel and activities become visible to others and what is revealed as a result to outsiders’* (Goldsmith, 2010, p. 915).

corrupt as such, although they departed greatly from the expectations and perceptions of those subjected to them. They do represent, however, an apparently routine and mundane tendency for police officers to begin at the end, by deciding in advance of any investigation what their desired outcome will be, and to work backwards, constructing the case to fit. This may be, in part, because the emphasis on ‘clean up rates’ as a prominent part of police performance assessment feeds into the fact that

‘police... have to consider what tasks take priority [in order to meet efficiency and savings targets, within the wider goals of improving clean up rates] as they will not be able to fulfil all the demands placed on them with the resources provided. The police may feel further alienated at the further development of the league-table mentality, which pits police force against police force (Martin, 2008:8, p.173).

It may also be, in part, because of the ability of police to conceal their activities in this respect – unlike ‘high profile’ police behaviour (such as policing protestors) which can be, and increasingly is, caught on video camera,⁵⁶ the vast majority of initial contacts with police in the cases featured in this study were in private homes.

The expectation, amongst Group One and Two interviewees, that police investigations would follow particular rules and processes, based on assumed values and police integrity, was based largely on media derived information, much of it fictional. Further, most interviewees shared the wider public perceptions of ‘dangerous criminals’ being

⁵⁶ e.g. the recent dishonesty of a senior police officer in encouraging peaceful protestors in London to believe they would be free to leave, before leading them into a kettle, and having all of them arrested, was filmed and widely distributed on the internet (Guardian, March 28th 2011).

‘out there,’ so could not conceive initially of any notion that police may consider them (the accused, or their family members) as ‘criminal.’

Police officers prioritising economy and high clear-up figures, against a public perception of dangerous criminals needing to be apprehended and punished as quickly as possible, with a highly publicised political agenda claiming to be ‘tough on crime, tough on the causes of crime’ opens up the possibility that both the impression of achieving economy and high clear up rates, at the same time as appearing to be tough on crime, can be achieved without any criminals actually being apprehended.

The ‘collateral damage’ is innocent individuals, slotted into the roles demanded both by public calls for perpetrators of serious crimes to be apprehended, police requirements for serious crimes to be cleared from their records, and the largely unsupervised, low accountability nature of police practices.

A serving police officer with 31 years’ service, whose policeman son was wrongly accused by fellow officers said:

‘give the public perception that everything’s fine and rosy and dandy. I’ve got officers on cctv lying, filling in false records, loads of criminal offences, and the police said there’s nothing to investigate, they just refuse, because they don’t want it out in the public domain...The police are purely out to con the public and they will get anybody, and finger anybody, they’ll put all their efforts into getting the prosecution, and the problem is, while they’re doing that, the real crook is still out there and they’re losing

evidence...The police are so politically scared now of politics and public perception and it's getting worse, and there's more and more innocent people just going to get put away because it pacifies. No police force wants a serious outstanding crime on the books now.'

(Family member, serving police officer, accused (also police officer),
convicted, sentenced 15 months.)

CHAPTER FIVE

Evidence

Introduction

One of the most important purposes of all police investigations is to produce ‘evidence’ which can be used to obtain prosecutions. “Evidence” is the material from which criminal investigations and prosecutions are built, its definitions and meanings taken to be commonly understood and self-evident. This chapter examines why it is necessary to clarify what is understood by the word ‘evidence,’ and how its different meanings to different groups and individuals impact on both the processes which lead to wrongful convictions and the experiences of those who find themselves wrongly accused/convicted, and their families. A number of common understandings of information which is believed to constitute evidence are examined, and the differences between these understandings and their legal equivalents are addressed, with the emphasis on the effects of those differing understandings on the wrongful accusation and conviction of factually innocent individuals.

Throughout the experience of wrongful accusation and conviction, and post conviction processes, a recurrent difficulty is that of differences between lay understandings and legal understandings. Common phrases and concepts were accepted, by wrongly accused/convicted persons and their families, as having only one ‘common sense’ interpretation, whereas to legal professionals, the interpretation was something completely different. McEwen reminds us that *“the rules of evidence may be seen to suppose that the object of a criminal trial is not to ascertain the objectively accurate*

picture of the facts, but to adjudge how effectively or otherwise the prosecution has proved its case” (1998, p.17)

Restrictions on what can and cannot be used as evidence are poorly understood by accused persons and their family members. Although there has been much discussion and debate about the failings and difficulties of certain types of evidence, and their contributions to wrongful convictions, those discussions will not, of themselves, form part of this study, as the importance of evidence in the context of this study refers to what accused persons *understood* to be evidence (or, indeed, not evidence) and how those understandings impacted on actions taken or not taken on the basis of them.

Forensic science expert, Professor Allan Jamieson, speaking at the Annual United Against Injustice (UAI) Conference, Dragon Hall, London, October 2007 said,

‘What is evidence? I asked this of a police officer with 28 years experience, and he had to think about it. He said, ‘well, evidence is what we collect.’... Evidence is something that can help to prove or disprove a story. So we’ve got a bit of problem here, because unless you’ve got some kind of a story in your head, you don’t know what you’re collecting. So that gives me the beginning when I’m working for the defence. What was collected, and why was it collected? Why did you collect this part and not that part?’

Perceptions and beliefs about what constitutes ‘evidence’ was one area where Group One and Two interviewees were most strongly reliant on concepts of ‘common sense’

and logical progression. For most, the first thoughts of evidence were the fact there would be none which could be used against the accused person, because s/he had not committed the crime. This lack of evidence, it was strongly believed, would have been enough, in itself, to convince investigators of the innocence of the accused.

But, as the quote from Prof Jamieson above illustrates, police officers cannot collect what is not there. This was a concept which Group One and Two interviewees found difficult, if not impossible, to accept, although for most, the realisation that this approach had formed part of the manner in which the case against them had been constructed, came too late to challenge.

The idea that investigating officers ‘start off with some kind of story,’ and base their ideas of what to collect or not collect as evidence on the basis of that story is something that simply did not occur to any of the participants in this study. Quite the opposite was the case – it was their belief that investigating officers began with an event – an incident which was the outcome of some sort of foul play, and would look at everything with an approach of neutrality and impartiality – if it could be interpreted as fitting with what might have happened, then it would be given degrees of importance as a picture *emerged*. The differences in approach here are stark. But more importantly, consciousness of the difference in approach is available to only one group – the investigating teams. The accused and their families have no idea that what they imagine will, and should, be considered as evidence will not even be further examined if it does not fit with the ‘kind of story’ to which the entire investigation is being tailored. Yet, as Reiner comments,

'Police abuse is not the product of some overweening constabulary malevolence, constantly bursting at the seams of whatever rules for regulating conduct are laid down. It is based on pressure to achieve specific results, using traditional techniques that may often be inadequate'
(Reiner, 2010, p.211).

The achievement of 'specific results' is clearly dependent on strategies which will lead to such specific results, those strategies being decided in advance, and incorporated into the ongoing process. This does not, of course, necessarily constitute 'abuse,' rather the adaptation of 'traditional techniques' to meet with the requirement to achieve 'specific results.'

A difficult question for many families to understand was why, with the availability of 'obvious' evidence, did the case have to go to trial? Many rationalised this situation by assuming that the police had made mistakes, or that, having set off in a particular direction, the police had no way of halting the process – either way, these families believed, in spite of their disappointment and dismay at the police investigation, that it would 'all be sorted out by the courts.' Perhaps even more importantly, there was an absolute expectation that the defence team would understand the significance of issues of evidence which had been 'missed' by police investigators, and use such issues of evidence to maximum potential in both the preparation and construction of the defence case, and during the trial itself, as an essential part of the 'sorting out' process.

This Group One interviewee, who had been accused of serious sexual offences, before it came to light that the allegations were malicious, demonstrates the strength of feeling

and belief that the outcome of the trial process is the most trustworthy and important factor:

‘I wanted to go to court. I had been accused, but never got a chance to answer. I wanted to tell my side, for everyone to hear the truth. I never got to do that. There will always be people who will think, well, there must have been something. If I’d had the chance to go to court, we could have sorted that. Nobody could have argued with the court’s decision.’

(accused, charges dropped when complainant admitted she had lied.)

There are several types of ‘evidence’ as understood by wrongly accused persons and their families, which differed significantly from what the CJS process recognised or accepted as evidence;

Truth as evidence

This was the single greatest erroneous belief regarding concepts of evidence which emerged from this study. No matter how confused or surprised individuals were about the various differences in understandings, the belief that the truth was an important element of evidence lay at the foundations of decisions and actions taken or not taken by wrongly accused persons and their families.

This person represents the beliefs of the majority of Group One and Two interviewees—that ‘the truth,’ itself, constitutes evidence:

‘I expected the truth to come out at trial – there was nothing else to come out. They were lying – there could be no evidence other than their words, because nothing had happened. That is one of the things I still cannot believe – there was no evidence, none.’

(accused, convicted, sentenced 11 years)

Historical sexual abuse cases are notoriously difficult to defend in court, because there is little ‘evidence,’ as it is generally understood, available. Yet confidence that ‘the truth’ constitutes evidence in its own right, (as considered above), and will be evident to jurors, if not investigators, is strong.

One woman, whose father was arrested on charges of historical sex abuse, said:

‘I understand that if an allegation’s made, they have to investigate it. ..(but) they didn’t investigate. That’s the bit I just couldn’t get my head around – I still can’t. They could easily have spoken to so many people who would have shown she was lying. They just didn’t care. They took her word for it – that was all they were bothered about.’

(family member, accused convicted, conviction overturned on appeal)

However, even in cases where solid, verifiable evidence exists, it is not necessarily accepted as such - this Group One interviewee, who was interviewed for this study whilst awaiting trial, and requested a follow-up interview after being acquitted, had stated that he longed for the trial date to come around, so that he could clear his name. He had been accused of sexual abuse of a child. Following acquittal, he said:

‘What I don’t understand to this day is how it ever got to the trial stage in the first place. They knew we had the evidence that proved it didn’t happen. If they’d been at all reasonable in the first place, we could have explained to them that medically, it wasn’t possible, and they could...they should...have gone back to them and said, ‘You’ve just made this up – we have evidence to prove it.’... They’re like a mad dog with a bone – as soon as they think they can get a conviction, they just won’t let go, even when there’s evidence that there’s no crime, so there can’t be a conviction.’

(accused, acquitted at trial)

‘No evidence’

The belief that evidence is physical and/or tangible led many Group One and Two interviewees to believe that there was little to worry about, since there was no physical or tangible evidence which, they believed, could possibly be used. This was particularly noticeable in cases where a person had gone missing, and a charge of murder had been brought, even though no body had been found. There was almost certainty, both in accused persons themselves, and in their family members, that there could not possibly be a conviction for murder when there was no body, and no supporting evidence. This was in part based on beliefs about what constituted evidence, and partly on apparent reassurances from the legal professions that without such evidence, there could be no case:

‘The judge actually stood there and said, ‘Why is this man here when all you can show me is this?’[and]‘If they believe that someone is dead, they should have enough evidence in my eyes; evidence would be a body part,

you know? ... more blood, more blood to realise someone had actually died... bloodstained carpet, ... evidence found in his car and boot – how could he transfer a body through the whole house that they were living in? How can they arrest someone without a body?’

(family member, accused on remand, awaiting trial.)

Many Group One and Two interviewees were at a loss to understand why their legal representatives would not entertain their offers of ‘evidence’ in support of innocence. The emphasis on ‘no evidence’ as evidence cannot be understated, and some legal representatives appeared, at least to their clients and their families, to share the same beliefs.

For example, one family member said:

‘[the solicitor] was telling [us] that there was no evidence against ***...he just said that because there was no evidence against *** involving the murder, that’s how it would be dropped down to affray... it was a total lack of understanding on my part... because I thought murder was actually, physically doing it yourself – killing somebody’

(family member, accused convicted, sentenced to 13 years.)

The solicitors in this case failed to explain the doctrine of Joint Enterprise, leading the family to believe that lack of evidence of actual, physical involvement in the crime of murder, and indeed eyewitness testimonies that he had not touched the victim at any point, would be enough to exonerate their family member at trial.

Another, whose family member was charged with murder, although his wife was originally considered a ‘missing person,’ and no body had been found, said:

‘He got bail... and we thought, well, this is really good, and he was out on bail for a whole year.... I just don’t understand how *** got convicted, there was not one bit of evidence. We weren’t that worried because we actually thought...we didn’t think it would be like this... to be honest, they (solicitors) were so confident... they were too confident that there was nothing on *** that they thought they were going to wing the case, to be fair.’

(family member, accused convicted, sentenced to 18 years.)

Evidence as defined by defence teams

Reliance on the knowledge and experience of legal teams, however, was a critical factor in accused persons and their families accepting that information they offered as ‘evidence’ could not be used, even if they did not understand why:

‘Even when we did try to make suggestions, we were just dismissed – we thought it was probably that they knew about legal rules and things that we didn’t and that was why our suggestions couldn’t be implemented.’

(accused, convicted, sentenced to 11 years)

Information deemed as ‘evidence’ as it was disclosed to and by defence teams was a matter of bemusement for many wrongly accused persons and their families, and

appears to have bolstered confidence that the case against the accused would not stand at trial. One family member was relieved to hear that evidence, in the form of statements, supported the statement given by her family member. She was then unable to understand how this evidence could be used *against* the accused, by slotting it ‘out of context’ (as the accused and his family perceived it) into the prosecution case. There was no comprehension that the chosen context was exactly right for the purposes of the prosecution case.

One accused person suggested every type of tangible evidence he could think of which would clear him of the charges against him:

‘I believed that... they [defence team] would use my answers for preparing my defence, and not a defence to just get a not guilty, but one that would prove my innocence...I gave them a list of witnesses I wanted them to call. I asked about how to find out the time of death through post mortem. I asked for eye witnesses to alcohol addiction and for the blood/alcohol tests to be done. I even asked for an expert in sado-masochistic sexual practices... all of these requests were listened to and then I was told none of them would work at all.’⁵⁷

(Accused, convicted, sentenced to 18 years.)

⁵⁷ No explanation we offered as to why none of these suggestions could be used, although it emerged after conviction that several of them would have, if used at trial, or, indeed, pre-trial, had a significant impact on the whole process. The blood/alcohol tests, for example, would almost certainly have proven that the accused was ‘unfit for interview,’ and the evidence obtained during that interview disallowed at trial.

Evidence as provable and/or supportable (e.g. corroboration)

All of the Group One and Two interviewees maintained that there was ‘no evidence’ to connect the accused person with the crime. By ‘no evidence,’ individuals were clearly reliant on their perceptions of evidence as physical and tangible. In 10 out of 30 cases, the prosecution case was based entirely on accounts/accusations made by one other individual – most of these were historical sexual abuse allegations, for which no ‘physical’ evidence could be produced because of the time lapse between the alleged offences, and the case coming to trial. One case, however, centred around the testimony of the person who had admitted the offence (murder) but had implicated another. This testimony was, in turn, reliant on accounts of the contents of text messages which had been deleted, and not recovered by investigators later, therefore, there was only this witness’s word that the texts read as she said they did. The accused in this case said:

‘Police ignored the fact that all the details that *** gave came only after she had read my very detailed statements and seeing the telephone charts. The police have a duty to investigate any evidence that could prove a person’s guilt or innocence, this did not happen in my case.’

(accused, convicted, sentenced to 18 years.)

The double confusion about what constituted evidence in this case is clear – on the one hand, tangible evidence which could have been recovered (text messages) was ignored in favour of a witness account of what those text messages said, an account which was favourable to the prosecution case, and extremely detrimental to the defence case. On

the other hand, the witness giving this testimony had clearly been ‘primed’ by being given access to detailed information which did not, in itself, become evidence.⁵⁸

The idea that the word of one other individual amounted to ‘evidence’ was something that these families could not accept or understand. One said:

‘How bad is that? Somebody says you did something – no proof, no evidence, just their word for it, and the police can come and take you away and lock you in a cell, and there’s nothing you can do...I couldn’t prove I hadn’t done anything, and I thought, they’re not going to put a 16 year old girl through cross examination that makes out like she’s a liar... how do you fight something that’s not there?’

(accused, charges dropped when complainant admitted she had lied.)

Some Group One and Two interviewees reported what actually happened in terms of ‘evidence collection’ as a reversal of their beliefs and expectations of what should have happened. Rather than police officers gathering evidence to support or refute allegations, when it became apparent that the original allegation was not supported by emerging evidence, police officers returned to complainants to offer an opportunity to alter the complaint to fit with information which had been gleaned from the accused:

‘When the evidence or the so-called key evidence of the prosecution witness didn’t fit with information *** had freely given, that DC then went

⁵⁸ This, is an example of Green’s ‘revelatory knowledge’ - the ‘openly offered meaning’ (of the actual text contents) may not have produced the ‘knowledge’ required (to support the prosecution case,) and therefore, further information, in the form of statements, was sought (and selected) to reveal the ‘hidden meaning’ of the exchange of a series of texts, though the actual contents of the texts remained undisclosed (Green 2008).

charging back off to the prosecution witness and got them to change the evidence under the guise of additional information- this is a ploy that is used to mitigate the discrepancies and inconsistencies and downright clear lies from the prosecution witness to fit what the accused has said.’

(family member, accused acquitted at trial)

‘Obvious’ evidence

The opposite of that is the failure of police investigators to gather what was, to the wrongly accused and their families, ‘obvious’ evidence. In a case where a family member was murdered after spending the evening alone at home, this relative points out:

‘No-one has ever explained why there were two used wine glasses at the house that night when no-one has ever said that they were with [the victim.] I have never been able to stop thinking that this is significant.

(family member, accused convicted, sentenced to 18 years.)

Another family member highlights what was, to the family, an inexplicable series of events in which what was perceived to be solid, tangible evidence was never followed up:

‘They took a week to come forward, even though they were relatives [of the victim]... one of them had cut his hair, but they eliminated them from the enquiry within a day – the DNA results weren’t even back. They never got the clothes they were wearing, or the bike... all of that should have

been tested for forensics... just like they didn't get the search party's clothes...there were so many things we found out later – *** and *** – both of them were at the scene of the crime on the night of the murder, but the police didn't trace them, even though they had been told about ***, and they had ***s DNA from the start.'

(family member, accused convicted, sentenced to 20 years.)

In direct contrast to types of evidence believed to be recognised or understood by wrongly accused persons and their families, were legal or procedural definitions of 'evidence' which were beyond their knowledge or understanding:

Identification evidence

Identification evidence, for example, was generally believed to be based on identification of *distinctive* or *distinguishable* factors – specific individuals, identifiable vehicles, scientifically 'irrefutable' factors such as DNA profiles or fingerprints. On this basis, innocent individuals were confident that no identification evidence could possibly be found which would link them to the crime, the resultant belief being that, even should the case proceed all the way to trial, exoneration would be guaranteed as juries (and judges) are required to find guilt 'beyond reasonable doubt.' Without identification 'evidence,' as these individuals understood it, there would be obvious 'reasonable doubt' and the case would fall.

Few understood that '*if an eyewitness may be able to identify clothing worn by the culprit, but not the culprit himself, it will probably be futile to mount an identification*

parade rather than inviting the witness to identify the clothing' (PACE, Code D, e.g. Ashworth, 2005, p.117)⁵⁹

Such an 'identification,' on the basis of clothing, would not have fallen within the understood concepts of identification evidence for the participants in this study, on the basis that it is far too vague, that the courts would not accept such vague information as evidence, and if, by some remote chance, it was allowed as evidence, it would immediately constitute reasonable doubt. The situation in Scotland is even more confusing because dock identifications are still permissible as evidence.⁶⁰

In one case in this study, the accused person was identified as having been at the home of the murder victim (his girlfriend) by two of the victim's neighbours. There were already difficulties with these identifications, in that there was no known time of death, the body had been found some distance away, and there was no forensic evidence that the murder had occurred in the victim's home, quite aside from the fact that the accused person had perfectly valid reasons for being at his girlfriend's home on the evening in question. These witnesses, however, were asked at the identification parade to identify 'the male you described as ***'s boyfriend.' Neither the accused person, or any of his

⁵⁹ (It is worth noting the presumption of guilt implicit in the wording of the PACE Code quoted above – it is not a 'suspect', but a 'culprit' whose clothing has yet to be identified. The Home Secretary gives a similar insight into the presumption of guilt which has crept into official statements on justice matters: regarding the retention of evidence in the wake of investigations which either do not proceed to trial, or in which the accused is acquitted, the Court of Appeal quoted the Home secretary thus:

'[the police] routinely retain all the records of the investigation, including the notes of interviews with suspects... this has always been the case. The police would not dream of throwing away their memory on the off chance that the *offender* (sic) may or may not commit a further offence' (Ashworth 2005, p 128) (my emphasis added).

⁶⁰ Once one 'positive' identification has been obtained (and the inherent bias in the dock identification process here casts grave doubts on the reliability of how positive such an identification could be) subsequent 'identifications' are permissible even if the witness says only that the accused is 'similar to' the suspect. However, rules of corroboration in Scotland dictate that key evidence against an accused person must not come from a single source, but should be substantiated by at least one other, independent source. A witness 'identification' of an accused person as 'similar to' or 'like' a suspect would be assumed, in the understandings of Group One and Two interviewees, neither to be a positive identification, nor a means of corroborating an identification by another witness.

family members, believed that these ‘identifications’ could in any way incriminate him, especially because the witnesses had, in essence, been asked to pick out the accused, yet both were central to the prosecution case which succeeded in obtaining a sentence of 22 years.

Police statements as evidence

There was little understanding amongst Group One and Two interviewees that police statements do not constitute evidence unless witnesses ‘adopt’ their statement on the stand (i.e. agree that what is being said in court is, in fact, what they said in their statements). Several participants made reference to evidence during trial which differed significantly from earlier statements, expecting that judges would stop such evidence being heard, on the basis that the witness must be lying (or have been lying in previous statements.) Where witness statements changed significantly over time prior to trial wrongly accused persons expected these statements, and the changes apparent between them, to provide evidence in court that these were unreliable or dishonest witnesses. The concept of defence solicitors choosing not to call such witnesses on the basis that their changed statements were ‘irrelevant’ created a great deal of confusion and resentment, especially as no explanation was offered regarding the difference between ‘legally relevant’ and what wrongly accused persons and their families perceived as ‘logically relevant.’

One accused person, hearing a significant witness demonstrably and provably being dishonest⁶¹ in evidence, brought the matter to the attention of his solicitor during a break in proceedings. He states he was told by his solicitor:

⁶¹ Evidence of this dishonesty was later highlighted in evidence submitted to the Appeal Court; although accepted, it was not sufficient to have the conviction overturned

‘For god’s sake, she’s just lost her sister in a horrible murder. Show some compassion.’

This accused person was subsequently sentenced to a minimum 20 year sentence.

Evidence taken ‘at its highest.’

This was a concept which participants in this study did not understand (many of them never having heard of it) and did not have explained to them by their legal representatives. The idea that evidence could be considered, as originally given, without taking into account any of the arguments or available information offered against it, in order to ascertain whether a case had merit or not was, to those who came to understand it, both unfair, and representative of trickery:

‘I think it’s quite an unfair and unreasonable way of judging whether there’s a case to answer or not... what they mean by the prosecution’s case taken at its highest ...very, very weighted towards the prosecution – they take their case when it’s at its best, and none of the arguments that have gone against it are taken into account...’

(accused, acquitted at trial)

The privilege against self incrimination.

None of the accused persons in this study believed it would be possible to incriminate themselves, because of their own knowledge that they were factually innocent.

Furthermore, there was no understanding that statements given in support of that innocence by other family members could be used as evidence of guilt.

The European Court of Human Rights, in response to the use of statements used against suspects in two cases said:

‘...The right not to incriminate oneself, in particular, pre-supposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused... the right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent...’ (Ashworth 2005, p. 130).

What slips through the safety net of the European Court’s directives is another presupposition – that accused persons will know what may incriminate them. Although remaining silent is one way of appearing to ensure that an individual does not incriminate him/herself, the inclusion of the right of juries to draw inferences from that silence⁶² demonstrates that it is not the safeguard it appears to be. But wrongly accused, factually innocent individuals and their family members have a further view on maintaining silence, and that is that, since they have nothing to hide, (a) silence is unnecessary, as it is impossible to incriminate oneself in those circumstances, and (b) remaining silent might imply ‘something to hide’ to investigators.

⁶² In England and Wales. There is no negative inference allowed to be drawn from exercising the right to remain silent in Scotland, as yet.

In particular relation to the right of individuals not to incriminate themselves, and the corresponding right to silence, is the issue of statements as evidence. Participants in this study believed that all statements would be subject to the same treatment: statements would be checked for accuracy, truthfulness and completeness, statements which were found to be inaccurate, untruthful or incomplete would be further investigated, and through this process, 'the truth' of various different accounts would emerge. The idea that there would be a strategic manipulation of statements, and that the presentation of statements would be subject to very specific selection processes did not occur to any of the accused or their families who participated in this study.

In one case, an individual, whose family member was later arrested, had already given one voluntary statement, and returned voluntarily to the police to include some information which he later remembered. This was later used against him and his relative, to suggest that both he and the accused person had lied, and were 'trying to cover up' by altering statements. Post conviction, this family discovered that several witnesses who had given evidence for the prosecution had altered statements on several occasions, yet this information was not before the jury. In another case, a family member, on hearing that the accused had been arrested, went to the police to offer an account which he believed would demonstrate the mistake police officers had made by arresting the wrong person. On the strength of his account, he too was arrested. By the time this case came to trial, the original family member who had been arrested was cleared, but this relative was convicted and sentenced to 30 years. His partner says:

‘*** phoned the police and said that he had further information for them.

He went to the police station of his own accord and they arrested him... he

had nothing to hide... in his eyes he had nothing to hide, he was telling the truth, he didn't need a solicitor.'

(family member, accused convicted, sentenced to 30 years.)

Clearly, where individuals perceive of themselves as witnesses, and investigating officers do not enlighten them, then the right not to incriminate oneself is unenforceable (even if those individuals were aware of what self-incrimination means in legal, rather than lay terms) – and is not covered by Article 6 of the ECHR.

Expert and 'scientific' evidence.

The strength of beliefs and perceptions about evidence deemed 'scientific' or 'forensic,' and the areas impacted by those beliefs, cannot be understated. Confidence in the infallibility of scientific evidence, and in particular, DNA evidence, was remarkably strong. One family, told that sperm heads had been found on the body, were convinced that the case was already over, since the accused family member had been vasectomised 14 years previously. Their entire approach throughout, from arrest to trial, was based on this 'irrefutable' knowledge – no jury could convict a man who did not produce sperm of a murder in which sperm heads on the victim's body featured so prominently in the case. Furthermore, this man was bailed, leading the family to believe that even the police did not believe him to be guilty, as, in their opinion, people suspected of such brutal murders were not granted bail. He was subsequently convicted and sentenced to 22 years.

The role of expert witnesses, and the quality of so-called expert evidence has come under increasing criticism in recent years (e.g. Redmayne et al 2011, Fisher, 2008,

Lean, 2008). There are various strands to this criticism; pseudo science passed off as actual scientific examination/findings, unqualified or poorly trained individuals obtaining positions of respect, responsibility and influence, results and evidence being slanted to support certain contentions, and so forth. Although there is an awareness that this may be contributing to the incidence of wrongful conviction of factually innocent people, there is another factor which bears directly on the matter in the UK, and that is funding. Where defence cases are funded by legal aid, defence teams must justify any application for funding in terms of efficiency and economy. One view taken (by legal aid decision makers) is that in terms of costs, the appearance of two expert witnesses is unjustified, and defence counsel should cross examine the prosecution expert, rather than insisting on calling experts of their own. This is especially so where funding has been provided for an expert report for the defence, the reasoning being that the information contained in the report should be sufficient to enable adequate cross-examination⁶³.

Wrongly accused persons and their families, as a general rule, do not have this explained to them, and therefore conclude that their defence team has failed to act in their best interests. One family member said:

‘[The QC] thought he could do it all himself. They paid a fortune for the expert to come up – they filmed the tests and everything, then he didn’t

⁶³ “156. The Bar Council raised another potential obstacle to be negotiated by the defence: "The Legal Services Commission often requires counsel's written advice before it will allow the necessary expenditure to instruct an expert for the defence [...] The fee often has to be agreed before it is known how much work will need doing and what the costs involved in presenting the case in court might be". (House of Commons Select Committee on Science and Technology, Seventh Report, May 2004.) The Bonomy Report (2002) recognises the problems inherent in obtaining sanction for defence expert evidence in Scotland, on the one hand, and the requirements to meet strict time considerations for case preparation on the other.

call them in court. The prosecution did [call their own experts], though.

[Our QC] didn't call a single expert for our side.'

(family member, accused convicted, sentenced to 20 years)

When the defence team is expected to cross-examine evidence introduced by prosecution experts, then, very often, that evidence has already been selected or influenced by investigating officers, and precise instructions given to the experts as to what to test/analyse/ comment upon. For example, one accused person explained that the scene had been cleared by the time the expert witness who was eventually used in court was asked to give a report.⁶⁴ But, as the accused person in this case points out, this was not the only expert report provided during the investigation:

'They get an answer, and the initial answer is...probably accidental, then they got another one...who was a little bit higher up the chain, and he says the same, so they go and get another one... all of a sudden, these two fires have come into play, but he's still saying one started as a result of the other, so it's still accidental, so they go away and get another one - they just keep getting another one an another one and another one until they get the answer they want. And once they've got the answer they want, then that's the expert – everyone else was talking rubbish.'

(accused, acquitted at trial)

⁶⁴ The case involved the death of a child in a house fire, and the police officer who showed the expert around told him that a 'paper taper' had been found. The expert then produced his report on the basis of this information. Fortunately, for this accused person, the defence team noticed this anomaly, and had an expert report prepared, including photographs, which had not been available to the other expert, proving that the so-called taper had, in fact, been an envelope lying flat on the surface of a printer.

Funding for so many reports for a defence team would almost certainly not be approved, highlighting the inequality inherent in the funding process, an inequality which is not apparent to wrongly accused individuals and their families, or to the wider public. The accused in the above case was acquitted on a ‘not proven’ verdict, and one of the criticisms later levelled (by those who believe the not proven verdict is not indicative of innocence) was that the defence solicitors ‘did not even call their own experts.’

This is a common criticism by the general public, where failure to call defence experts is perceived as ‘proof’ of the weakness of the defence case, and the strength of the prosecution case.

However, funding issues do not provide a full explanation for the failure of defence teams to bring expert witnesses to trial to give evidence on the defendant’s behalf – one family member, in a case which was privately funded, said:

‘Time of death and affects of alcoholism on the brain and memory should have been a significant feature; however, the solicitor would not listen to me, even though I found an expert to give an opinion.’

(family member, accused convicted, sentenced to 18 years)

This family later concluded that the failure to call experts was based on the QC’s personal beliefs about the guilt of the accused person, and the financial gain or loss attached to defending the case more robustly:

‘I should have realised ...that they had no faith in what I was saying...I think they had already decided the case was lost before we started the trial and didn’t want to waste time...my QC said [getting expert reports] would mean delaying the start of the trial, and they didn’t want to do that... I don’t think they would have earned any extra cash by calling any experts and didn’t want to have extra work to do which may have meant they missed out on other cases to attend.’

(Accused, convicted, sentenced to 18 years)

Many families felt that what was being portrayed as evidence was not evidence of anything relevant to the case, or was unnecessary, and introduced only to confuse matters for the jury, or to suggest some sort of scientific justification for the charges, even if the jury did not understand the science itself.

For example, a Group Two interviewee said:

‘It’s only after we got our hands on all the papers that we realised...there’s a lot of it that’s just not needed... in court they came up with all his stuff about transference and everything – I think the jury were so lost in all that that they either didn’t realise or forgot that even if the sperm had been transferred in whatever ridiculous way the experts were trying to say, it couldn’t have come from [the accused.]’

(family member, accused convicted, sentenced to 22 years.)

Ignorance of the science underpinning DNA evidence both allows misleading evidence to be put before juries, and juries to apparently accept that evidence on the basis that it must be reliable. The lack of a defence expert to explain the probability of DNA transfer between family members was a serious complaint for this family member, who believes retrospectively that the lack of an expert witness in court for the defence made it almost inevitable that the accused person would be convicted ;

‘We had no expert in there ...with the defence, because with the DNA, we only had my daughter’s side [as it was given] to an expert, whereas we should have had one on our side to go over ***’s version... if you’re a jury and you hear those words, ‘DNA’ and you’ve got nobody there to say, ‘Well this is why that’s there, this is how this could have happened,’ they’re just going to hear what they’re hearing; DNA... you know what people are like, but they never got that expert in so we, looking back now, we just had no chance at all.’

(family member, accused convicted, sentenced to 14 years.)

Opinions and understandings about DNA evidence amongst Group One and Two interviewees prior to the wrongful accusation varied from simply not understanding (if, indeed, they had given the subject any real thought), to believing that the science was thorough, and DNA evidence not only reliable but irrefutable. The changes in opinions and understandings were striking: one family initially believed that DNA evidence would even show the height of the perpetrator, another family member believed that juries had to believe forensic evidence, and was ‘a bit shocked’ when the judge directed

the jury that they did not have to believe the forensic evidence, and the shift in beliefs and perceptions is summed up by one Group One interviewee thus:

‘You go through your life thinking that all of these advances are being made, and they can tell more and more all the time. If you believe how everything is portrayed, you’d almost come to the point of thinking, we don’t need to have trials any more, because all these scientific expert witnesses and everything, they can just gather all these tiny fragments and piece them all together and tell you exactly what happened without talking to a single person- that’s the impression you get from what you get told about DNA and experts to do with this, that and the next thing, but it’s not the case at all...’

(accused, acquitted at trial)

Seeing themselves as ordinary members of the public, accused persons and family members surmised that jury members would have the same types of understandings regarding expert evidence as they, themselves, did:

‘They got away unchallenged really on a lot of things... and because it wasn’t challenged, they could just wash the courtroom with all these facts and figures and it was just, it was too much for jury members to understand... I think that a lot of the case is because they’ve [jury members] got no alternative, there was never anything else offered in its place....so...the jury would’ve thought, well, there’s nothing else we can sort of look at to compare...so...just being lay people, they just went along

with it because these are so-called experts, the experts must be right, that's what we all think, but obviously, I know differently now. But that's what you know Joe Public thinks – that's what I would think if I sat in there.'

(family member, accused convicted, sentenced to 22 years)

This impact of expert evidence, even when perceived to be not fully understood by jury members, was a source of concern for several Group One and Two interviewees, especially when, to their own understanding, the evidence was clearly flawed or misleading. The realisation that expert witnesses are offering opinions, rather than fact based analyses, increased both the shock that this evidence was allowed, and the concerns about its impacts:

'...it's always "my opinion" – it's not rock solid... well, everybody has different opinions...I thought, well, if they believe what he says, even though in his report, he says it's unfair to suggest that it could be ***'s (DNA,) the damage was done- to that jury, the damage was already done there... I just couldn't believe it – these were the experts saying [the DNA profile] is a poor fit to ***, yet he's still standing there saying it *is* [***'s DNA). He's saying it is, but his report is saying it's unfair.'

(family member, accused convicted, sentenced to 27 years)

Often, expert witnesses justify apparently misleading or biased evidence as being a product of the instructions given to them (Fisher, 2008, McEwen, 1998).⁶⁵ McEwen

⁶⁵ Experts are asked to examine or analyse specific items, and are asked very specific questions, and there is no need for them to report on anything other than the answers to those specific questions. For example, if forensic experts are asked 'Is it possible that this hair came from suspect A?' they need only answer yes or no, with statistical probabilities to support their response. There is no requirement for them to check whether the hair matches anyone

refers to “a major problem” being the “*danger that experts for each side will form an allegiance to their client and lose detachment*” (1998, p.162) and a culture which has, “... led experts to identify themselves with the prosecution, so that the police were not informed of adverse results – the government research scientists had convinced themselves that these were irrelevant (1998, p165). This situation led a family member in a very high profile case to comment:

‘...it was apparently a conversation between two forensic scientists...the prosecution forensic scientist was speaking with a higher scientist, and they were discussing this thing...it had no evidential weight at all – totally neutral- meant nothing in either direction. It was put to the jury that this was critical evidence...the prosecution guy said [in conversation with the higher scientist] well, I never really thought that what I had said would lead to a conviction. But he never stood up and said that, and then the guy he had the conversation didn’t say it either. So here’s a guy languishing in jail, and they both knew this piece of evidence was worthless....’

(family member, accused convicted, served 8 years, conviction overturned following two appeals and a retrial)

In spite of the experiences of so many others, recently wrongly accused persons and their family members still trust that it is evidence, as they understand it, or lack of it, which will exonerate their loved ones. One family member, the accused person being

else, whether known to the investigation or not, unless they are specifically instructed to do so. The tendency for experts to be either influenced by biasing information included within instructions (e.g. Dror & Charlton 2006), or to be seen to be “loyal” to their client (e.g. McEwen 1998) contributes to conditions where selective instructions produce selective results.

on remand awaiting trial at the time of writing, responded to the question, ‘When this goes to trial, what do you think will convince the jury that this is an innocent man’ with

‘Oh, well, I think... the lack of evidence... the lack of evidence and basically...*** saying that he’s not guilty of it.’

(family member, accused remanded, awaiting trial)

Conclusions

Common sense, everyday understandings of what constitutes evidence, whether ‘scientific’ or ‘expert’ evidence, or the more run-of-the-mill evidence which appears self evident and obvious to individuals not involved with the CJS, clearly vary significantly from the far more technical and tightly prescribed ‘evidence’ perceived and understood by those working within the CJS. The gap between these two understandings is easily (and regularly) manipulated by prosecution bodies in order to secure convictions.

Wrongly accused individuals and their family members proceed on the basis that they understand what constitutes evidence, and what evidence will “prove” that the criminal investigation is mistakenly targeting the wrong person. The absence of “evidence” implicating the accused person is believed, in itself, to be important, supported by the belief that, with no evidence to support the direction of the investigation, that investigation cannot culminate in charges or prosecution. A number of other commonly held beliefs about evidence (“obvious” evidence, tangible evidence, corroborated evidence, for example) are the basis on which actions are taken or not taken by wrongly accused individuals and their family members.

These people are unaware of the precise and selective nature by which police investigations elicit pieces of information to be strategically utilised as evidence (Green 2008), which are then shaped by the nature of that precise selection to be slotted into subsequent stages of criminal justice processes (McEwen 1998).

Legal definitions and rulings regarding specific types of evidence (e.g. evidence taken “at its highest” and the privilege against self incrimination) are either profoundly misunderstood by lay people, or are outwith their knowledge entirely, creating circumstances where wrongly accused individuals and their family members may act against their own interests. The belief that factual innocence makes it impossible to incriminate oneself, coupled with the belief that the absence of evidence of wrongdoing will support claims of innocence is one such example.

“Scientific” and “expert” evidence, entrusted as reliable because of its claimed scientific or expert roots, even though much of it is not understood by lay people,, further compounds the confusion.

The existence of so many different meanings, definitions and uses of evidence, and the ignorance of lay people regarding how information is collected, interpreted and presented as evidence within specific frameworks, and for specific reasons, not only impact directly on actions taken or not taken by the wrongly accused and their families but forms part of a larger process by which information transformed into evidence by these factors is then utilised as subsequent stage of CJS proceedings.

CHAPTER SIX

Legal Advice and Representation, and Trials

Introduction

Following a police investigation which has resulted in charges being brought (and, in some cases, an accused person being remanded into custody) accused persons and their families looked to the courts to rectify what they continued to perceive as a ‘mistake’ by police investigators. Rather than experiences of police investigations serving as an alert that the justice system may not operate in the manner believed and expected by the accused and their families, those experiences were rationalised as an error, a breakdown in proper procedures, or even the vagaries of individual police officers’ personalities.

This chapter examines the “logical progression” thinking, based on beliefs and perceptions about the CJS, which underpins the decisions, actions (or failures to act), and justifications of wrongly accused individuals following police investigations. Once charges are brought, and information to support those charges has been gathered, the processes of the CJS continue along particular lines, many of which are not known to accused persons or their family members, who proceed, instead, on the basis that their perceptions and beliefs about how the CJS works represent factual and reliable knowledge.

The nature of trust in both legal representatives, and the legal process, following a police investigation, are discussed, in contrast to the restrictions, technicalities and procedural rules within which legal representatives are required to construct the defence case. The impact of Legal Aid funding, and political pressure on legal professionals is

also examined. The chapter focuses on the sharp contrast between legal and lay understandings of common terms and phrases, and the impact of this contrast on the abilities of the wrongly accused and their families to adequately communicate and participate in the process of their own defence.

The use of the word 'system' in the term 'Criminal Justice System' was understood, in the main, to imply a variety of bodies and organisations, all working within an integrated whole. To the wrongly accused and their families, one part of that system – police investigations – had 'broken down,' and they proceeded in the belief that the next part of the system would recognise and repair the 'damage.' It did not occur to them that the system might be, as explained by a retired senior police officer

'A totally different system for both [those inside the CJS, and those outside it] – it works for the people in it, it does not work for the people outside of it. The system works for itself, in my opinion...[it] is a self fulfilling, self interest organisation which exists to perpetuate itself.'

(retired senior police officer)

Green's theory of revelatory knowledge suggests that knowledge is produced via particular investigatory processes which 'reveal' hidden or underlying information (truths), which is then '*fitted into appropriate contexts of existing knowledge by experts who interpret it and give it meaning*' (Green 2008, p.12). Therefore, the perceived 'breakdown' in CJS processes at the point of police investigation is, in reality, an indication that the system is functioning as intended, *by and for the system itself* – particular types of information, presented in particular forms are required to feed into

subsequent phases of the system's functioning. Furthermore, this information is itself hidden from the general public – reflecting Foucault's emphasis of the conflicting, yet paradoxically cohesive nature of *'[a] guaranteed system of rights that were egalitarian in principle... supported by these tiny everyday physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical...'* (Foucault, 1977, p.222).

The Criminal Justice System, as perceived by the general public through a variety of influences, *resembles* the actual operation of that system, which is reflected back, from a distance, via filters of media representation and so forth. But the public, generally, rarely comes into direct contact with the deeper workings of that system.⁶⁶

References to the Criminal Justice *System* by Group One and Two interviewees, whilst emphasising the strength of prosecution powers and actors, demonstrated perceptions of defence teams as being 'on the side' of clients, within that system, to ensure a 'fair contest.' Alongside these perceptions was a very strong belief that trials were the absolute centre of the system. The purpose of trials was believed to be an exercise in getting to 'the truth' of what had happened, that truth being the single most important factor in determining innocence and guilt. This belief was reflected in survey results which found that over 90% of people generally believed the statement 'the purpose of the trial process is to uncover the truth in order to prove the guilt or innocence of the defendant' to be true.

⁶⁶ (The emphasis, for example, on improving public perceptions of the police as the 'front line' of the justice system, rarely tackles the underlying issues which lead to loss of public support. Instead, it is the *appearance* of more accountability, more understanding, more efficient officers which is seen to be of import, reinforcing the reflection of the Criminal Justice System which best fits common perceptions and beliefs about it.)

But McEwen asks:

‘Why should the court behave as if the ‘parties’ are on equal terms and the state only an interested bystander, despite initiating, organising and funding the criminal trial, and where appropriate, exacting punishment upon the defendant?’ (McEwen, 1998, p.5).

Where defence cases are funded by legal aid, the role of the state assumes a greater interest still – state funding underpins both sides (the impression given that this funding provides each side with equal resources.) The ensuing contest, then, appears removed from state interest or intervention – it is for the professionals and experts to utilise those resources to their maximum potential, the ‘winner’ emerging as a result of technical and strategic brilliance.

Given the emphasis on factual innocence – something absolutely known and unquestionable to the wrongly accused and their families – it is hardly surprising that their actions following police investigations were based on the belief that the trial process would bring matters to a satisfactory conclusion – i.e. recognise and acknowledge factual innocence.

Similarly, the use of logical progression reasoning, on which the wrongly accused and their families had relied during police investigations, still featured strongly in expectations about preparation of defence cases and trial proceedings. Almost all believed the process to be analogous to the jigsaw puzzle, where individual pieces were painstakingly pieced together to reveal a ‘whole’ picture. There was no comprehension,

or even suspicion, that a process more akin to ‘Lego’ blocks, from which any number of models may be constructed, would feature anywhere in criminal cases. The ‘one model’ approach (one truth, one form of innocence, one picture from which to evaluate truth), is clearly both at odds with, and at extreme disadvantage against, a ‘many models’ approach. ‘All of the evidence’ was believed, to return momentarily to the jigsaw analogy, to be all of the details which provided a whole picture, and which, in turn, provided a context within which the guilt or innocence of the defendant could be appraised.

For example, one Group One interviewee said:

‘I thought that all of the evidence against [an accused person] and all the evidence that would counter that – the defence evidence – would be used as well – it would be an equal match and out of that, surely, if it was an equal match, then, yeah, if everything is heard then the conclusion that’s come to is based on knowledge of everything that happened.’

(accused, acquitted at trial.)

Reliance upon, ignorance of, yet blind faith in, procedural fairness, allowed wrongly accused persons and their families to continue to trust that the justice system would operate as they expected.⁶⁷ There are two elements to this, both of which bear on the beliefs and perceptions of the wrongly accused and their families, and the wider public. Factually innocent individuals who find themselves at the centre of a criminal

⁶⁷ The term ‘procedural fairness’ would, in itself, become yet another example of the confusion of expectations created by the difference between lay and legal understandings, as discussed in ‘Evidence’ .

investigation begin with the perception that procedures (about which they generally know little or nothing) will be fair, and they proceed as if that is, in actuality, the case.

Members of the wider public, informed via the media about such cases, also believe that ‘proper procedures’ are being followed, and are, therefore, likely to believe that if a case proceeds all the way through the system, then it will have done so fairly and properly, and the final decision must therefore be correct. This may, in some way, account for public acceptance of verdicts, particularly in high profile cases, even when doubts are raised about the safety of these convictions later (as discussed in chapter 7, Post Conviction Processes).

The second element is the importance of *perceived* fairness. Because of the nature of legal processes – the lack of direct experience of, or access to, the ‘deeper workings,’ the difference in lay and legal understandings of key terms and concepts, so long as procedures are seen or believed to be fair, then those processes, and the authorities which implement them, are likely to retain legitimacy and compliance (e.g. Tyler 2006). There is, of course, a very real difference between what is seen to be fair, and what individuals would experience, first hand, as fair; it is clearly in the interests of authorities to maintain perceptions of fairness, whether or not processes themselves, on closer inspection, would be accepted as fair.

The cultural and professional influences and demands on defence solicitors, taken in comparison with the beliefs and expectations of their clients, highlights one of the central difficulties faced by wrongly accused individuals and their families. Defence

solicitors are required to defend against the technical legal case, which brings with it technical, law-specific versions of ‘evidence.’

Whether through self concepts of expertise and understanding being ‘superior’ to that of clients (otherwise, why would clients need to be represented by solicitors in the first place?) arrogance, negligence, or professional pressure, it is apparent from the experiences of Group One and Two Interviewees that defence solicitors consistently fail to explain the differences in what constitutes evidence in court cases, and why these differences are important. In many cases, solicitors ignored or dismissed evidence brought to them by clients which, it was later found, could have been successfully used to exonerate those clients.

Duty solicitors

Experiences of solicitors for wrongly accused persons and their families fall into four distinct categories, three of which will be discussed in this chapter – duty solicitors, preparation for trial, and trial process. The fourth, post trial, is discussed in Chapter 7, Post Conviction Processes. It has to be noted, however, that all of the stages of wrongful conviction feed into and influence each other, and as such, the separation attempted here is not a complete separation, but rather an attempt to view each of the stages in their own right, whilst remaining mindful of the interdependence of each stage on the others.

The wrongly accused and their families meet with their first challenge to their perceptions of procedural fairness during police investigations, when apparent procedural irregularities arise, but, as discussed previously, there is a tendency to

‘explain away’ such irregularities as ‘mistakes,’ highlighting the extent to which concepts of ‘procedural fairness’ are accepted as given.

The Duty solicitor arrangement, in place in England and Wales, and Scotland, enables the right of individuals detained in connection with an offence to have access to legal advice before and during questioning (although, until the Cadder ruling in Scotland, Section 14 interviews⁶⁸ could be conducted without the requirement for solicitors to be present.)

However, many Group One and Two interviewees initially indicated that they felt no need to insist on the presence of a solicitor, since, as they were innocent, there was no need. There is some evidence to suggest that police manipulation of information regarding the need for, or right to, legal advice may ‘reassure’ factually innocent suspects into waiving such rights.⁶⁹

The ‘duty solicitor’ was perceived mainly as an advisor; an official loosely attached to police stations whose job it was to come along and advise those who had been arrested and/or charged. There was no sense of ‘ownership’ or relationship with duty solicitors;

⁶⁸ In Scotland, prior to October 2010, interviews under Section 14 of the Criminal Procedures, (Scotland) Act (1995) were allowed – in essence, this meant that individuals could be detained for questioning for up to six hours without access to legal advice or representation. Following a Supreme Court ruling, in October 2010, in the case of Cadder (Cadder v HMA [2010 UKSC 43]), ‘Section 14 interviews’ were deemed unlawful, and the practice has since been halted. However, the Scottish cases in this study all occurred prior to this ruling, and all of the accused persons were subject to section 14 interviews. Those who were convicted are currently in discussion with legal teams with a view to challenging their convictions in view of the Supreme Court ruling. The Duty Solicitor arrangement in Scotland, therefore, previously came into effect after arrest, rather than detention.

⁶⁹ Ashworth and Redmayne ((2005, p.88) state that, in police custody ‘*about 34% of suspects now receive legal advice,*’ giving examples for the poor uptake of the right to legal advice and representation as police manipulation of information, so that suspects are either not told that advice is free, or a lack of clarity in how information (cont P203) is imparted, or decisions on the part of suspects not to wait for legal advice, ‘*because waiting for legal advice is likely to prolong custody,*’ and quote one third of suspects not being told that legal advice is free, and one quarter not being clearly informed about the right).

they were perceived by most as ‘there for everybody in those circumstances,’ as explained by this family member:

‘You haven’t retained a solicitor, so that [duty] solicitor has no real interest in looking after your best interests. They just do the job, sort of thing. They’re there- they’re not actually representing you.’

(family member, accused acquitted at trial)

Duty solicitors, sometimes understood in this way by accused persons and their families as an extension of the police investigation, rather than representatives of the accused person, are the next ‘step’ in wrongful accusations, where factually innocent individuals are required to make judgements and decisions in circumstance for which they have no real point of reference or experience. Skinns’ suggestion that ‘*the role of the duty solicitor is misunderstood by some suspects, who believe that they work for the police....*’ pointing out that ‘*perhaps it was the inexperienced suspects who misunderstood the role of the solicitors...*’ (2011, p.20) is borne out in the experiences of Group One and Two interviewees. However, this study found that ‘inexperienced suspects’ who were inexperienced because they were factually innocent, whilst misunderstanding the link between duty solicitor and police, still believed that solicitors were there to help them, (most notably, in realising the innocence of the accused person, and relaying that innocence to whatever authority would recognise it and resolve the matter).

Reliance on police information regarding the attendance of, or need for, a duty solicitor (or indeed, any solicitor) was strong.⁷⁰ One Group Two interviewee reports:

‘I asked her [police officer] if I was under some sort of arrest or investigation because she was following me around, and she just laughed and said no... [when my daughter] tried to say to the officer ‘What is going on’ [the officer] said, he’ll be alright...we’ll look after him, he’s got us, he’ll be alright, this is just some sort of formality was the word used then... we’ll just take him, have a chat and he’ll be back home... sounds bad, but I didn’t even think of any seriousness amongst the allegations.’

(family member, accused convicted, sentenced to 11 years)

This was the experience of several Group One and Two interviewees, but it is important to note that this was rooted in beliefs that, having done nothing wrong, there was no need to have a solicitor present. Factually innocent individuals and their family members were unaware of the implications of speaking to police officers without legal advice, or of the possibility that anything said by innocent individuals could be used in any way to harm them. Again, Skinns’ finding that ‘*suspects are also concerned about police inferring guilt from requests for legal advice*’ (2011, p23) was also borne out by this research.

An accused person, demonstrating the belief that it is only the guilty who need legal assistance, says:

⁷⁰ Skinns points out that ‘*It may be that informal conversations between the police and suspects contribute to suspects’ perceptions about the relative seriousness of the offence. In particular, the police may (informally) downplay the seriousness of the offence, thus implying that custodial legal advice is unnecessary*’ (2011, p.23). This both echoes and expands upon the findings by Ashworth and Redmayne (2005) that information regarding solicitor presence can be unclear and/or misleading.

‘I knew I’d done nothing wrong, so why would I need a solicitor? If I’d done something, then I’d be on the phone straight away to a top solicitor to make sure he’d get me off.’

(accused, acquitted at trial)

The majority of accused persons in this study who were arrested ⁷¹ (67%, or 20 out of 29 persons arrested) were allocated a duty solicitor, as they saw it ‘by the police.’ None questioned the apparent contradiction of their accusers also providing them with their means of defence against those accusations. Duty solicitors were generally thought to be ‘on the accused person’s side,’ to advise them on points of law. There was no understanding, at this early stage, of accused persons having any awareness that the law itself might be able to overcome the fact of their innocence and obtain a conviction.

Only 3 out of 30 of the accused persons included in this study believed that they might be convicted of an offence, and all of those believed this would be for more minor, peripheral offences – admitting to drug offences as part of the investigation, admitting to fraud as part of the investigation, and so forth. That these individuals admitted to such offences in an attempt to ‘help the police with their enquiries’ is, in itself, an indicator of the extent to which individuals will voluntarily offer information, believing it will prove their innocence of the crime for which they have been accused, even if that information incriminates them in lesser offences.

Those who used duty solicitors were reliant on the duty solicitor to advise them on what they saw as the best course to demonstrating their innocence. Almost half had no idea

⁷¹ Accusations were made against 30 individuals, out of which 29 were arrested. Of those, 24 were convicted, one is still on remand, one had all charges dropped, and the remaining 3 were acquitted at trial.

that they could have chosen their own solicitors – some, in fact, were told by police officers that they had to deal with the duty solicitors, and many stayed with the same solicitors right through trial, even though they had begun to have doubts and reservations about the performance of those solicitors. (This is discussed further in ‘Trials’ below.) Initial contact with duty solicitors is reported by several Group One and Two interviewees as cursory – it is only retrospectively that many accused persons and their families realise that their trust in duty solicitors at the very beginning was one of the factors leading to their wrongful conviction. Poor advice, no advice, and legally incorrect advice were the three most common complaints – one accused person, who was under the influence of alcohol at the time of his arrest, reports

‘My solicitor came and woke me up, he didn’t stay long, and left. Apparently I was confused ... the nurse said I was unfit for interview...I had trouble even answering simple questions like my own name...I don’t really recall that.’

(accused, convicted, sentenced to 18 years)

Although these solicitors had been ‘allocated,’ and there was a strong belief that accused persons had no choice but to stay with the solicitors allocated to them, even when there were early signs that advice from these solicitors was incorrect, there was an equally strong belief that the solicitors would somehow understand in time for trial, what was important for the defence of the accused person. One teenager, who had been charged for murder, was told repeatedly by his solicitor (who had been allocated as a duty solicitor at the time of arrest) that the charge would be downgraded to affray, as there was no evidence that he had been involved in the murder. There were two aspects

to this advice. The first was that the solicitor gave this advice before seeing any evidence, so it was based on the word of the client. As a result, the client formed a strong belief that the solicitor ‘believed in [his] innocence.’

Flowing from that belief was a conviction that this solicitor, believing such innocence, would fight the accused person’s corner. The client was very young, and had been denied access to outside communication for more than 48 hours at the time this advice had been given. The second aspect is that the youth had been charged under Joint Enterprise doctrine, a fact which appears to have escaped the solicitor. At no point before trial was the youth, or any member of his family, advised of the significance of the Joint Enterprise aspect of the charge.⁷²

Some participants were surprised to discover that the ‘duty solicitor’ was not, in fact, a qualified solicitor at all, but a legal agent, who may be unqualified or inexperienced (Skinns 2011). The use of legal agents, or Accredited Police Station Representatives,⁷³

⁷² Charges brought under Joint Enterprise doctrine in England and Wales state that any individual who knew, or could reasonably have anticipated, that an associate would or could carry out the crime, will be guilty of the same crime. There are three elements which must be proven for a charge under Joint Enterprise doctrine to succeed – knowledge (or at least a reasonable anticipation) of a common purpose, participation in that common purpose, and the intention to participate. The doctrine of Art and Part is the Scottish equivalent. Individuals are not charged with ‘Joint enterprise’ or ‘Art and Part,’ the charge will read exactly the same as a charge not brought under these doctrines – i.e. Murder, Assault, and so forth.

⁷³ According to the Institute of Paralegals (England and Wales):

‘People arrested and held at police stations generally have the right to receive legal advice and assistance whilst in custody.

There are duty solicitor schemes providing this service. They are paid for by the Legal Services Commission under the legal aid scheme. Originally the idea was to have solicitors attend the police stations to give advice. However the rates of pay are very low and so increasingly (especially outside of office hours) solicitors’ firms use accredited paralegal police station representatives instead. (cont..)

To become an accredited police station representative paralegals must undergo a training and mentoring programme and receive approval from the Solicitors Regulation Authority.

We describe this as a quasi regulatory situation because a paralegal does not need to be an accredited police station representative to go and advise clients. However if the instructing solicitors’ firm wants to be paid

for initial contacts with clients who have been arrested is not widely known about. Expectations, however, that duty solicitors, once involved, would protect accused persons' rights were very strong.

The important issue here is that probationary police station representatives are allowed to attend police stations and advise clients, after requiring to have been present at just four such interviews. Although there are, in theory, restrictions in place preventing Accredited Police Station Representatives from giving advice, at least initially, in serious cases, the experiences of some of the participants in this study suggest that these guidelines are not strictly adhered to⁷⁴. The situation can only be addressed if individuals are aware that the person attending is a Police Station Representative, and none of the accused persons in this study knew that persons other than qualified solicitors might attend to give advice at police stations. The few who later discovered that their advice had been given by police station representatives only made this discovery post conviction – some are still unclear as to whether or not their initial advice was given by qualified solicitors or police station representatives.

under the legal aid scheme for providing that service then they must use an accredited police station representative' <http://www.theiop.org/regulation.html>

Becoming an accredited police station representative in England and Wales involves first registering with a 'supervising solicitor.' The trainee then attends police stations with the solicitor in order to provide a portfolio of four case reports – two observing the solicitor giving advice, two giving advice under the supervision of the solicitor. Once the portfolio of these four case reports is submitted, the 'probationary' police station representative can attend police stations on his/her own for the remainder of the 12 month period. During that time, they must submit the second part of the portfolio, which includes five detailed reports of cases the probationer has conducted by him/herself. Successful graduation to the status of fully accredited police station representative is achieved by successfully passing two examinations – the Critical Incident Test and the Accreditation exam. All of the above must be completed within 12 months of original registration.

⁷⁴ The introduction of the Criminal Defence Services Direct (CDS Direct) in England and Wales requires that police officers log calls on behalf of persons questioned at police stations, and the CDS Direct then tries to contact a solicitor on behalf of that person. If a named solicitor cannot be contacted within two hours, a "duty solicitor" will be offered instead. CDS Direct staff are referred to as "legal advisers."
http://www.direct.gov.uk/en/Governmentcitizensandrights/GettingLegalAdvice/Legalaidincriminalcases/DG_196362

Furthermore, the accreditation scheme applies only when Legal Aid is being sought – because ‘a paralegal does not need to be an accredited police station representative to go and advise clients,’ individuals funding their legal defence privately may find that the representative who advised them at the point of arrest has no recognisable qualifications of any sort.⁷⁵

Nonetheless, the fact remains that not one accused person, or any of their family members who participated in this study, was aware that non solicitors could, and might, be giving advice at the point of arrest and initial interview. One Group Two Interviewee, on discovering that her sixteen year old brother had been given very poor advice by a non solicitor, was distraught to find out that she could not challenge that advice as it was deemed to have been ‘accepted’ at the time of giving.⁷⁶

Reassurances that duty solicitors are trustworthy and will take care of the accused persons’ best interests may come from the simple gratitude for ‘*hav[ing] a solicitor who appears friendly and helpful, regardless of the quality of the legal advice* (Skinns, 2011, p.29) given that factually innocent individuals who participated in this study would have been unable to judge the quality of the advice they received.

The irreparable damage done in police interviews where duty solicitors (or perhaps

⁷⁵ Concerns following the Cadder ruling in Scotland were raised about the impact of the ruling on the availability of duty solicitors out of hours. It is reasonable to expect that the use of accredited police station representatives will increase to meet the new demand created by the Supreme Court Judgement and the subsequent emergency legislation introduced as a result.

⁷⁶ A challenge may be made if it can be shown that a representative failed to advise a client that s/he is an ACPR (or similar) rather than a qualified solicitor. However, this client maintains that the representative did not, contrary to guidelines, advise the client of his (the representative’s) status, but, as there is no record, there is no way of proving this either way, negating any possibility of challenge.

APSRs) failed to properly advise the accused was an area where, retrospectively, accused persons and their families felt betrayed by the system they believed was protecting them:

‘*** had the duty solicitor, and he never said a word to him. Never stopped him from saying what he did say, which is probably a lot of what got him convicted [even though] he (the accused) got [several details] wrong...’

(family member, accused convicted, sentenced to 15 years)

In summary, a combination of lack of understanding about what may be ‘incriminating,’ reliance on the Duty Solicitor to guide and advise, police information downplaying the seriousness of circumstances and the failure of Duty Solicitors to properly protect the rights and interests of their clients led, in several cases, to accused persons giving information which was later used against them.

The question raised by these experiences, however, is why accused persons, having experienced a police investigation which had proceeded in a manner far removed from their expectations, continued to trust the Justice System to right the wrong.

In this respect, the gap between lay understandings of how the justice system works, and legal understandings, is marked. Trust in the justice system is a multifaceted concept, its boundaries blurred by the fact that different languages are utilised by those within and those outwith the CJS. Whereas the ‘misunderstandings’ of police investigations are taken to be straightforward misunderstandings of people ‘speaking

the same language' (i.e. police officers and accused persons mean the same when they speak about 'evidence' or 'alibi' and so forth,) the expectation that those dealing with 'the law' would naturally speak a different language (legal speak) when in the legal context, was held in conjunction with the belief that lawyers would translate, in both directions, for those who were not legally trained. It was on the basis of this expectation that wrongly accused persons and their families entered communications with defence teams, seeking a 'proper' explanation for the circumstances in which they found themselves, and a professionally informed solution.

Defence teams and trial preparation

Although contact with solicitors, in the first instance, was most often in police station interviews, the relationship between accused persons and their families and what would become 'defence teams' did not come into being (at least in the perceptions of the wrongly accused and their families) until it had become clear that matters would proceed to trial. Defence teams, therefore, raised far more personal and specific expectations than duty solicitors. Individuals and family members referred to 'our team,' with the clear and unquestioned belief that the legal representatives were approaching the case with the same beliefs, expectations and objectives as the families themselves.

Trust placed in defence teams was qualitatively different to that placed (originally) in police officers. Whilst participants expected that police officers would recognise innocence, sooner or later, the failure of police officers to do so was rationalised as a 'risk' of the job – misunderstandings, police officers acting upon what they perceived to be reliable (but known to the wrongly accused and their families to be mistaken)

information, or ultimately, that police officers are not charged with the responsibility of making the final decision about who is or is not innocent.

Defence teams were viewed in a different light. Participants' expectations were straightforward – lawyers employed to defend a person against charges made, did not face the same ambiguity as police officers. Their client was innocent, they would both know and believe that to be a fact, and all they were required to do was to demonstrate that fact in court. There was no perceived 'risk' that solicitors or QCs would act on mistaken or erroneous information, or that there could be any misunderstandings which would lead to failure to properly defend the client, as the defence team had direct access to the accused and his/her family members, and to all of the information uncovered by the police investigation, and the objective of the defence team was to prove their clients' innocence. There was a further, very strong belief, that defence teams were a large part of the means of righting the 'wrong' which was perceived to have occurred during the police investigation, trials being the other part of that means.

Ignorance of criminal proceedings in general was, in part, based on assumptions about legal professionals and what they actually do. Many accused persons and their families understood that there was a clear and obvious difference between solicitors that they may have used for domestic or business matters, such as conveyancing or business contracts, and the solicitors they would need to defend against serious criminal charges, but that, in the main, was the only distinction most could identify. Thereafter, solicitors advertising or recommended as 'criminal lawyers' were deemed to be both competent and experienced in whatever area of criminal defence the individual cases required. Many families would only learn retrospectively that the legal team they had trusted to

defend their case had no previous experience in such serious cases. Very few asked about experience prior to solicitors being engaged. This was, in part, because a significant number of Group One and Two interviewees believed that once a duty solicitor was 'allocated' to a case via the legal aid system, they (the accused) were required to stay with that solicitor for the duration of the case, as previously discussed. Further, fear of changing solicitors (when it was discovered this could be done), in case such a move adversely affected the outcome of the case (or, indeed, in case another solicitor would not take on the case), was quoted as a reason for staying with a defence team where concerns had arisen in half of cases in this study. This situation often led to conflict within families, where some family members wanted to change solicitors, and others were too afraid to do so. There was a common misunderstanding that where defence work was funded by legal aid, accused persons had no element of choice in which solicitors represented them – that was believed to be a decision taken by the Legal Aid Board (or some other unidentified body within the CJS).

For example, one family member reflects the beliefs of several Group One and Two interviewees:

'The police had allocated, or they'd got us this person, that was it, that was who you had to stay with throughout, because they'd heard all the interview throughout - we know better now, but we honestly didn't even consider any other option...we just assumed that who you had that day... that was your solicitor throughout.'

(family member, accused convicted, sentenced to 11 years)

This also highlights the belief that solicitors' knowledge of the case was both extensive (they were involved right from the first interview) and critical to the defence case. Even though, in this case, it would later transpire that the 'duty solicitor' was, in fact, an Accredited Police Station Representative (APSR), this family believed, as did others, that events at interview, plus anything the accused had told the APSR would be faithfully relayed to the next 'solicitor' they met.

Even amongst those who funded their cases privately, there was little real knowledge or understanding about how to choose or evaluate solicitors for the task. The majority of people in this position (although, in terms of this study, there were only very few), tended to follow recommendations from solicitors they had used for domestic or business purposes previously.

Although it would appear to be stating the obvious that accused individuals and their families expected that the solicitors would 'properly defend' against the charges, few had any real concept of what was involved or required for a 'proper' defence. A combination of trust and deference contributed to a situation where defendants and their families, ignorant of the processes and requirements of their situation, were reliant on the defence team to guide them, and to act for them, but also held an absolute expectation that this was, in fact, what defence teams were doing.

A serving police officer, who clearly believed that his background of 30+ years service had given him a reliable insight into the CJS said:

‘I put that much trust in the legal system – I’m a police officer and I thought everything in it would be fine and the truth would come out, no problem, and the legal team would do everything in their power to make that so.’

(Serving police officer, family member, also a police officer, convicted,
sentenced to 15 months)

This family claim to have been told that it would be ‘better’ for them to privately fund the accused person’s defence, using a firm which did not accept legal aid cases, highlighting a point raised by several participants about legal aid funding of defence cases: that ‘legal aid solicitors’ are of inferior quality and experience in comparison to privately funded solicitors. The experiences of those Group One and Two interviewees who had funded their defence privately does not bear out the suggestion that a ‘better defence’ is obtained by private funding as opposed to legal aid funding, however, the perceptions of privately funded clients as ‘more important,’ in the views of legal representatives, were clear in some cases:

‘I called up one day – I’d been trying to get her for over two weeks, but she’d never return my calls or emails. So I finally got her this day, and I said, I don’t mean to be a pest but... and she jumped in right away and said, Look ***, I’ve taken your call, but you’ll have to be quick. (The QC) is working for a paying client, and you know that has to come first – *** (convicted person) will have to wait.’

(Family member, accused convicted, sentenced to 11 years.)

Yet one family who had funded the defence of their accused family member privately said:

‘The solicitor was, in my opinion, incompetent or indifferent... we were all lost and the solicitor was the only one who knew how it all worked...I am not satisfied with anything that the defence did...I believe that many solicitors are not capable of taking on such major cases...’

(family member, accused convicted, sentenced to 18 years.)

There was also confusion regarding the roles of various individuals, and their relationships to one another. For example, there was no concept of accused persons, or their family members ‘employing’ duty solicitors, or, in most cases, defence teams. Yet the acts of ‘engaging’ and ‘instructing’ legal representatives are, from the point of view of those representatives, contractual arrangements. However, the intermediary of the Legal Aid system blurs this arrangement, with accused persons and their families tending to see legal representatives as somehow being ‘given’ or ‘provided,’ and legal representatives perceiving the Legal Aid Board as their paymasters.

The significance of this lack of clarity only becomes apparent after conviction, when attempts are made to appeal those convictions. Where a team of legal representatives has not carried out clients’ wishes, or has failed to utilise information which convicted persons and their families believe should have been crucial to their defence, the appeal court will invariably dismiss such concerns on the grounds that accused persons had ‘ample opportunity’ to instruct counsel. (This is discussed further in Chapter 7, Post Conviction Processes.)

This is yet another area which is mired in confusion between the many legal protocols and directions governing legal process. Solicitors, and their agents, are ‘*free to decide whether to accept or decline instructions from a potential client*’ and are ‘*under an obligation to prepare the criminal case...having due regard to economy*’ but also that ‘*the solicitor’s primary duties are to the court and to a client.*’ (CLT (Scotland), 2008 p.139, p.147). As a result, the appeal court fall-back position that clients should have instructed their legal representatives prior to trial, ignores the facts that (a) solicitors are not obliged to carry out those instructions, (b) financial restrictions may make it impossible for Legal Representatives to comply with clients’ instructions, and (c) the technical difficulties arising from solicitors’ twin duties to the courts (which are responsible for the trial of clients) and clients themselves may create situations where solicitors could be seen to be neglecting their duties to the courts in trying to follow client instructions.

Wrongly accused persons and their families, however, tended to trust that their legal teams knew best what decisions and actions should be taken to best represent the clients’ interests, and deferred to the legal representatives’ superior knowledge and experience, even where explanations, if given at all, were not understood.

The problem with Harding’s (2009) definition of trust and entrusting is that it depends on notions of *voluntary choices*⁷⁷.

⁷⁷ Asserting that ‘*trust is an attitude that recognises and responds to the freedom of individuals to make choices*’ (2009, p. 247), Harding goes on to suggest that ‘*to entrust is to expose voluntarily, to the discretion of another person, interests that one cares about, with a trusting attitude towards, and usually also trusting expectations of that other person*’ (2009, p. 249).

Wrongly accused, factually innocent individuals do not appear to trust in this manner, for a number of reasons. Firstly, the element of choice, as such, is not available to them, except in the most basic ‘take it or leave it’ sense. Faced with interacting with a system about which the accused person has no knowledge or experience, but may have acquired perspectives and beliefs which suggest the need for legal advice, the decision to either seek or accept an individual who is charged with giving that advice can hardly be called a ‘free choice,’ neither can acceptance of any advice given be considered a ‘voluntary decision to trust’ that advice. Secondly, unless the accused person has the financial means to choose, the ‘choice’ of solicitor is dependent on the Legal Aid system, and, as many of the Group One and Two Interviewees reported, is perceived to be both decided by the Legal Aid system, and a ‘fixed’ arrangement. Thirdly, wrongly accused persons and their family members simply do not know what it is they are ‘choosing’ – their trust is that what they perceive as an entire system is operating on a plane which is alien to them, but which they believe exists to secure fairly simplistic objectives – to properly find and prosecute the guilty, and to exonerate the innocent.

Legal advisers on the other hand appear not to share such notions of trust, seeing their clients’ circumstances as series of factors to be argued within a specific framework, following specific rules, and approaching cases with a ‘some you win, some you lose’ attitude. One QC said,

‘It’s not about innocence. It’s about dealing with the charges made against the client, and that’s an entirely different thing. That’s what people just don’t understand. We have a job to do, within a set of rules that ordinary members of the public don’t even know exists. It doesn’t matter how often

you try to explain- if you've got the time to explain, that is – they just can't accept the idea. They have to think we're fighting their side, and I suppose in a way we are. But not in the way they think we are. It's not that personal. It can't be – we couldn't do what we do properly if we let it get that personal.'

The very suggestion that legal representatives may not be considering innocence as a factor in the defence of their clients is one which, were accused persons to know and understand this in their dealings with their representatives, would presumably seriously undermine the trust basis of the relationship, therefore, the trust element is, in fact, based on false premises on the part of the accused person.

Alexander and Sherwin clarify the position as it is understood by legal professionals, if not their clients:

'In addition to tolerating a good deal of deception by private actors, our legal system itself engages in various types of deception. Much of what lawyers do in representing clients can be viewed as deceptive.... The body of law at times seems designed to mislead ordinary citizens about the content of legal duties and the consequences that follow from their breach...' (2003, p.418).

This is the technical nature of the adversarial system which is 'hidden in plain view' from the general public. The adversarial system requires that pieces of information are selected on the basis of their utility in responding to claims made by 'the other side'

(McEwen 1998) – as such, concepts of truth and innocence become secondary to the adversarial process – if the prosecution contends A, the defence will choose strategically which information best refutes A, within the rules and restrictions of strictly legal processes. At the point of first interview, however, accused individuals assume that the fact of their innocence will be of central importance to the legal representative, and that the representative will do whatever they can to have that innocence recognised. This assumption, rooted in beliefs and perceptions of procedural fairness, is, unknown to those individuals, at odds with a legal system in which *‘the lawyers’ role is to take one side of a case and argue in favour of it, whether he believes in it or not...[in] language [that is] is hard to understand...[i]t is designed for communicating with other lawyers; an antiquated secret code’* (Andrews, 2004, p.1)

The difficulty faced by wrongly accused persons, when these two worlds of different understandings collide, is that they are unaware that any collision has occurred. Marmor notes that *‘one of the main virtues of the rule of law consists in the value that we attach to the predictability of the legal environment’* (2004, p.23). Although Marmor is discussing the worries of retroactivity of judicial decisions, this point is a more generally perceived and expected feature of legal processes; in particular, the belief that innocent people will be routinely and predictably exonerated in criminal investigations and/or prosecutions.

That people should be easily able to work out what ‘the law’ is, and how to remain law abiding, is a commonly accepted given, coupled with an expectation that

‘The law must avoid taking people by surprise, ambushing them, putting

them into conflict with its requirements in such a way as to defeat their expectations and frustrate their plans' (Ashworth 2011, p.5).

Yet this is, in fact, exactly the situation faced by wrongly accused individuals and their families. Believing that compliance with the law, in their given circumstances, is their *protection*, in that having done nothing wrong, the might of the legal establishment cannot harm them, they do, indeed, find themselves taken by surprise, ambushed (often by their own attempts to have innocence acknowledged) and in conflict with a system which is operating in ways that are either unknown to them (the wrongly accused) or in contradiction to what was expected or believed.

The difficulties faced by accused persons in their attempts to influence proceedings, either throughout the preparation of the defence case for trial, or during trial itself, was a source of considerable criticism by interviewees in all Three Groups. Although it was not until after conviction that the extent of the sense of betrayal was experienced (Group One and Two Interviewees continuing to believe that their legal representatives were 'fighting' for them, and believed in their innocence), retrospectively, these people highlighted several areas where legal teams had behaved in ways thought to be inconsistent with what was expected of them by accused persons and their families.

The failure of accused persons and their family members to take action when these inconsistencies arose must be understood in the context of the dependency relationship between client and solicitor. Accused persons and their families were dependent on the legal teams, both for guidance and representation. There was a strong belief that

challenging statements or decisions of legal representatives was neither appropriate nor possible.

The answer to this is bound up in the complexities of how members of the public view the justice system, and the legitimacy of its representatives and processes. It is, in fact, an essential element of continued confidence in the CJS that members of the public believe that there is equal opportunity for both ‘sides’ to argue their case, and that judges remain impartial throughout (McEwen 1998). This was the precise belief and expectation of factually innocent individuals and their families facing trials, and accounts for their impatience to have their cases heard in court. (Results from the scoping survey carried out as part of this study suggests that members of the public believe that the trial is an equal contest overseen by an impartial judge.⁷⁸)

Perceptions of legal defence representatives as attempting to get to the truth, and to present that truth in court so as to have an innocent accused person exonerated overrode concerns about preparation, apparently illogical decisions, and lack of contact in the run up to trials. Wrongly accused individuals and their families did not even consider the possibility that their defence team may not believe them, may not properly acquaint themselves with the facts of the case, and may go into trial without even the most basic understanding of the factors which those wrongly accused persons and their families considered critical to their defence.

A long term campaigner with almost three decades experience explains:

⁷⁸ Almost 70% of survey respondents believed accused persons have adequate opportunity to state their innocence during trial, 70% believed that unfairly or wrongly obtained evidence will be disallowed at trial, 63% believed that the jury hears all of the available evidence both for and against the accused, and 69% believed that judges remain impartial throughout trial proceedings.

‘We have been in a position where we [campaign group] have been consulted all along, the client’s been consulted all along, the family’s been consulted in great detail, and then at crucial moments...that’s been neglected, or wrongly represented, to disastrous effect. So even when you’ve got a degree of co-operation, it’s not guaranteed, it’s a system that, really, lawyers may be acting for their clients, employed by their clients, but in practice, they [clients] don’t have that degree of control at all – when it comes to the crunch, you don’t have it.

(campaigner and case worker, 28 years experience)

Such a pessimistic view is not one held by wrongly accused persons and their families as they approached the trial process. The ‘cliché’ referred to by the above quoted campaigner during interview, that people come to meetings post conviction saying ‘I thought British Justice was the best in the world’ was still, prior to trial, a very strong belief. The strength of belief that perceptions of the justice system, as portrayed by the media, reflected the reality of how the CJS operates, cannot be understated. References to media as the main source of information believed to be correct about police investigations and trials featured in 72% (or 33 out of 46) Group One and Two interviews, with 22% (or 10 out of 46) making direct reference to fictional shows such as ‘The Bill’ and ‘CSI.’

Only two families who participated in this study expressed satisfaction with their legal representation – the accused, in both cases, was acquitted at trial. They did, however,

express the same concerns about the police investigations leading up to trial as those who were ultimately convicted.

Trials

The argument that juries of lay people serve as a protection against state abuse of power (Ashworth & Redmayne (2005), fails to take account of the effects of abuse of powers prior to trials, which are not known to jurors.⁷⁹

Further, as members of the public, jurors, like the wider public, are recipients of media portrayals of political rhetoric which emphasise responsibility, the rights of victims as central to concepts of ‘justice’ and an increasing intolerance of, and hostility towards, offenders.

Also, the existence of the appeals process, and the CCRC as an ‘independent’ body, able to look at convictions where questions regarding their safety are raised, may influence jurors towards conviction where juries themselves are unsure of guilt, but may be afraid of acquitting someone who could then go on to offend again.

An experienced investigative journalist explains:

‘The introduction of the CCRC just made things worse, in that it institutionalises Miscarriages of Justice. Rather than putting the emphasis on eradicating the causes of Miscarriages of Justice, and focussing on

⁷⁹ *‘bringing lay people into the court room means that the pursuit of justice is not a closed shop, dominated by lawyers and other professionals. It makes trials genuinely public and helps to prevent the State abusing its power’* (Ashworth and Redmayne, 2005, p.299)

getting it right in the first place, the CCRC gives the idea that there are mechanisms for rectifying Miscarriages of justice, thereby providing an official acceptance of [their] occurrence.’

(investigative journalist, author specialising in injustice)

There are also, as this study has shown, the difficulties raised as a result of the differences in lay understandings and perceptions of concepts and phrases used during trials, and their legal equivalents. Even taken from the idealist position that juries base their decisions on the information before them at trial, their interpretations and understandings of that information are unlikely to take into account the legal and procedural ‘secrets’ which are contained in the ‘ancient code’ used by legal professionals.

It is against this backdrop that wrongly accused persons approach trials, although the expectation is clear – that juries will be given the opportunity to hear all of the evidence for and against the accused, that ‘the truth’ will be apparent, and juries will rely on ordinary common sense when considering their verdicts. Neither wrongly accused persons nor jurors are likely to be aware that earlier decisions and actions taken by police investigators, or prosecuting and defending legal representatives will already have been ‘shaped’ by the rules governing trials, those rules, and the decisions and actions they shape being hidden within the deeper workings of the CJS, and absent from general public beliefs and expectations, and media representations of the CJS.

Lack of useful or reliable information from legal teams prior to trial left wrongly accused persons and their families entering into the trial process on blind faith. Many

had only met senior counsel a short time (ranging from just hours to a few days) prior to the beginning of proceedings.

Because of expectations that ‘everything would come out at trial,’ two interlinked concerns arose repeatedly in this study – one being prosecutors failing to ‘play by the rules’ and the other being defence representatives who both failed to challenge such behaviour by prosecutors, and also to properly use the information available to them in order to challenge the prosecution case. Arising from these concerns were decisions and behaviours by judges which were far from the previous beliefs and expectations of wrongly accused persons and their families (as discussed in ‘Judges’ below.) Once again, there was no real understanding that these ‘failures’ were, in fact, indications that the system was actually functioning in exactly the way it is both designed and intended to function.

Although individuals understood the prosecution to be trying to ‘secure’ convictions, there was a clear expectation that they would do so by what were perceived to be fair and procedurally correct means. Where, for example, information had been obtained by what were perceived to be unfair or illegal means, it was expected that such information would not later be produced as ‘evidence’ against the accused. One family member said:

‘Even the main [prosecution] witness... she wanted to retract her statement, but the police wouldn’t let her, but she went on the stand and she was a complete mess – she didn’t answer any of the questions, really, that were asked of her...so I think she was pressured by the police to go into court.’

(Family member, accused convicted, sentenced to 18 years)

It was, however, defence QCs, rather than prosecuting QCs who came in for the harshest criticisms from wrongly accused persons and their families in this study.

Arrogance and dismissiveness by defence QCs, and lack of knowledge of, or preparation for, the case, were sources of complaint for many Group One and Two interviewees in this study. Lack of communication and understanding also featured highly in complaints and concerns, many of them raised with solicitors during trial, but remaining unaddressed throughout. The sense of helplessness for accused persons and their families in these circumstances was clear – having expected the trial to be the forum in which ‘their’ truth would finally be aired, and their side of the story told, there was nothing they could do, and no-one to whom they could turn, in order to rectify the situation which then developed.

Having trusted legal teams in the run up to trial that everything was in order, and accepting dismissals of their own suggestions on the reassurance that legal teams ‘knew what they were doing,’ the perceived failure to adequately prepare QCs for trial was a source of great anxiety for wrongly accused persons and their families entering the trial process. One family member says:

‘It was a complete shambles...it wasn’t prepared. Our barrister was dropped... so we had quite a length of time to get a new barrister; [the solicitor] said not to worry about that, but then no barrister appeared, and [the solicitor] said he was getting another one...then that one fell through. On the Friday when the trial was due to start (but it didn’t start til the

actual Monday,) [the solicitor] still hadn't planned a barrister – he said, 'Don't worry, I'll get one over the weekend,' and we was like, What?... and he said 'Don't worry, a weekend for a barrister is more than enough to go through a trial...'

(family member, accused convicted, sentenced to 14 years)

Few had dealings with QCs in preparation for trial, the majority meeting counsel either just once before the trial began, or on the morning of the trial itself. None questioned whether solicitors had actually passed on information to counsel throughout the run up to trial, instead, taking it for granted that this was being done.

Even when it became apparent that counsel had not been properly informed or prepared, there was nothing accused persons or their families could do, yet they continued to believe that once the trial was properly underway, as evidence was given and witnesses cross-examined, QCs would realise where the 'gaps' in their knowledge and understanding lay, and, aided by the solicitors, would address issues as they arose.

For example, one family member, after saying:

'The barrister, when we were talking to him [on the first day of trial] it didn't even sound as if he'd looked into the case- he commented about the three of them punching into the victim, and that's just not what happened'

(family member, accused convicted, sentenced to 13 years),

went on to say that she still expected that 'the truth' would come out at trial. Although most Group One and Two interviewees stated that they really did not know what to

expect at trial, because they had never experienced a serious criminal case trial before, they demonstrated underlying beliefs by the actions they took as trials progressed. These beliefs echoed the same expectations on which they had relied throughout the police investigation and preparation for trial – that dishonesty and unfairness would be properly addressed, that the truth would emerge, and that the innocent would be exonerated. Regardless of the fact their experiences at each previous stage had fallen far short of their expectations, they continued to expect the next stage to rectify those previous failings, and this was nowhere more apparent than in trial proceeding themselves.

What was perceived during trial as arrogance by counsel was later rationalised, mainly, as having occurred due to two influences – either that the QC did not believe (and had not believed throughout) that the client was innocent, or that the client did not matter to the QC, who was simply doing a job for very good pay.

One family, who paid £7,000 for a barrister to read the case papers in the first instance, were astounded at the treatment they received, even though their total bill for services ran to £30,000. One said

‘I thought, like everybody, that they know everything, and they’re not telling you because they don’t want to worry you, but they’ve got all these things that they’re going to pull out that they can prove, and get justice... [at trial,] you ask him a question or anything, and he’d snap our heads off...and when we sent notes over to him, on bits we knew he’d missed, he’d just take them off the solicitor sat behind him, and he’d just screw

them up. He didn't even read them and screw them up, he'd just screw them up.'

(family member, accused convicted, sentenced to 15 months)

When these proceedings collapsed in an abuse of process hearing, the family, remaining with the same legal representation, reported being shocked when the QC handed over CCTV footage, telling them to 'go away and study the tapes' in order to see if they contained anything which might help the defence case for the accused person. The same family member said:

'And then we thought, just a minute, the barrister hasn't even studied the tapes, so now, then, we start to realise that they're given a case, and they defend you with as little paperwork as they can get away with...you daren't say to each other [the barrister's] crap, because you don't want to admit it...we were all kind of thinking about it, but we didn't want to express it because it was then real and we had all our eggs in that basket by then.'

(family member, accused convicted, sentenced to 15 months)

Judges

The belief that judges would ensure trials were conducted fairly and (what was believed to be) lawfully, dominated the expectations of wrongly accused persons and their families. This was reflected in the survey findings forming part of this study, which reported over 70% of respondents in agreement with the statement: 'The courts will recognise and disallow evidence obtained by wrongful or unfair means, by breaking

rules, or by serious errors or breaches of procedures during investigations’ and 69% agreeing that judges remain impartial throughout.

In spite of Lord Bingham’s claim that ‘*[a]s for the judges, the public entertain a range of views, not all consistent (one minute they are senile and out of touch, the next, the very people to conduct a detailed and searching enquiry...)*’ (Lord Bingham, 2010, p.9), wrongly accused individuals and their families harboured no such doubts – judges should, and would, ensure that the truth be revealed and the innocent exonerated. The trial was, after all, the last point in a series of events where expectations and beliefs had been shattered at every step, and individuals who had experienced this process looked, each time, to the next level to rectify the situation.

The trial also was the arena in which the two separate belief systems and languages concerning the CJS came into direct and obvious collision, and the words and actions of judges epitomise the utter confusion and disbelief experienced by wrongly accused persons and their families, most especially when considering judges directions to jurors. One family member said:

‘I hadn’t seen the indictment, and I don’t really understand charges and how they’re worded and all that....the judge is doing his summing up...the first charge, is if [Incident 1] happened once, the second...if it happened more than once...the third and fourth charge relate to [incident 2] – if it happened once, he’s guilty of charge three, if it happened more than once, he’s guilty of charge four. Charge five is the rape charge, charge six is an alternative to charge five – so that means if you find him guilty on charge

five, you don't need to use charge six. If you find him not guilty on charge five, then you bring charge six into play...[the verdict]...charge five – guilty, charge six, guilty....The judge said, before he sent *** down, he said, 'You can't find him guilty on charge six. It's the first time I've ever had to do this- I'm over-ruling the jury...you obviously didn't understand what I was telling you, I thought I had explained that clearly enough before you left here.'

(Family member, accused convicted, sentenced to 14 years)

To this family member, the common sense conclusion (and the conclusion expected to be reached by the judge) was that if the jurors had not understood such a critical part of the instructions given to them, then no-one could be sure that they had understood any of the other important facts of the case. The judge's acknowledgement that the jury had clearly misunderstood raised the expectation, in the context of judges being understood to be fair and impartial, that the verdict in its entirety would be unsafe. Again, using logical progression reasoning, this family member could not reconcile an impartial judge noting the failure of the jury to properly understand directions, with that same judge's decision to allow the rest of the guilty verdict to stand.

The difference between lay and legal understandings became far more pronounced at trial than at any other stage in the process of wrongful conviction of factually innocent individuals. One family member, for example, found it impossible to understand how a judge who had said 'it is common ground that you *** took no part in the stabbing,' could then go on to pass a minimum 13 year sentence for the crime of murder. Similarly, another family member believed that the judge had 'told the jury that they

must acquit,' when, in fact, the judge, as is common practice, had instructed the jury that if they were unsure about whether guilt had been satisfactorily proven by the evidence, then they must give the accused the benefit of the doubt and acquit.

Retrospectively, wrongly convicted individuals and their families viewed the actions and decisions of judges as an indication of personal involvement on the judges' part, which is a reversal of the beliefs and expectations with which they entered the trial process.

One family member expressed bitterness at what he perceived as a personal desire on the part of the judge to punish the family, rather than responding professionally and impartially to the information before him:

'He didn't have to send *** to jail – that judge knew it was a very, very, very poor enquiry and the level of guilt had to be suspect. He could have suspended that sentence. And he could have left us to fight, but, no, he wanted to make us suffer...'

(family member, accused (serving police officer) convicted, sentenced to
15 months)

Another, following conviction, came to believe retrospectively that the judge had been biased from the moment the case came before him:

‘He made up his mind. He seen that comment and that was it, in my view. And didn’t listen to any of the evidence that proved it weren’t him. It was enough for [the judge] that [the accused] owned the car.’

(Family member, accused convicted, sentenced to 12 months)

Conclusions

Wrongly accused individuals and their families, having experienced a police investigation which has, in their opinion, ‘gone wrong,’ and resulted in charges of a serious nature, continue to trust throughout the subsequent stages, that the error will be recognized and rectified. Rather than the failure of the CJS to right the wrong creating a suspicion that the CJS is not working as these people believed and expected that it would, the level of trust that the situation would be corrected *increased* as cases progressed through the process.

The existence of two different sets of understandings and meanings for common concepts and phrases was known by only one group – those working within the CJS. Wrongly accused individuals and their families believed that the CJS of their beliefs, perceptions and expectations not only existed in real terms, but would be recognizable, transparent and familiar in its operations. Even though Group One and Two interviewees had had no previous dealings with the CJS in serious matters, the information gathered through life experience, unexamined assumptions and media representations was taken to be factual, reliable knowledge. ‘Knowing’ that a presumption of innocence must prevail, that evidence must *prove* facts for or against the alleged guilt of the accused, that judges will strictly enforce ‘the rules’ (those rules themselves being taken to be ‘known’ in a general, if not detailed manner) and that

juries will hear all of the evidence, was the basis of the continued trust in a system and its processes which failed time and again to meet those beliefs, expectations and perceptions.

The failure of CJS professionals, from police officers to judges, to explain that well known phrases and commonly accepted concepts had, in fact, vastly different meanings in legal terms, not only contributed to maintaining the ignorance of those individuals whose decisions and behaviours would be based on that ignorance, rooted in a trust that their beliefs and perceptions constituted reliable knowledge, but was, in itself, a necessary part of the process of obtaining these convictions.

One Group Three interviewee said;

‘... the majority[of clients] believe that because you’ve got a title – solicitor, or lawyer, or advocate, for that matter, that these people are experts in their field, and a great many people may feel intimidated to challenge that person’s view – you wouldn’t go to a doctor and tell a doctor what your illness is – you listen to the doctor....a great deal of lawyers feel that they have more loyalty to another lawyer than to their client... that’s even, in terms of respect, loyalty...to the opposition, rather than their client. I’ve seen Prosecutors... and defence counsel sitting at the same table, sharing the same coffee, speaking about the same case, outside of court, speaking about the client like he’s... I don’t know...not even a commodity... he’s not part of the process... it’s a game between two

people who respect each other, and they've got no thought for the person that's under trial.'

The beliefs and perceptions of the wrongly accused and their families are mirrored by beliefs and perceptions held by the public generally, which exacerbates the difficulties faced by wrongly accused/convicted persons. Where the public, generally, believes that CJS processes are fair, that innocent individuals are exonerated by that system, and that safeguards are built in at every stage to ensure that convictions are properly and justly obtained, and where that general public has not had access to the lived experiences of wrongly accused/convicted persons and their families, in which those beliefs and perceptions are thrown into sharp relief against the realities of the actual operation of the CJS, then the general public has no reason to consider, far less suspect, that convictions are anything other than fair, just and 'right.'

The increasing centrality of the importance of victims and victims' families to criminal justice processes further reinforces public perceptions of a justice system 'on the side of' victims. Overly emotive, personalized media focus on victims and their families, political rhetoric exaggerating the threat to 'decent people,' and promising tough action against offenders, and the secretive, coded language of legal professionals all converge to present an image of a well-oiled machine, working seamlessly to deal with criminals and acknowledge (and properly 'compensate' through conviction) victims and their families.

Against this public perception, sympathy and support for individuals claiming wrongful conviction and factual innocence is not readily invoked; indeed, the opposite is often

the case, with negative media coverage critical of appeals processes and the corresponding cost to taxpayers.

Having experienced the failure of the system to rectify its errors at every stage, right up to conviction, it might be expected that wrongly accused individuals and their families would realize, or at least suspect, at the point of conviction, that such a prolonged and extensive catalogue of ‘errors’ may be an indicator of a process operating to a different agenda than the one they had believed and expected to be the case. Emotionally, the point of conviction was a blow for which none of the Group One and Two interviewees were prepared. The ‘final realization’ that the error had not been acknowledged and rectified had to be faced in the same instant that the reality of a custodial sentence (in most cases, a substantial number of years) came into being.

The effect of this double blow, it might be predicted, would be a catastrophic loss of confidence and belief in the system. This parent represents the reactions of many Group One and Two interviewees:

‘I screamed like an animal. I screamed like...it’s a noise I’ve never heard, put it that way. It was torture, agony... (crying)...I was on my knees, and it was as if everything just stood still. Everything just stood still. I just kept saying, it’s not true, it’s not true, it’s not true...’

(family member, accused convicted, sentenced to 20 years)

Indeed, this same family provides a clear example of the differences in understandings and perceptions between legal professionals and lay people:

‘[the solicitor] phoned back later and said, ‘I’m sorry, I got that wrong.’ For just a second, I thought, oh my god, he’s made a mistake. I thought it was ok after all, and he turned round and said, ‘No, he was found guilty by the art and part verdict... I said, you call that fucking justice? You have a cheek to stand there and say that’s justice? [The solicitor asked]’Do you know what art and part is?’ I said, you’re not talking to a fucking idiot, I know what art and part is...ask *** and *** ... everyone in *** knows what art and part is. He said, ‘Well I can’t possibly comment on that, but I do apologise for getting it wrong.’ It was as if he was putting the knife in twice.’

However, the finality of the conviction did not destroy belief or trust in the justice system, as wrongly convicted individuals and their families continued to believe that the safeguards and abilities to rectify errors which they believed to be built into post-conviction processes would put right what the system, to that point, had failed to rectify.

CHAPTER SEVEN

Post Conviction Processes

Immediate aftermath of conviction

This chapter examines the most common experiences in the immediate aftermath of conviction, and the longer term post conviction processes faced by wrongly convicted individuals and their families, as they seek to have their convictions overturned, and their innocence recognised and acknowledged.

The lack of preparation for such an eventuality is discussed, highlighting the extent to which trust that the CJS would “rectify the error” had underpinned beliefs, perceptions and understandings about the processes leading up to conviction. The continuing impact of Legal Aid funding, raised in the previous chapter, is addressed in relation to appeal processes.

Of particular interest in this chapter is the impact of CJS processes which failed to fulfil previous expectations and beliefs in previous stages, and the reasons why people continue to trust those processes, in spite of their previous experiences. The difficulties faced as a result of the now-cumulative failings of the CJS to “rectify the error” are addressed, along with a brief overview of some of the support and campaign groups to which many turn when trying to overturn wrongful convictions.

Almost all of the Group One and Two interviewees whose cases went to trial knew nothing about appeals processes, and had given the subject no thought, on the belief that

the trial would acquit the accused person, and there would be no further action required. There was, however, an underlying assumption that the right to appeal was automatic, especially when the convicted person was factually innocent, and this assumption was challenged immediately following conviction.

Only seven families out of the 24 cases ending in conviction claim to have been told by their defence teams that an appeal was possible, and that the process would be started immediately.

For many, however, the response of legal representatives following conviction plunged them into further confusion and despair, as the legal representatives' responses were reported to be a stark and final message – you cannot appeal, there are no grounds. For 12 out of the 24 cases which resulted in conviction, this news came immediately following conviction, although different reasons and 'explanations' were given. According to a family member, one QC told his newly convicted 20 year old client 'make something of yourself, you've got 27 years to make something of yourself – educate yourself' Another was told he was 'not allowed' to appeal, and another still reports being told that there was 'no point' in appealing seriously flawed forensic evidence on the basis that 'you can't question DNA.'

This family member attempts to explain the utter devastation experienced by those who were given the news, immediately following conviction, that they could not appeal:

'We didn't know about appeals, certainly was not expecting the verdict we got, but to then be told we could not appeal, we were...this is it, this is the

end of the road. It was like we'd had our arms and legs sliced off in the courtroom, and the rest of it was being done outside before we came home. Took everything from us- that's it, there's nothing more we can do...[when we found out this was wrong] I was absolutely livid... had we known and it had been discussed with us, we could have started putting everything into place straight away.'

(Family member, accused convicted, sentenced to 11 years)

Post conviction processes take different routes, dependent on whether the original defence team remains engaged with the convicted person or whether their input ends at conviction (either because the legal professionals believe, rightly or wrongly, there to be no strong grounds for appeal, the legal professionals themselves have no interest in pursuing an appeal for other reasons, or because the convicted persons and their families no longer trust them enough to continue to represent them). Both processes are discussed separately below, although both end, ultimately, in the same place – with a team of legal representatives attempting to present a case for appeal to the Courts of Appeal.

Where the original team was retained, wrongly convicted persons and their families continued to trust that the legal representatives were still fighting to prove the clients' innocence, and that the by-now cumulative 'mistakes' could still be rectified. For these families, it is only after a failed appeal that the extent to which they have been failed by the various processes of the CJS dawns on them. One family member, the family having retained the same legal team for 5 years and experiencing long delays, very poor communication, no explanations for why processes initially believed to take months

were taking years, said:

‘I would urge anybody in our circumstances – when you hear that word, ‘Guilty,’ sack the legal team right away. They haven’t done their job, and they’ll lie to you, string you along, they’ll do anything they can to keep you... we were too scared to do that in the beginning – we’d never been in that position before, we didn’t know what we could and couldn’t do, and they made us believe they were the best, that nobody else would be able to handle such a big case... and look where it got us...five years that my son can never have back...When [the appeal] failed, they said, ‘Don’t worry, we’ve still got the CCRC.’ We knew then that they’d been crap from the start, but we were still scared... it was *** [campaigner] who said, ‘Let’s face it, another team couldn’t do any worse.’ And it was only after that that we found out how bad they’d really been...looking back, I wish we’d sacked them the minute the guilty verdict came back – that’s what I tell people to do now- don’t be scared, just do it...’

(family member, accused convicted, sentenced to 20 years)

On the other hand, when wrongly convicted persons and their families find themselves abandoned by their legal representatives, a new process emerges, in which these people find themselves having to learn how the CJS really works, by a variety of means, in order to try to find routes to appeal.

Progressing without legal representation

The process of changing legal teams is one which, even in view of the sense of betrayal and disappointment experienced, proved difficult and frightening for the people who took this route, whether voluntarily or not. For some, the belief that it was better to have some legal representation, no matter how poor, than to have none at all, was a source of anxiety and dread, whether as a result of the legal teams withdrawing from the case, or as part of the decision process about whether or not to continue with the same legal representation. Many of the families echoed a view which was offered by an experienced investigative journalist:

‘When it comes to challenging a conviction, it should be enough to say and show, ‘this is ludicrous. It doesn’t matter whether they’ve been ‘correctly’ convicted – the situation in which they have been convicted is absurd.’

However, the process of learning and understanding the difference between ‘correctly’ or ‘properly’ convicted in legal terms, and the same conviction in terms of factual guilt or innocence was one which only began for these families after convictions had been obtained, and in some cases, after the first appeal had failed. Many expressed anger and disbelief that these differences had not been explained before, and outrage and bitterness that they existed at all – one family member said:

‘I think what happens is a when a person goes inside, they start learning more about the legal system than they would have known on the outside...[the information they need before they go to court and trial] I think they learn ... when they’re in prison...’

(family member, accused convicted, sentenced to 30 years)

Many family members reported finding information, mainly via the internet, which clarified their situation and brought understanding that the language in which they had been trying to communicate throughout the case was a different language to that being used within the legal professions. Many became extremely knowledgeable about legal processes and terminology, with a growing sense of dismay and disbelief that their legal representatives had not enlightened them.

A long term campaigner explained:

‘[people] rarely have an idea of what the appeal process is and what they can do with it...they have expectations that there is an appeal process and that it can be used and that the wrong can be put right. They have no idea, for instance, that the appeal process does not review the case- I think most people expect something like that, so they don’t understand that they need fresh evidence or argument about the conduct of the trial...they don’t know what they need for an appeal... they don’t know why the lawyers have suddenly stopped doing anything for them, because they don’t understand that the money has run out and there is no funding for it...people do have unrealistic expectations, and it’s not their fault, it’s a common currency, and most people don’t even think about it until it hits them...’

(Interview, long term campaigner)

Three families who participated in this study contacted the trial judge directly, following conviction, in the hope that the judge would review the case on the basis of their representations. All three included references to letters of support, petition signatures, and evidence which they believed should have been adduced at trial, indicating the strength of belief and trust in the role of judges to ensure ‘justice’ prevails, by assessing all of the information impartially. None understood the deference afforded jury decisions, and what has been called the ‘traditional’ reluctance of judges to interfere with jury decisions (a factor which would become yet another source of disbelief and bewilderment in later appeal processes.) However, in the late 1990s, concerns amongst legal professionals emerged that

‘There is a trend within the Court of Appeal that seems to suggest that amongst some judges there is an approach where convictions are sustained in the face of compelling fresh evidence or new arguments never before the jury’ (Campbell Malone, Statement of Purpose, 2001).

In other words, there is concern amongst legal professionals that on the one hand, apparently perverse decisions by Appeal Court judges were being explained away as a result of judges being reluctant to interfere with a decision reached by a jury, (the reasons being that the ultimate right to a trial by jury was that the decision of innocence or guilt be taken by a jury of the accused’s peers) but on the other, appeal court judges were, in effect, second-guessing what the effect of new evidence may be (or may have been) on jury decisions, or, perhaps worse, were deciding simply that new evidence was not of significant importance to be placed before any jury, even if it had never been before a jury previously.

Several family members made contact with writers, journalists, documentary makers and high profile organisations in the hope of finding alternative ‘authorities’ to take up their cases. All of the wrongly convicted and their families who participated in this study demonstrated a fierce determination to ‘fight,’ even though most, although they knew what they were fighting *for*, had no real idea exactly what it was they were fighting against.

The earliest stages of this process are the most frightening and bewildering, with many families reporting searching the internet for information as the only route available to them:

‘I had to go on the internet and find wrongful convictions, innocence project, MOJO, all these sites, and suddenly, in every case did I read and look at, the similarities to our own situation were so in your face it was as if, hang on, this family is talking about us...to be completely honest, it’s people like [campaigner contacted via internet] who’s prepared to be there, listen, take a look, give an honest opinion, and be prepared to stand up...where I haven’t got the voice and the knowledge to do so, and challenge different things, because I haven’t got a clue where I would start, but without [campaigner] we just couldn’t do it. He would possibly just have served his sentence.’

(family member, accused convicted, sentenced to 11 years)

Progressing with the original defence team

Where legal representatives informed families that they would appeal, few convicted persons or their family members questioned why the original defence strategy had concluded in a conviction, or what it would be that the defence team could do differently to obtain a successful appeal. The tendency to blame judges, jurors or experts for the conviction, or to accept apparent reassurances from defence teams that something had ‘gone wrong’ and could be put right via appeal were the most common justifications for failing to question the role of defence teams in these circumstances. These families took much longer to understand the differences between their perceptions and beliefs about the CJS and its actual processes, because they remained bound by, and still trusting of, the closed nature of the legal representatives’ communications. This was understood by many Group Three interviewees:

‘People are often not told very much by lawyers... or they’re certainly not very clear about it... one of the problems is that defence lawyers simply can’t be bothered or, I suspect sometimes, families of clients are just a nuisance to them...try and get them to do things that they don’t really have time or money to do, so it’s rarely explained to [the families] what’s going on and what the options are, so they haven’t gained in the process leading up to conviction, they haven’t learned much about the CJS except the fact that it hasn’t worked in their case’

(campaigner)

Another said:

‘QCs who look at lawyers like they’re shite on their shoes... Say you come from [working class area,] and your lawyer is looking at you like you’re shite, and the advocate is looking at your lawyer like *he’s* shite, how in god’s name are you ever going to get your argument up to that advocate? That advocate is more interested in speaking to his pal who’s sitting across the table, over coffee or port... talking about the case ...oh, we’ll just do this...ok, you do that... therefore, it’s not really your trial, you’re just a pawn in a game between two privileged men who really aren’t looking at you like you’re a human being.

Deals are done between advocates with no consultation with solicitors whatsoever – that’s advocates who believe they are above everybody else...advocates did [a deal] *in spite* of their client, not because of him. The new [appeal] QC believes [his client] to be guilty. He talks about the family like...well, like I would talk about pedigree dogs, if you know what I mean.’

(solicitor)

Two of the main reasons these families stayed with legal teams who had already failed to properly represent them, ignored their wishes and suggestions, and had been extremely difficult to communicate with, are fear and ignorance. Blind to the reality that their legal representatives do not believe in the convicted person’s innocence (or simply don’t care one way or the other), and to the fact that a different agenda is at play

than the one wrongly convicted people and their families believe is operating, these families are easily bullied and manipulated. Threats that no other lawyers will take on the case, that changing lawyers will result in long delays whilst new representatives familiarise themselves with the case, or that legal aid funding will not be available for a new team, were all reported to have been utilised by solicitors in cases covered by this study.

One family's experience demonstrates what appears to be an almost cynical manipulation of their fear and ignorance, in order to cover up for dishonesty and unprofessional conduct by solicitors (dishonesty and unprofessional behaviour that the family did not know about at the time, but discovered later). The convicted person was afraid to change his legal team, despite other family members' misgivings, but the discovery that the solicitor had lied led to a change of heart:

‘...[the solicitor] hadn't outright lied to *** [previously,] he'd just skipped around the truth, so this was an outright lie... so I got permission from *** ... to collect his files off the solicitor and seek legal advice elsewhere. And on hearing this, the very next day, [the solicitor] ran up to see *** in prison...him and the barrister – the barrister's basically told him that he's got no appeal at all, there's nothing they can do, and he left. The solicitor stayed...he said, 'Don't mind the barrister, he thinks that you think he hasn't done the best for you, so he's in a one...if you change solicitors, you'll rot in here. They'll want paying, we'll do it for nothing, we'll stick by you, you'll walk away' – basically emotionally blackmailing him...’

(family member, accused convicted, sentenced to 13 years)

This client was just 16 years old, and it later emerged that the solicitors had represented his co-accused to the extreme detriment of the defence of this client. In this one passage, as reported by the family member, there are five separate examples of outright dishonesty, although the convicted boy had no way of knowing that at the time.⁸⁰

For both families who retain the original legal representatives and those who ‘go it alone’ before seeking out new legal teams, one of the most surprising and frustrating discoveries is the slowness with which the entire system progresses. One family struggled for three years to obtain their case papers⁸¹, another is still (at the time of writing) attempting to effect disclosure of critical forensic evidence for testing almost 5 years after the original conviction, and another was told by solicitors for almost three years that applications to various authorities had been made, and were being ‘followed up,’ only to discover, on dismissing the legal team, that no such applications had ever been made, forcing this family to start over after three wasted years in which they fully believed ‘progress’ was being made.

A solicitor explains the difficulties faced by legal teams accepting appeal work:

‘This case, for example, was passed to my firm...it’s a very large case...there must be 70 folders...so perusals for that...reading... you get X

⁸⁰ The five dishonest statements are (i) There are no grounds for appeal, (ii) nothing can be done, (iii) changing solicitors will destroy any chance of release, (iv) a new team would require to be paid (v) by staying with this solicitor, the client will ‘walk away.’

⁸¹ In Scotland, unless a convicted person elects to represent themselves, s/he has no right to access to his/her case papers, which are deemed to ‘belong’ to the solicitor. This is different in England and Wales, where the convicted person has an automatic right to receive case papers, and can pass these papers to others if they so choose.

amount per page, and when we submitted the bill, they said, no, we're not paying that. We said, why? And they said, the bill's too high.... reading for a year...and they refuse to pay it. How's the man supposed to get an appeal... they're not paying lawyers to read his case to find grounds of appeal... it's decided by a board....who are saying, in effect, there's caps on certain things, and that makes it very unfair. It's not just legal aid which supports people getting bad representation, it's the Law Society... their guidelines say I can't represent another lawyer's client – there have to be exceptional circumstances... if, for example, Mr X felt he was not getting the job done, and didn't have the knowledge... to sack his legal team, but still had concerns, he would not be allowed to approach another legal team and ask for advice.'

This information, however, is not available to wrongly convicted persons and their families. The rules forbidding solicitors from advising other solicitors' clients is part of the 'brick wall' for wrongly accused persons and their families who are not satisfied with the work their legal representatives have done, but have no idea how to replace them. Other solicitors are unlikely to tell family members outright that they must sack their existing team before they (solicitors) can advise them. A solicitor said:

'I have to word it very carefully – I can only say in very general terms that if, for example, a person is unhappy with their legal representation, they may choose to dispense with their services, and are then free to seek out another representative. But I also have to say, people in these circumstances are free to choose whichever legal representative they wish

– I can't say, 'if you come to me once you've sacked them, I'll take your case' – there are strict rules against that. It's generally much easier if all of that is done through a third party.'

Appeal processes

At the time of writing, of the 24 people convicted, whose cases are covered in Group One and Two interviews, four were refused permission to appeal, seven had failed appeals, eight were still attempting to secure permission to appeal, two appeals were in progress and only three had been successful, although all three had required more than one appeal to have convictions overturned. It is clear from these figures that the perception of an automatic right to appeal is at odds with the reality – only half of the cases covered by this study had managed to obtain permission to appeal, and only three had resulted in the overturning of the conviction. That each of these three convictions was overturned on a second or subsequent appeal emphasises the difficulties faced by those attempting to have convictions addressed by the appeals system which they had originally believed (a) would be an automatic recourse following the wrongful conviction of factually innocent people, and (b) existed to right such wrongs.

Although several Group One and Two Interviewees were aware of the importance of obtaining trial transcripts as a central factor in the earliest stages of preparing an application to appeal, or to the S/CCRC (even if they did not, as a general rule, understand why), many were extremely critical of the manner in which court transcripts are produced and made available to families. The centrality of transcripts to appeal and post-appeal processes, whilst accepted as necessary by those families, became a source of intense stress and anxiety, since many could not afford the costs involved, and could

not, therefore, progress appeal applications and preparations adequately. Some solicitors steadfastly refused to apply for transcripts, on the basis that all that would be required for appeal would be the judge's summing up.⁸² Others claimed that there would be no need to apply for court transcripts until leave to appeal was granted, which some families construed as approaching the appeal 'the wrong way round.'

The failure of the courts system to utilise the much less expensive, and readily available, technology of digital recording, file duplication and email distribution was something many wrongly accused persons and their families could not understand.

One family member said:

We knew they'd [prosecution witnesses] lied on the stand, and now we could prove it...but the solicitor, she just kept saying, the transcripts won't make no difference, we're not going to get an appeal on them...when we then got rid of her because we found she was lying to us... we tried to get them for ourselves... they did put us off for a few months, but eventually then said we could have them... four hundred pounds, but for pennies, and it was just an email they sent, with attachments. How can that cost four hundred pounds- they were only less than about 20 pages each... there was three of them in all...and then we find out that there's already copies of two of them anyway...why couldn't they have just scanned them and emailed them like that.... what would that have cost? Nothing – they wouldn't then even have had to pay for paper or stamps.

(family member, accused convicted, sentenced to 11 years)

⁸² The justification for this claim is that this document is the only one which would highlight technical errors in the direction of the trial, which are, in turn, the only real factors (aside from new evidence) considered by the Court of Appeal.

Obtaining permission to appeal is a source of hope and encouragement for wrongly convicted persons and their families. Regardless of how many times CJS processes have shocked and failed them, there is still a very strong belief that the appeal process, as the ‘next stage,’ will finally rectify the situation. Few understood, or had explained to them, the technical processes required to progress to an appeal hearing, so the term ‘leave to appeal’ created unrealistic expectations that this meant an appeal would necessarily follow quickly. The process of placing the application first before a single judge, and from there, if necessary, before a panel of three judges, was poorly understood by most participants in this study, especially where initial beliefs that innocence in itself would be a ground for appeal had been abandoned, and families had sought what they believed was ‘new evidence.’ Believing they had understood the concept of new evidence, and making great efforts to find such evidence, these families expected that the finding of this evidence would automatically ensure an appeal. Once again, the difference in lay perceptions of what constitutes new evidence, and the legal equivalent, is stark.

The qualification that new evidence must be that which was not, or could not reasonably have been available at the time of the original trial, *and* the additional condition that good reason must be given for the new evidence not having been available or adduced at the time of the original trial are sources of extreme frustration, not only for wrongly accused persons and their families, but also for campaigners and supporters⁸³. One family member said:

⁸³ Although the strict rules determining what constitutes new evidence, or the requirement for new evidence to be found before an appeal can be considered in England and Wales, do not apply in Scotland, where a case can be referred for appeal on the ground that a miscarriage of justice may have occurred, there has been an increasing emphasis in Scottish cases for new evidence to be produced in support of applications for appeal.

‘I didn’t know anything about the new evidence thing- that came as a right surprise. I thought I had loads that would get people to sit up and take notice... I didn’t know we couldn’t use it because they’d had it at the time of the trial...it’s just not right, is it? If you’ve got all this evidence that someone is innocent, it should...it just doesn’t make sense, does it?’

(family member, accused convicted, sentenced to 17 years, appeal failed)

A long term campaigner saw the manipulation of legal terms, in order to mislead or misinform defendants and the wider public, as part of a wider social trend:

‘We ended up invading Iraq because Iraq possessed WMD, which the Iraqi regime might place in the hands of Al Queda type terrorists. Such a rationale was, of course, wrong on both counts. Any apparent evidencing was fallacious. We proceeded on a basis of fundamental misrepresentation. What we did here in Iraq, stands as a leitmotif of that time. We were collectively postured and configured to do precisely such things...we were socially and politically organised to fundamentally misrepresent whatever we wanted to...[these cases are] informed by the same motif.’

In spite of the confusion engendered by the different meanings of ‘new evidence,’ some families who did manage to uncover new evidence within the legal definition were dismayed to find their legal teams, even whilst assuring them that this evidence was significant, then failed to use it in appeal hearings themselves.

One family discovered at trial that their defence team had failed to have forensic testing carried out:

‘The QC was asked [later] why he didn’t get forensics...he said it’s not worth questioning the forensics, he said you can’t question forensics...*but he also said [accused person] didn’t ask him to get forensics done*’ (emphasis added)⁸⁴

On discovering new, and as far as the family was concerned, conclusive evidence of the convicted person’s innocence, this family was shocked when the new defence QC point blank refused to present this new evidence as part of the appeal. A family member said:

‘ [the QC] wanted to put this in as a disclosure issue, rather than a forensics issue. We lost the case because the first team didn’t bother with forensics, now we’ve got a report saying this blood on the other guy’s trainers was definitely the victim’s blood, so it couldn’t possibly have been *** who killed him, and [the QC] doesn’t want to use it. He’s actually said he’ll walk away from the case if we try to use it. I can’t understand that...ok, so it’s a disclosure issue because they lost the trainers until after the trial, but surely, well, it’s black and white, isn’t it? Saturated in the victim’s blood... they’re not ***’s trainers... to be honest, I think they’ve all got their heads together – they don’t want it coming out about the trainers because that would show that the police knew they’d got the

⁸⁴ This is an example of the tendency within the legal profession to default to blaming the client for failing to properly ‘instruct’ counsel, as discussed previously, although in this case, it is counsel himself who is excusing his failure to carry out what, to the family, seemed like an obvious duty and responsibility of the QC, as a failure by the client to instruct him to do so.

wrong guy, and that they tried to cover it up by losing [the trainers.] I think it would just be a huge embarrassment for that to come out, so they'll all just skirt round it... this is my son's life we're talking about...'

(family member, accused convicted sentenced to 15 years)

The expansion of this family member's understanding of the legal and forensic technicalities of the case is clear, in that the difference between 'disclosure issues' and 'forensic issues' forms the centre of the concern of the matter being discussed. However, even with such expanded knowledge and understanding over time, this family member still believed that the weight of forensic evidence is, and should be, greater than the weight of a 'technical' issue, such as disclosure, demonstrating a failure to understand the technical and strategic decisions which may underlie the QC's insistence that the technical issue may, in fact, be the one which is more likely to persuade the court of appeal.

To wrongly convicted persons and their families, as at every stage in the process, the most important factor in appeal hearings is that 'the truth' be acknowledged, and the innocence of the convicted person recognised. They have no understanding that rules of etiquette and custom, inextricably linked to legal processes and protocols, are likely to be of far more importance to their legal representatives, especially as the appeal process does not address issues of innocence or guilt, as explained by an experienced campaigner:

'When a case does go to appeal, you're reliant on the senior counsel presenting it to the appeal court, and they will persist on having their own

ideas...how you deal with judges in the appeal court is a very specialised thing.’

The idea that *how* information is presented in the appeal courts (or even how information is selected for presentation in the appeal courts) is more important than *what* is presented, left several families at a loss as to what had gone wrong, as such a possibility had not occurred to them.

One family member, discussing a case where demonstrable police dishonesty had led to a conviction, could not understand why the barrister would not attack the officers’ dishonesty as part of the case:

‘[The barrister’s] attack was, ‘Look, if we go into this saying these officers are lying, that could have serious consequences for *** if it goes wrong. We’ve got to try and discredit the case, and we’re going to have to do it some other way without going out and out calling them liars...’ I thought... that’s a bit of a strange thing to say, I thought, well, they were not bothered about the truth, they were just going to try and battle it out, and I was concerned, but again... it were cowardice, my son was there depending on this man for his life...’

(family member, accused convicted, sentenced to 15 months)

The discovery that not only their own legal teams, but appeal court judges and other authorities, may be making deals behind the scenes, was a source of deep distress and resentment for some families. In some cases, it was a trade off of evidential issues,

whereas in others, agreements regarding procedural issues were taken with the full knowledge of the defence team, but without reference to the convicted person or their family members;

‘As far as I know, there was an agreement that, should it be found that the trial was not legitimate, you know, that the evidence was all wrong, he would get a re-trial, not his freedom. So that was the agreement and that was what happened. They sent him back to prison to wait for his re-trial... what I didn’t realise was the amount of collusion going on between the authorities and his legal team ...there was this multi-agency organisation that wanted to put *** under their eye if he was released... his legal team had obviously been liaising with the police...’

(family member, accused convicted, acquitted at re-trial after serving 8 years)

Although this person was cleared at re-trial, an arrangement had been made behind the scenes to place him on probation, and under surveillance (even though, legally, on acquittal, he had the right to be presumed innocent), and his own legal team had arranged for him to be taken away to a bail hostel on his release, without informing either the client or his family that they were doing so.

The failure of appeal court judges to grasp the most basic facts of cases raised even more questions for families already struggling to make sense of the circumstances in which they found themselves. One family member, speaking of an obvious error in the judges’ reasons for refusing an appeal says:

‘I don’t really know what to think about that. If they just got it totally wrong, then what else didn’t they properly understand? But I can’t help but think, maybe they know something – they’ve let something slip there. We never could understand how [those people] got to [where they said they went] in such a short space of time – the defence told us it wasn’t important, but we thought it was. If it’s true they really left from [Place X,] that means they lied on oath – all of them. Why would the appeal judges say they left from place X? If it’s just a mistake, then it’s a pretty big one – how can they be making mistakes like that when someone’s life is literally on the line? And if it’s not a mistake – well that means they know it was all lies, doesn’t it?’

(family member, accused convicted, sentenced to 20 years)

A family member, who has withdrawn from the campaign to overturn the conviction in that family, emphasises the helplessness of families who have brought what they believe solid and tangible new evidence to the court of appeal, only to have it ignored or rejected:

‘If we can get the completely unsolicited opinion of [another] judge, mentioning that there could have been a miscarriage of justice, into the court of appeal, and still not get a retrial, then I don’t see what hope there can possibly be.’

(family member, accused convicted, sentenced to 18 years)

Another Group Two Interviewee explains the frustration and confusion faced by families when judges appear to agree that something has gone wrong, and then use legal technicalities to uphold the conviction:

‘They all [appeal judges] agreed that the police behaviour was outrageous ... but somehow it’s ok because he didn’t confess to anything. Why does that matter? They still used all that stuff against him at trial – tried to say he was aggressive and cocky, even though they had been goading him for hours – what was he supposed to do? Of course he was going to fight back – he hadn’t done anything... But the judges seemed to be saying it’s ok ... just so long as they don’t confess...it’s the same as what they did with ***. They said if he’d been a suspect, the way he was questioned would have been illegal, but because he was a witness, it was ok. How was he a witness when they’d bloody arrested him, for christ’s sake?’

(family member, accused convicted, sentenced to 20 years)

A Group Three interviewee highlights the differences in what the general public believe about the appearances of the CJS, and its reality:

‘Look at *** – he’s been in 7 [years] and everybody knows – everybody within law knows [that he’s innocent.] It’s disgusting, it’s a disgrace... some of the terminology I’ve heard from senior advocates is “Disgusting and disgraceful”... now if that’s the case and these are senior legal people saying that, and it still takes 7, 8 9, even 10 years to get back into a court of law to be heard... there’s something wrong.’

The sheer determination of wrongly accused persons and their families to ‘fight on’ despite failure after failure to have the truth about their convictions acknowledged is remarkable, especially when such a decision can have far reaching consequences in terms of ‘progression’ through the prison system towards parole and release. Essentially, in order to be considered for parole, convicted persons must undertake courses ‘addressing’ their ‘offending behaviour.’ Participation in, and completion of, these courses provide ‘evaluative’ points with which psychologists and probation staff can demonstrate a reduction in the risk of likely re-offending upon release. Innocent individuals’ refusal to participate in these courses (on the grounds that they have no offending behaviour to address) results in these prisoners being labelled as ‘in denial’ and, as such, ineligible for re-categorisation to lower security prisons, early release, and so forth.

Here, again, is an example of two separate languages and meanings in direct opposition – the parole system requires risk reduction to be demonstrated in quite specific terms; terms which make no allowance for the fact that there may be no risk to be reduced to begin with. Refusal to participate in such courses can only be labelled ‘denial’ of the original offence, since the entire justification for the courses and those expected to participate in them is that prisoners are prisoners precisely because they have been properly found guilty of some sort of offending behaviour by the courts. There is, quite simply, no ‘language’ within the context of prisoner rehabilitation and risk assessment with which to address the lack of risk because the prisoner is innocent of the crime charged.

For wrongly convicted persons, however, refusal to participate in courses is, to them, a

clear and obvious message to the authorities that they did not commit the crime. Even though practically, participation in courses would facilitate early release, no convicted person who participated in this study was prepared to admit to something they had not done. This is a very common stance amongst wrongly convicted persons (e.g. Lean 2008, O'Brien 2008, Jenkins, 2008.) That these prisoners are aware that their refusal to participate in courses may prolong their imprisonment far beyond the original tariff⁸⁵, and perhaps indefinitely, makes this decision all the more remarkable. In the course of this study, a wrongly convicted person who had featured in a previous study, committed suicide in prison on his 66th birthday. Had he been prepared to 'admit' the offence of murder and participate in courses, he would have been eligible for parole the month he died. Because he refused to do so, there was, and would continue to be, no prospect of parole.⁸⁶

Despite official assurances that it would be unlawful to prevent prisoners progressing through the prison system, or to prolong sentences on the basis of 'denial' (or protesting innocence,) official statistics indicate a large number of 'over tariff' prisoners.⁸⁷

⁸⁵ Following the introduction of Indeterminate sentencing in 2005, the tariff, or 'punishment part' of a sentence is the minimum term which must be served before the convicted person can be considered for parole.

⁸⁶ Although the official position is that it would be unlawful to prolong sentences, or refuse prisoners the opportunity to 'progress' through the system, if they refuse to participate in 'offender management courses' there is clear evidence that this is, in fact the reality of the matter, with many prisoners serving more than their full sentences, whereas prisoners admitting guilt and undertaking courses become eligible for parole once the minimum sentence requirement (often one third to one half) of the original sentence has been completed.

⁸⁷ **a parliamentary question to the Justice Secretary on May 16th 2011 regarding prisoners 'over tariff' received the following response:**

As at 17 November 2010, there were 6,316 offenders in custody being held beyond their tariff expiry date.

Length of time over tariff

520 prisoners were over tariff by 10 years plus

774 prisoners were over tariff by 5 to 10 years

850 prisoners were over tariff 3 years to less than 5 years

975 prisoners were over tariff 2 years to less than 3 years

1,288 prisoners were over tariff 1 year to less than 2 years⁸⁷

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110516/text/110516w0002.htm#11051625000012>

Post conviction organisations.

A number of groups set up to support the wrongly convicted and their families, and to protest and lobby against injustice generally, have been in existence for some time, for example, JUSTICE, INNOCENT, Liberty, Miscarriages of Justice Organisation (MOJO). (See Appendix IV for details of the different approaches taken by these groups.)

A plethora of smaller, more closely focused organisations has emerged in the last decade or so; Falsely Accused Carers and Teachers (FACT (UK,)) False Allegations Support Organisations (FASO,) People Against False Accusations of Abuse (PAFAA,) Joint Enterprise, Not Guilty by Association (JENGBA) and so forth, highlighting the extent of incidences of wrongful accusation and conviction of factually innocent people, and their need for support and advice.

It would appear, at first glance, that with so many different organisations highlighting wrongful accusation and conviction, the general public would be much more aware of the problem than public response or media interest would suggest. The question of why this does not seem to be the case was raised with campaigners and journalists

A long-term campaigner said:

‘... there’s no co-operation between all the groups. There’s too much in-fighting and back-stabbing. Everybody wants to be top dog.... everyone thinks their case is the most important... You have to realise, this damages people, it really damages them. It becomes the most important thing in their lives, getting their innocence recognised... getting somebody

somewhere to stand up and say, this was wrong. They know it was wrong... everybody knows it was wrong, but they need the authorities to admit it. But that's not the ideal conditions for getting people to work together...co-operate. You think about it, it's all very well saying we should all support each other, but how do you get people who've been let down by everything they've trusted – they've lost everything...how do you get them to say, ok, we'll all try to get X cleared...I'll just sit back wait a bit longer.... let somebody else get cleared before me?'

An investigative journalist said:

'You look at all the big cases in the past. It's investigative journalists who've got them out into the public. That's what gets the attention.'

A changed economic climate and a different focus on what is considered newsworthy was offered as part of the explanation by another journalist:

'The tabloid media are far more interested in reporting about convictions, and the 'evil' that is supposedly behind them. They are not interested in Miscarriages of Justice. Also, original reporting is going down, partly due to lack of resources – this affects all areas of journalism, not just Miscarriages of Justice. It's easier to work from press releases than spend the amount of time that is required in original reporting. There are time and resource restrictions...like every other industry, journalism has felt the impact of the changed economic climate...'

This stance is reinforced by an experienced, freelance investigative journalist:

‘There are much fewer documentaries than there once were, for two reasons – money, and the programme makers are running scared. They say that the intensity of the research makes it too expensive to do properly, and there is the added problem of perhaps paying for six months’ research, only to find that the case is not, in fact, a miscarriage of justice after all. But is there really a need for such long term research? I would say we can usually tell much quicker.’

This combination of uncoordinated campaign and support groups, and media disinterest, diffuses and dissipates the potential strength of support and influence which could be brought to bear to raise public awareness and increase pressure for the problem of wrongful accusation and conviction to be properly addressed. Whilst it is understandable, given the sheer scope of possible wrongful accusations and convictions, that certain groups begin to focus on specialist areas (Joint Enterprise, accusations against carers, false sexual allegations etc) the lack of central structure to bring all of these groups together lends itself to the more general belief that cases of wrongful accusation and conviction are few and far between, and are easily and quickly rectified. Against a popular press which reinforces this view repeatedly, the lack of a strong, co-ordinated rebuttal leaves the popular view unchallenged.

Innocence Projects

Innocence projects were introduced into the UK by Dr Michael Naughton of Bristol University in 2004, although the Innocence Network UK (INUK) website makes clear that INUK is ‘not a campaign or victim support group.’

(<http://www.innocencenetwork.org.uk/aboutus.htm>)

Innocence projects have been set up in universities across the UK. Investigations into allegations of wrongful accusation are undertaken by student groups, under academic supervision, where a convicted person has exhausted all other routes. Importantly, innocence projects consider cases where the claim is one of factual innocence, rather than technical miscarriages of justice.

The existence of a group with the facilities to thoroughly investigate cases, whilst at the same time researching the realities of wrongful conviction is clearly beneficial, especially when considering that no other group previously existed with such a wide remit within the arena of wrongful conviction of the factually innocent, (the CCRC being restricted to the legal approach previously discussed). However, Innocence Projects are still bound by the same restrictions as the CCRC and the Court of Appeal – any new evidence found must fall within the legal definition of new evidence, and applications to the CCRC will still be required to meet the ‘real possibility’ test. (See S/CCRC below).

Although Innocence projects are another beacon of hope for the wrongly convicted and their families, and acceptance onto an innocence project is welcomed as a positive development, some individuals have been disappointed by the experience (perhaps

because their perceptions or expectations of what an Innocence Project could do were unrealistic to begin with). One family member, for example, was surprised and disappointed to receive a letter stating that no work had been carried out on that case in 12 months, but offering no real explanation as to why such a long period of inactivity had occurred. A convicted person, considering an opportunity to have his case reviewed by an Innocence Project said

‘I’m quite happy for them to have a look, but I don’t really have much faith...it’s a bunch of students – how committed are they really going to be? I’ve heard from a couple of the guys about students leaving the project, and stuff not getting done, or not getting passed on, paperwork getting lost or missed....you can’t really hold it against them. I mean, if they’ve only got to do a term or something to get their marks, it’s not as if it’s really important to them, is it?’

(accused person, convicted, sentenced to 17 years)

A campaigner was concerned about academics overseeing Innocence Projects as a career move, rather than as a commitment to what he saw as a ‘cause’:

‘Look at ***. He got that Innocence Project, but he didn’t know the first thing about the people his students would be dealing with. He was all about numbers and statistics. The first thing these people have to realise is that every one of those numbers, every one of those statistics is a real person, with a real life that’s being pissed down the drain with every day that passes. If they’re telling their students X percent of convictions may

be wrongful convictions, or miscarriages of justice, or whatever term they choose to use, then it's just numbers, isn't it? It's not real people...'

Students, too, have experienced difficulties in becoming involved with Innocence Projects. One said:

'I did the criminology module, just because I was interested in the subject. I found it fascinating, and wanted to get involved with the Innocence Project, but it was full. It's really for the law students... I think students from other courses can only get a place if they haven't filled them all with law students. I was really disappointed...I do think other subjects could bring important insights and ideas to Innocence Projects...I'm doing media studies, so I know that part of the problem is getting media coverage for these cases. Since we couldn't get on the Innocence Project, a group of us have been contacting other organisations to see if there's anything we can do as volunteers – I really want to get involved, it's become really important to me.'

The impression, rightly or wrongly, that Innocence Projects are run by, and for, Law students is unfortunate, in that it raises the obvious criticism that, since a large part of the circumstances impacting on wrongful conviction of factually innocent people is the dominance of legal terms, understandings and definitions, the focus on law students to 'spot' factors or details of importance risks reinforcing the status quo, since law students may be required to look only for what appear to be legal factors.⁸⁸

⁸⁸ By way of explanation, in one case where a conviction had been obtained on the basis of mobile phone evidence, the legal stance was that, since telephone logs, interpretations of those logs, and an account of calls and texts from

The overly tight legal definitions and terms surrounding virtually every aspect of wrongful convictions must, of necessity, form a large part of the vocabulary and perspective of law students, running the risk of closing off the opportunities for new evidence to emerge from a non-legal perspective.

Internet campaigns

The steady increase in internet campaigns, although creating an outlet for information which is largely ignored or dismissed by the mainstream print and broadcast media, is orchestrated by individuals who have little or no experience of creating and guiding a large media presence, or how to maintain and increase interest once a case has begun to draw attention. An apparently successful campaign for one high profile case in 2009/2010, which drew several hundred supporters, collapsed amidst a very public, bitter and acrimonious dispute between various contributors.⁸⁹ There were several consequences, including some contributors and supporters withdrawing from internet advocacy, others withdrawing from some campaigns whilst supporting others, and the creation of a general rift in what had, prior to that, been an encouraging and cohesive group. Anonymous and malicious posting, and posters using multiple online identities, have been an ongoing difficulty for online campaigns (and campaigners), with smear tactics and dishonesty being used to discredit individuals and cases, sometimes spilling

witnesses had all been before the jury, there was little point in revisiting the 'telephone evidence' as it was unlikely to produce anything which would meet the definition of 'new evidence.' However, a supporter with no legal training, but a background in IT discovered, on looking over the telephone 'evidence' that several of the claimed timings did not tie up with the case against the convicted person. Further investigation from an IT perspective demonstrated not only that 'logs' produced as evidence had been reconstructed to include selective (and prejudicial) information, but that the telephone itself had been tampered with. Although this case was not investigated by Innocence Project students, it does highlight the need for an 'alternative view,' where a purely legal view may have missed such vital information.

⁸⁹ This campaign was beset with difficulties introduced by control issues, contributors who were ignorant of the actual legal processes involved, defensiveness, a tendency for contributors to interpret criticisms and suggestions as personal attacks, and the recurring difficulties of malicious and disingenuous contributors posting under numerous false identities.

over into physical threats and arrests⁹⁰.

Restrictions in Scotland introduce an added difficulty for individuals wishing to run internet campaigns, as it is an offence to make public many documents used in trials or court proceedings,⁹¹ something which is a central part of internet campaigns both in England and in the USA. The ability to make available publicly actual copies of documents used in investigative and trial proceedings is considered to be a strong factor in convincing members of the public that a conviction is wrongful, but in Scotland, the inability to do so leaves open accusations that supporters of wrongly accused/convicted persons cannot ‘prove’ that their claims have any basis in truth or fact, and those supporters and campaigners have no way of effectively responding to such accusations.

However, family members who had become involved in internet campaigns reported, in the main, a positive experience. One said:

‘We didn’t really have any support at all until about a year ago, so basically I was on my own...the support since his site went up...there’s lots of support coming through there, and we’ve met other families in similar situations... it’s horrible to know that there are other people going through what *** is, but it’s nice to know you’re not the only one – it’s weird...through [the website], I met *** and ***[campaigners]... we got his barrister through his website, and also, JENGBA...through them we

⁹⁰ In the course of this study, four people were arrested for online harassment and intimidation, direct physical threats were made to at least three individuals, including death threats, photographs of individuals’ homes and family members were posted online, and personal addresses and phone numbers were released. Police in England acted on complaints of online harassment and intimidation, whereas Scottish police refused repeatedly to do so.

⁹¹ In Scotland, where case papers are deemed to belong to the solicitor, the solicitor is prohibited from disclosing information to ‘third parties’ – for example, statements and expert reports in cases in England and Wales have been incorporated into campaign websites, but this would be an offence in Scotland.

went to a meeting... his solicitor attended that, and through that meeting, we ended up with ***'s barrister, who's one of the top barristers in the country. [The internet presence] ...does do a lot to help you.'

(family member, accused convicted, sentenced to 15 years)

Duncan Campbell, a journalist with The Guardian, set up the 'Justice on Trial' website in 2009, and the number of cases and injustice issues quickly escalated. At the time of writing, the site runs to 140 pages, featuring dozens of cases, as well as films and comment from experienced journalists and campaigners. However, the sheer number of cases featured on the site caused one journalist to comment:

'Back in the days when the Birmingham Six, Guildford Four cases were emerging, there were only one or two high profile cases which emerged individually – as they came up one at a time, each received individual attention. Now, there are just so many, editors are overwhelmed. Whereas before, they might get 10 contacts regarding one case, and then decide to investigate, now they are getting 10 contacts about 10 different cases at the one time. The Justice on Trial case has just too many cases listed...the numbers of individual cases means that much of what is reported has no context – there is no stepping back and looking at contexts or trends.'

Media and public perceptions

Historically, the media has played an important role in highlighting incidences of wrongful conviction of factually innocent individuals. The BBC's 'Rough Justice' series, which ran from 1983 - 2007 and Channel Four's 'Trial and Error' (1986 – 1999)

drew large audiences, and carried out in-depth investigations into cases of alleged wrongful conviction.

Hostility from the legal professions towards Rough Justice, in particular, and television ‘interfering’ with court processes in general, are exemplified in the famous remarks by Lord Denning in 1983 when he said in a television interview, following the overturning of the conviction of (Mervin) ‘Jock’ Russell, the first man released from prison as a result of a Rough justice investigation:

‘After a decision by judge and jury, the media must *not* go round trying to get what they call fresh evidence showing that the decision was wrong’

(Retrial By Television; The Rise and Fall of Rough Justice, BBC 4, 2011).

As these series became less popular (although it is difficult to say with any certainty whether it was, in fact, diminishing popularity or increased financial pressure to produce programmes more cheaply, with the introduction of additional commercial channels, and political and judicial pressure to toe a more traditional and deferential line) gradually, more ‘reality’ style programmes grew in popularity.

One, which appears to have had a significant influence on public perceptions, is Crime Scene Investigation, a fictional series which depicts forensic investigation and scientific evaluation of evidence as ‘the norm’ in criminal investigations. Whilst there are various views on the extent to which this show has influenced public perceptions of forensic work in police investigations and trial evidence, at least one family demonstrates the

extent to which popular opinion has been affected. Describing the prosecution approach, this family member says:

‘In ***’s case, there was no forensic evidence. Now any normal person, well, to me, if someone was to say there was no forensic evidence putting the person at the scene of the crime, then you’d think, well they mustn’t have been there. But the way [the prosecution] put it, well, he watches the CSI programmes, so he was forensically aware, so he knew not to leave any forensics... I mean, from what I’ve seen on television, if you’re involved in a murder, and it’s a fight, you’re going to leave some part of DNA there, or fibre evidence...’

(family member, accused convicted, sentenced to 30 years.)

The wider public also appears to believe that forensic evidence used at trial is as reliable as it is presented in fictional TV series. For example, a family member of the victim in a particularly high profile murder insisted, post conviction, when a campaign was launched questioning the safety of the convicted person, that there were ‘strands of [the convicted person’s] DNA all over the body.’ When it was pointed out that partial DNA profiles in this case were evidentially worthless (in part because there were not enough ‘markers’ present to constitute a reliable match, in part because there were markers common to several potential suspects, and in part because there were several ‘mixed’ profiles), this person responded ‘they can tell even from those bits they did get. They know it was his [DNA.]’⁹²

⁹² In the course of a series of threats made against me, this information was imparted, by the family member making the threats, as “justification” for the victim’s family’s fury regarding claims of innocence for the person convicted.

More general media reporting following conviction, however, is noteworthy for its tendency to support the conviction, even where doubts are raised, and for the selective manner in which post conviction processes are reported. This is particularly prevalent in high profile cases, where levels of reporting often involve emotive images of distraught family members and ‘evil’ perpetrators, who continue to make victims’ families suffer by ‘exploiting’ the appeals system.

Police and court proclamations following successful appeals often take the form of suggesting that the cleared person was not really innocent, but had been cleared on a ‘technicality.’ The media publish and broadcast these statements, supporting continuing suspicion of people who, in law, have the right to be presumed innocent (as the case against them, the conviction having been overturned, has clearly failed to prove them guilty beyond reasonable doubt). The Sunday Times, commenting on the overturning of the Barry George conviction noted:

‘Scotland Yard said officially that it was disappointed with the outcome of the case, but senior sources told The Times that they were furious with the way the case ended. One said: ‘This was a year-long investigation which accrued a huge amount of evidence. The jury deliberated for less than eight hours — can they really say they gave due consideration to all the facts?’ (The Times, 2nd August 2008)

That there had been two trials, the jury misled as to the significance of crucial evidence in the first trial, and an appeal in which three judges agreed that the conviction was unsafe, was not immediately offered in contrast to the unidentified Scotland Yard spokesperson’s remarks.

The use of the term ‘officially’ is belied by the failure to attribute the source of this quote, and the reference to the jury deliberation time is misleading: juries are often pressed to reach verdicts within a specified time as part of an overall trend towards enhancing ‘court efficiency.’

One family member, for example, said:

‘I can remember the judge saying to the jury, you take your time on the decision, you won’t be pushed into anything ... it was only a short time when they came back in and said they hadn’t reached any sort of conclusion...we were sent home to come back the next day. Again they were reminded of that and I thought, well, yeah, he’s said that again – suddenly we’re sitting outside the court room...[the] usher of the court, she [said] they’ll only get to ten o’clock then [the judge will] push for a majority. And I said, No, he’s telling them they can have as long as they like, and she went, No, it doesn’t work like that... she said he’d only give them so long and then he will accept a majority. It went to a majority...it was terrible...although we were told a jury can take as long as they like, no, there was effectively a timescale obviously to keep to, and I find that pretty poor when this is someone’s life...’

(Family member, accused convicted sentenced to 11 years)

The media tendency to emphasise and reinforce the ‘official’ stance that many convictions which are overturned are technicalities, rather than admissions that an innocent person has been wrongly convicted, is highlighted in media reports of another

well known comment from Lord Justice Mantell, who, on overturning the convictions of the ‘M25 Three,’ stated that the quashing of the convictions was ‘not a finding of innocence, far from it.’⁹³

Such a statement has two significant effects on public perceptions. Firstly, it is legally correct, since the Court of Appeal does not consider matters of guilt or innocence, but only the safety (in legal terms) of convictions. It is inconceivable, however, that Lord Justice Mantell would be unaware that general perceptions of court hearings, whether trials or appeals, are that they exist to ‘get to the truth’ to ascertain guilt or innocence, and that this case would be no different. But the second, most obvious effect of this statement is that it is, by implication, the opinion of a judge that these men were not innocent, but had been freed on a legal technicality.

It is against this tradition of ‘sour grapes’ comment from police and prosecution personnel that wrongly accused persons and their families, and their efforts to have their convictions re-examined, are portrayed by the media. Both failed appeals and the refusal of permission to appeal are invariably reported in the media as evidence that the original conviction was safe, and as an indicator of the lack of remorse or compassion displayed by the convicted person (the ‘callousness’ of continuing to ‘play’ the system rather than show remorse for their ‘crimes’ and ‘victims’).

Tabloid coverage of high profile cases is especially emotive and misleading. Reporting on the failure of an appeal in the Luke Mitchell case, in Edinburgh, for example, The Daily Record printed:

⁹³ As widely reported in the media at the time, (e.g. <http://www.innocent.org.uk/cases/m253/index.html#telegraph18july>)

‘MONSTER Luke Mitchell lost a FIFTH appeal bid yesterday over his horrific murder of girlfriend Jodi Jones. Even before the killer's latest defeat, his attempts to escape justice had cost taxpayers at least £112,000. Yesterday's hearing will cost thousands more in Legal Aid to Mitchell. And his lawyers are considering a sixth appeal attempt, this time at the Supreme Court in London. Campaigners say Mitchell is tormenting Jodi's family by continuing to drag them into court. The charity Mothers Against Murder and Aggression said: ‘If you're convicted, you should not be able to appeal unless new evidence comes to light’ (Daily Record, 16th April 2011).

This article demonstrates the many nuances inferring guilt which are a regular feature of such reports – the appeal is defined as an attempt to ‘escape justice,’ the term ‘appeal’ is substituted for the more truthful ‘hearing’ to make the process seem more protracted and exaggerated⁹⁴, and reference to ‘campaigners’ implies that the only campaigners are those ‘supporting’ the victim’s family, in spite of a large, public campaign supporting innocence, which is not mentioned in this report.

This particular approach, drawing together the proclaimed ‘evil’ of the convicted person, with the implied ‘unjustified’ costs to the taxpayer, and the continued suffering inflicted on the victim’s family (as an indication of the cruelty of the convicted person towards the victim’s family), reinforces public perceptions that both the original conviction was correct, and that subsequent appeals have continued to ‘prove’ that point.

⁹⁴ This hearing was, in fact, the judges’ announcement of their decision regarding an earlier appeal hearing. The five ‘appeals’ to which this article refers were, in fact, five hearings relating to only two appeals.

Comments by the Solicitor General Frank Mulholland QC that an earlier failed appeal in the same case would be a ‘comfort’ to the victim’s family (BBC, May 2008b), especially given the seniority of Mr Mulholland’s position within the legal establishment, emphasise perceptions of the CJS as being ‘on the side of’ victims and their families, and of ‘justice’ being inextricably linked to the opinions and feelings of those families.

Calls to restrict appeals have become a common factor in reporting of high profile cases, which is a worrying trend in light of the general shift to a more punitive public mood, and populist government policies and legislation aimed at ‘rebalancing the system in favour of victims.’

Indeed, commenting on concerns in Scotland that the right to appeal to the Supreme Court in London may undermine the independence of Scots Law, external affairs minister Fiona Hyslop is reported as saying

‘I am concerned about the threat to the independence of Scots Law and therefore against any amendment creating a new system of appeal from the High Court in Edinburgh to the Supreme Court in London. This would result in a layer of appeal that is unnecessary, and could put victims in Scotland at a disadvantage’ (BBC, 1st March 2011).

Ms Hyslop does not elaborate on why such a layer of appeal is ‘unnecessary’ or in what ways it could ‘put victims in Scotland at a disadvantage,’ but this statement echoes media led concerns that the appeals system is ‘against’ victims, and that the necessity

for appeals is questionable, with the added element of a Nationalist appeal to maintain the independence of Scots Law, and protect it from ‘a serial undermining of the Scottish justice system’ by Westminster.’⁹⁵

This one-sided approach by the media, and the lack of any serious reporting to the contrary encourages and maintains public misperceptions about the CJS, and leads and feeds are embedded in the CJS itself to ensure the right message is filtered to the general public via the media.

An experienced investigative journalist explains:

‘The Metropolitan Police ... have 80 full time press officers – what do people think they are doing? The leaking of information from the police to the media helps create an atmosphere in which convictions are more likely... defence teams are telling defendants not to speak to journalists (playing by the rules, when a case is active), yet the prosecution are already doing it...Once the conviction is secured, the whole negative media coverage comes into play... defence lawyers don’t understand that the media are part of the process.’

This begs the question, if defence lawyers do not understand the part played by the media in shaping and reinforcing public perceptions about CJS processes, then how can they advise their clients adequately with regard to dealings with the media?

⁹⁵ The EHCR was incorporated into domestic law in Scotland in the Scotland Act 1998, requiring Scottish legal practices to comply with the provisions of the Convention. Where there were challenges alleging that practices were not compliant, the appropriate court to address these matters is the UK Supreme Court, acting on behalf of, and representative of, the European Court of Human Rights. Therefore, it is not the independence of Scots Law which is under challenge, but questions of whether Scots Law is being applied in compliance with ECHR provisions.

The process by which negative media coverage has already begun and become entrenched in the lead up to, and duration of, the trial, sets the scene for what appears to be ‘justified’ negative reporting following conviction. One family member says:

‘I complained to the newspaper (about untruthful post conviction coverage)... they said, Listen, we’re not interested in the facts surrounding the case, we’re only interested in the conviction...the victim’s family had a massive march...over 400 people marched ... to get them a life for a life, ... that was before the trial started, ...they hadn’t even been convicted... they did a march a couple of months before we lost the CCRC, the appeal, they did a march exactly two months before he lost that, they do a march every year and yeah, I think it damages ***’s chances.’

(family member, accused convicted, sentenced to 13 years)

Although one journalist expressed the opinion that wrongly accused persons should attempt to get high profile coverage for their case before the trial is completed, a freelance journalist who has spent many years researching the Lockerbie Bombing case said:

‘The single biggest difficulty has been trying to get someone to take the story and run with it. It’s not just the story itself though, although that’s definitely part of it. It’s something deeper than that, something I don’t think many people realise... any one of [these big cases] would open such a can of worms, nobody’s willing to risk it. There’s a lot of pressure not to rock the boat – they don’t want anybody letting the cat out of the bag that

the system's rotten to the core. Guys like me, there aren't too many of us left...I'm glad I'm ready for retirement... I'd be hard pushed to make any sort of living out of this stuff now. If it wasn't for the overseas interest, I wouldn't make a penny – none of the big players here will touch this sort of material.'

(interview, freelance investigative journalist)

Decisions taken by judges in some high profile cases would appear to reinforce this journalist's opinion. When Sion Jenkins was released on bail, pending re-trial, one of the conditions of his bail was that a website which had campaigned for several years to have his case re-examined be closed down, even though Mr Jenkins himself had had no part in the setting up or running of the site. The official reason for such a decision was to prevent potential jurors at the up-coming re-trial from accessing the site to 'research' the case, although there were literally dozens of other sites featuring the case. (Lean 2008, Jenkins 2008)

The December 2010 release of Eddie Gilfoyle, who was convicted in 1993 of murdering his pregnant wife and trying to make the murder look like suicide, and had served 18 years in prison, stipulated that he must not contact the media either himself, or through a third party, resulting in the suspension of a supportive website similar to the one in the Sion Jenkins case. Three months later, the ban was lifted without public explanation. Mr Gilfoyle, in a press conference following the lifting of the ban said:

‘When I was released from prison in December, I was told in no uncertain terms that neither myself, my sister, my legal team or anybody associated with me could talk to the media.

If I have (*sic*), I was straight back to prison. Kenneth Clarke, the justice minister, authorised it. The reason he authorised it is because he didn’t want me coming out and telling the truth.’⁹⁶

Other routes

By the time a first appeal has failed, or permission for leave to appeal has been refused, fighting to overturn a wrongful conviction has become a way of life for families of wrongly convicted persons. Entire lives are re-structured around the process of searching for new ways to have the case re-examined, and innocence acknowledged.

One family member, asked if she would like the tape switched off because she was in tears recalling the verdict, said:

‘No...I know I’m crying, but it’s nothing to me, crying over what they did to him, because I function every day crying. That’s how I live...I function like this. I drive the car, I can do anything ... because if I didn’t carry on when I’m crying, I wouldn’t ever go forward...we’re hoping, still hoping, and I know I’m saying what I said earlier – you keep going to the next level thinking, well, they’ll sort it, they’ll sort it...I’m probably playing the naive card again, but I’m hoping these two (post appeal) organisations will

⁹⁶ As widely reported in the media at the time, (e.g. <http://www.wirralnews.co.uk/wirral-news/local-wirral-news/2011/03/22/convicted-wife-killer-eddie-gilfoyle-accuses-kenneth-clarke-of-gagging-order-cover-up-after-prison-release-100252-28382102/>)

have to – not be seen to, but if we corner them enough, will have to see sense. Because they don't see sense...'

(family member, accused convicted, sentenced to 15 months)

A family member, who became a prominent campaigner, explains the transformation in thinking which takes place over time:

'It's a growing thing, it's not a sort of one off, oooh, that happened, it's a developing thing. Because what you find out, you can't believe it to start with...something I've noticed, everybody who suffers from injustice goes through the same sort of process – some don't make it through the process... it kills them off early on, some make it through the process to become obsessed...which is the worst you can become, because you're finished when you become obsessed... and you've got people who come through the whole process, learn a great deal from it, apply it to themselves and move on...it's a different thing that you face... It's out to get you...the system. It's an awful feeling... unless you're able to vocalise it, unless you have the mental and physical capacity and health to do it, unless you have the skills to do it, unless you have the political and media support... you see what we need here? We need a raft of things to get justice...it's a massive, massive change, it's a process... you don't quite realise what's happening to you, it's only when you reflect back on it that you realise how much it's changed you.'

(long term campaigner, started out as family member)

What is apparent between the two accounts above is that, until the process is complete, and justice (as it is perceived by the wrongly accused) is obtained, then those caught up in the process are still being shaped by it and still, to some extent, unaware of the enormity of the impact that process has had, and is still having, upon them. This may account for the tendency of wrongly convicted individuals and their family members to continue to believe that somewhere in the ‘chain’ of authority and official organisations, the end of the process will be found.

Of the 27 cases covered by this study which went to trial, only three cases had progressed through the entire system and managed to have the conviction overturned. For one of those families, the ‘process’ was still not complete, as restrictions imposed prior to acquittal had not been removed. Further, the stance taken by judges ruling on compensation for wrongful conviction was, essentially, that , although the court of appeal overturns convictions on matters of safety (in legal terms) of conviction, compensation would only be paid where the applicant could prove factual innocence.

This has proven to be a major difficulty for wrongly convicted persons whose convictions are overturned either on appeal or re-trial, the CJS apparently utilising diametrically opposed reasoning to suit its own ends. Appeals cannot be obtained, heard or judged on matters of guilt or innocence, but when the system finally admits that a person has been wrongly convicted, that same system then demands proof of the innocence it has ignored or denied for so long.⁹⁷

⁹⁷ This approach changed with a Supreme Court ruling in May 2011 which deemed that compensation would be payable when ‘a new or newly discovered fact shows conclusively that the evidence against a defendant has been so undermined that no conviction could possibly be based upon it.’ It should be noted, however, that such a decision is still open to discretion and the interpretation of what judges believe would make a case ‘impossible to convict’ – in the same ruling, these judges refused compensation for one applicant on the grounds that a reasonable jury might still have convicted even if it had known about evidence which later emerged. Such a ruling creates similar conditions to

In six cases where families and/or accused persons participated in this study, the convicted person had served their sentence, and been released. Five continue to attempt to have their convictions recognised as wrongful, a sixth gave up when the length of time spent challenging the conviction exceeded the length of sentence he had served.

Of the remaining 18 cases which resulted in conviction, two are in the process of preparing applications to the S/CCRC, two have applications currently being decided by the S/CCRC, three applications were refused for referral back to the court of appeal, and one was successfully referred back to the court of appeal. That application, however, resulted in a failed appeal, despite a four year investigation by the CCRC before referral.

CCRC (England and Wales)

When the appeals process has been exhausted, convicted persons can apply to the Criminal Cases Review Commission to have their cases ‘independently’ reviewed.⁹⁸ Over the years, however, the CCRC has attracted significant criticism because of its perceived *lack* of independence. The CCRC is required to test the cases before it against an assessment of whether a case to be referred back to the court of appeal displays a ‘real possibility’ that the conviction will be overturned. Criticisms of the CCRC mirror those of judges ‘second guessing’ juries⁹⁹ – the CCRC is required, in effect, to second guess which cases the court of appeal is likely to overturn (Jessel, 2011, Reyes, 2012).

those raising concerns amongst lawyers and campaigners that judges using discretion are second guessing juries in appeal cases.

⁹⁸ The CCRC was originally set up in 1997, in response to a Royal Commission in 1991-1993, as a mechanism by which cases which could be miscarriages of justice could be reviewed independently, and returned to the Court of Appeal if this was found to be the case.

⁹⁹ Jon Robins, reporting in “The Lawyer,” January 23rd 2001, quoted Michael Mansfield QC thus: “The time has come to redefine what the Court of Appeal (CA) is truly about ... The CA should not become a second jury second-guessing what the original jurors would have found.” He went on to call for a review of the “role and powers” of appeal judges to prevent them from using their discretion in an “anti-democratic” way.”

According to David Jessel, former commissioner of the CCRC, “... *the CCRC’s obligation to second guess the Court of Appeal inevitably puts its judgments at an extra remove from justice and truth, and holds its applicants hostage to the vagaries of a court whose very failings were largely responsible for the crisis that brought forth the CCRC*” (Jessel 2011).¹⁰⁰ Another difficulty faced by the CCRC is the narrowness of the definition of ‘new evidence.’ Commissioners and case reviewers may be able to see quite clearly that evidence exists (and is abundant, in some cases) that the convicted person is not the person who committed the crime, but unless that evidence can be fitted within the legal definition of ‘new evidence,’ or good reason (again, good reason in legal terms) for evidence not being adduced at trial, then it cannot refer the case back to the Court of Appeal on the basis of that evidence. Critics have challenged the concept of independence for an organisation which must conduct its reviews within strict boundaries imposed by the very authorities whose decisions it must review.

One family’s experience of a refused CCRC application demonstrates this ‘second guessing’ process:

‘[the CCRC] are basically saying that because they think that *** is not a credible witness, he has no right to a fair trial, because they can’t deny there were conflicts. How can this be allowed?...I am absolutely furious as to the reason why they have refused him, surely even a witness not deemed credible has the right to a legal team with no conflicts of interest.’

¹⁰⁰ www.davidjessel.co.uk ‘Justice Issues’ 2011.

The Review Commission in this case both acknowledged and accepted that the behaviour of the original defence team had been unacceptable, in that they had represented two co-defendants, one to the detriment of the other. But a decision about whether the applicant would have been a 'credible witness' is clearly one for a jury, especially as the CCRC's information, on which this decision was based, came from the files of the solicitors who had been responsible for the conflict of interest in the first place.

Bob Woffinden, a respected and long term journalist specialising in injustice, said of the CCRC:

When it was set up in 1997, the Criminal Cases Review Commission was an experiment. It was an idea unique in worldwide criminal justice: an extra-judicial body that could give another chance to cases that had reached the end of the legal road. The time has now come to acknowledge that it was an experiment that failed..... The complaints are that the CCRC has become characterised by pusillanimity and procrastination. It is taking far too long to evaluate cases; it is not referring the cases it should; and even where it does refer convictions, its poor case analysis leads to poor appeals...[for government,] it has become a highly expedient mechanism. It allows ministers to deflect all questions about, and accordingly blame for, miscarriages of justice and the malfunctioning of the judicial system. Probably that's its main residual function: as a fig leaf (Guardian, 30th November 2010).

SCCRC

The Scottish Criminal Cases Review Commission, also set up in 1997, differed from its English counterpart in one particularly significant way – the SCCRC did not place the same emphasis on the need for new evidence, or the ‘real possibility’ test. Scottish cases could be reviewed by the SCCRC on the basis, alone, that a miscarriage of justice may have occurred (although assessment of evidence available at trial, and the reasons for failure to adduce evidence would still inform referral decisions).

Following the emergency legislation enacted in October 2010 (as a result of the Cadder ruling by the Supreme Court in London), this situation has changed. Whereas prior to the 2010 legislation, the Court of Appeal in Scotland could not refuse to hear a case which had been referred back to it by the SCCRC:

‘[the 2010 Act] gave the court a power to reject a reference if it considered that it was not in the interests of justice that it should proceed. In determining this ... matter, the court is required to have regard to the ‘need for finality and certainty in the determination of criminal proceedings’ (Carloway Review 2011).

A leading QC, speaking at a MOJO (Scotland) event marking the 20 year anniversary of the release of the Birmingham Six,¹⁰¹ said of this legislation, which is currently the subject of consultation and review, ‘It has completely emasculated the SCCRC.’

¹⁰¹ What Happened to the Birmingham Six? Glasgow Film Theatre, March 12th 2011

How, for example, can an organisation with a remit to investigate and refer back a case to the court of appeal on the grounds that there ‘may have been a miscarriage of justice,’ be reconciled with the organisation to which it must refer having the final say on what is ‘in the interests of justice,’ especially when it is that organisation’s original decisions which are under investigation as possible contributors to miscarriage of justice?

Wrongly convicted persons and their families, however, continue to believe that the S/CCRC exist as both an independent means of having their cases reviewed, and a real possibility that their convictions will finally be acknowledged as wrongful.

For many families, reaching the stage where applications to the S/CCRC have become necessary, trust that domestic justice can help them is very low, and they set their sights on the European Courts as the authority which will finally recognise the injustice represented by their experiences. The reasoning that there must be an ‘end’ to the process, and that that ‘end’ must be somewhere in the system, endures throughout the experiences of the wrongly convicted, in spite of numerous and repeated experiences which would suggest that this is not, in fact, the case.

An in-depth analysis of other routes available to wrongly accused/convicted persons, their families and supporters, is beyond the scope of this study. However, where references were made regarding approaches to other organisations – the Independent Police Complaints Commission (IPPC,) the Press Complaints Commission (PCC,) the Law Society, and so forth - similar reports of stonewalling, official meanings and interpretations of key terms and concepts differing significantly from lay or ‘common

sense' understandings, denial and dismissal, all featured strongly, which is perhaps unsurprising, in that many of these organisations will, of necessity, be required to communicate in the language and terms adopted by the various actors and processes within the CJS.

Conclusions

In spite of experiencing the failure of CJS institutions and processes to meet with beliefs, perceptions and expectations of wrongly accused/convicted persons and their families at every stage in the process of investigation, accusation and conviction, a strong belief that the CJS would eventually recognise and acknowledge its 'mistake' prevailed. The 'search for justice' throughout remained rooted in concepts of a system which would, without doubt, recognise innocence eventually. That innocence may already have been recognised and acknowledged within CJS spheres, but no actions taken to rectify situations where innocent people remained incarcerated, was something which Group One and Two interviewees could not comprehend.

The difficulties of communication with legal representatives, discussed in previous chapters, appeared to intensify for many, following conviction. Ignorance of the tight restrictions governing the appeals process, and the lack of access to adequate Legal Aid funding, where grounds of appeal were not immediately apparent, continued to confuse and anger the wrongly convicted and their families. While some families reported abandonment or dismissal by legal representatives, when requests to appeal were made to them, others reported promises to lodge appeals, but little explanation of what this would entail. These responses led to understandably different progress in post-conviction processes – some families were forced to “go it alone” in order to continue

their pursuit of justice, whilst others remained with the same legal representation which had taken them through the trial process. Many of the latter group reported frustration and disappointment regarding lack of communication, long delays, and legal representatives who did not seem to understand the significance of information given to them. (Once again, the differences in legal and lay understandings are immediately apparent, since many wrongly accused individuals and their families did not understand the legal restrictions which disqualified the information they held, from appeal processes.)

Post conviction processes, however, were the arena in which Group One and Two interviewees began to learn about, and understand, the legalities and technicalities of their circumstances, this learning often accompanied by intense bitterness and resentment in realisations that the aims and objectives of the CJS were so vastly different from those perceptions and beliefs of interviewees previously held as factual knowledge. Several wrongly convicted individuals and family members became extremely knowledgeable about CJS processes, legalities and technicalities, but, even with such enhanced understandings, experienced difficulties and obstacles in convincing legal representatives to properly address their suggestions and requests.

Access to information, both about the CJS, and other families in similar circumstances, has become an important resource for the families of wrongly accused/convicted persons, and for the many campaign groups which have emerged in recent years, although some Group Two interviewees reported internet activity as something of a mixed blessing; whilst that activity can give the appearance of progress, it seems to have little impact on the critical decision makers within CJS organisations.

The body of knowledge accumulated by wrongly accused individuals, their families and supporters, and the campaign groups, still faces similar difficulties of recognition and acknowledgement experienced by individual families – CJS processes, technicalities, terms and phrases, understandings and definitions have already shaped the information which led to wrongful convictions in the first instance, and continues to shape and influence post conviction processes in the legal context.

CHAPTER EIGHT

Conclusions

Introduction

This study set out to explore to what extent, and with what consequences, public beliefs and perceptions, held as factual knowledge about the CJS differ significantly from the actual objectives and operation of that system, with particular regard to the incidence of wrongful accusation and/or conviction of the factually innocent. Of particular interest were (a) actions taken, or not taken, by factually innocent, wrongly accused/convicted persons and their families as a result of beliefs, perceptions and expectations about the CJS, and the impacts of those actions (or non actions) on the outcomes of accusations and prosecutions, (b) responses and reactions from the wider public to those so accused and/or convicted, and their families, and (c) to a lesser extent, the impact of media influences on Wrongly accused/convicted persons and their families, and wider public opinions about these cases.

These were key areas which existing research on the phenomenon of wrongful conviction of the factually innocent had not previously addressed and represent an overlooked, but significant, factor in the processes which lead to such convictions.

The CJS in the UK generally, according to data derived from both survey results and interviews in this study, and in keeping with existing literature (e.g. Naughton, 2006, Tyler, 2006), is believed by the public to be fair, just, thorough, to exist to convict the guilty and exonerate the innocent, and to follow recognisable, fixed, accountable processes and procedures. However, factual knowledge about precisely how the system

operates is poor, beliefs and expectations (held as factual knowledge) being, instead, based on a combination of trust, unquestioned assumptions, common sense understandings, and deference. Those beliefs and perceptions, held as factual knowledge are, nonetheless, remarkably resistant to challenge, even within individuals who find themselves wrongly accused, and their family members (Tyler 2006, JUSTICE, 2002a).

Particular beliefs regarding concepts of truth, innocence and guilt, evidence, procedures, and the objectives of the CJS being to convict the guilty and exonerate the innocent, are held to be self evident, common sense ‘facts,’ and are held to represent factual and reliable knowledge.

These general beliefs and assumptions are strongly reinforced by media representations (whether reporting about ‘crime,’ or fictional representations of CJS processes) and political rhetoric (Peirce, 2010, Deutsch & Cavender, 2006). The picture presented is one of increasing risks of serious crime, dangerous ‘others’ who need to be properly dealt with by CJS agencies in order to protect the law-abiding, responsible majority, and both a CJS and government standing resolutely in protection and defence of the decent majority, in the face of ever increasing lawlessness by particular groups or individuals (Garland, 2006).

Political influences

A long term shift in both political approach and public opinion, couched in economic terms, and focused on notions of responsabilisation, self-regulation and participatory measures to reduce opportunities for routine crime (Morgan & Hough, 2008), has also

seen a shift towards more punitive attitudes towards crime and ‘criminals,’ penal populism reflecting political claims that ‘prison works,’ and a blame culture in which victims, portrayed as those whom the CJS should rightly be serving (Young, 2008, Ferrell, 2005), are placed at the centre of both policy making and other approaches to CJS matters. High profile portrayals of the suffering of victims (and victims’ families), often reported in highly emotive terms, and endorsed by political recognition, ramp up hostility and hatred towards offenders (Garland 2001), and lead to calls for ever tougher measures, both to ensure offenders are ‘adequately’ punished, but also to compensate victims and families in terms of retribution.

At the same time, reporting concerning convicted persons, (and increasingly, suspects), dehumanises and demonises those who are convicted or suspected, simultaneously emphasising their ‘differentness’ and ‘otherness,’ and reinforcing perceptions of ‘decent, law-abiding citizens’ by comparison (Garland, 2006).

A vast prison industrial complex has emerged, in which a large number of groups and organisations have a vested interest in the expansion of the use of prison (Giddens, 2008), as inclusionary policies have fallen out of favour, and initiatives aimed at tackling the underlying causes of crime have been ousted by the twin approaches of crime as a routine and mundane phenomenon to be managed by all ‘responsible’ citizens, and criminals as the cause of crime (the reasoning being that it is criminals who require to be dealt with in order to ‘solve’ the problem of crime) (Garland, 2008, Morgan & Hough, 2008, Young & Matthews, 2007).

Since the majority of 'ordinary people' are unlikely to come into close contact with CJS agencies with regard to serious crime, these assumptions about crime, criminals, risk, threat, and the role of CJS agencies and processes are rarely challenged (e.g. JUSTICE 2002a).

It is against this background that wrongly accused and convicted individuals, and their families, try to make sense of, and progress through, the circumstances in which they find themselves. The expectations and beliefs of those individuals are based on a strong self-identification as law abiding, responsible citizens, whose protection from wrongful accusation or conviction is guaranteed. Key concepts, terms and phrases, taken for granted as "self evident", form the basis of beliefs and perceptions held as factual knowledge.

Wrongly accused and convicted individuals and their families who participated in this study, struggled, throughout the processes of police investigation, trial, conviction and post conviction, to understand how they could have become subject to those processes within a system which they believed to be fair, transparent, and just; a system within which "dangerous others" were recognisable as a "type," easily differentiated from the law-abiding and responsible (Garland 2006).

The situation is further compounded by CJS practices which differ significantly from the beliefs and expectations of the general public (Kennedy 2004, Mellinkoffe 2004, Mansfield 1993), and the largely unsupervised and "*highly permissive nature of many police powers*" (Jefferson & Grimshaw, 1984, p.60), which form part of the structure of CJS processes, but of which the general public is ignorant (JUSTICE 2002).

This study demonstrates the extent to which people cling to their belief and perceptions of the CJS, even when faced with clear and concrete examples of the system working in ways far removed from those beliefs and expectations.

Legal versus lay understandings and applications of common terms and phrases.

Part of the reinforcement of common beliefs and perceptions about the CJS being held as reliable and factual knowledge, is the use of terms and phrases whose meanings are thought to be self evident and “common sense.” Yet these common terms and phrases have different meanings in their lay and legal applications, but understanding of those different meanings remains part of the ‘specialist’ knowledge of individuals and groups working within CJS agencies. The difficulties here are two-fold. On the one hand, ‘ordinary’ members of the public, whether wrongly accused persons and their family members, or the wider public, proceed on the basis that no such difference exists – that the terms and phrases used mean exactly what they believe them to mean. On the other, each stage of CJS processes is dependent on those which precede it, and therefore, actors in the different CJS agencies, utilising specialist knowledge and the ‘secret code’ contained in the legal meanings and interpretations, tailor their communications and findings to be seamlessly ‘slotted in’ to subsequent stages (Green, 2008, Andrews, 2004).

Factually innocent individuals and their families, at the point of accusation, are caught in the gap between lay and legal understandings. A shared belief with the wider public, that innocence and truth are central, crucial and self evident to police investigations, leads these individuals to attempt to communicate with investigating officers in (unknown to them) the ‘wrong’ language. A strong self-identification as law abiding,

responsible, decent citizens, coupled with the unassailable knowledge of their own innocence, encourages them to proceed on the basis of trust, and an unquestioned belief that investigating officers using terms such as ‘innocence,’ ‘truth,’ ‘enquiry,’ etc mean the same things by those terms, as they are understood by the wrongly accused and their families. The absolute belief that police officers would not knowingly target innocent people, that their job is to get to the ‘truth’ and apprehend the guilty, leads the wrongly accused and their families to co-operate with all requests and demands from police officers, even where those requests and demands appear to make no logical sense.

There is no comprehension or understanding that ‘the truth’ to investigating officers is something to be ‘uncovered’ from the accused person him/herself, or that openly offered information (‘evidence’ of innocence to the wrongly accused) will be rejected, as a matter of course, as dishonest (Green, 2008). The use of the term ‘enquiry’ or ‘investigation’ leads accused persons and their families to believe that the scope of investigating officers’ activities extend beyond a focus on the accused person when, in fact, often that is the central focus of ‘enquiries.’

Similarly, the terms ‘witness’ and ‘suspect’ appear to be clear and self evident in their meanings to ‘ordinary’ members of the public. Wrongly accused persons, and their family members, automatically assume that they are communicating with police officers as ‘witnesses,’ and do so openly and willingly, in the belief that, having done nothing wrong, (a) there is nothing to fear from such engagement, (b) the information they provide will help police investigators to ‘solve’ the crime, and apprehend the perpetrator, and (c) any information given cannot possibly harm the accused person. Even when cautioned and arrested, factually innocent individuals and their families

continued to believe that they were ‘witnesses,’ and the arrest and caution were simply formalities which required to be carried out in line with perceived procedures and rules (about which they knew nothing). There is no framework of reference within which accused persons or their family members can consider the possibility that information given by them to investigating officers may be deconstructed, and later reconstructed in incriminating terms against them. Nor is there any context within which to consider the possibility that police officers may be approaching the investigation from the viewpoint that the factually innocent person is, in fact, the guilty perpetrator (Punch, 2009).. (Several Group One and Two interviewees reported ‘going along’ with arrests on the understanding that investigating officers will automatically suspect certain people, e.g. ‘the boyfriend,’ but will quickly realise that ‘the boyfriend’ is not involved in any way).

The tendency for individuals to ‘go along’ with whatever police investigators require, in the first instance demonstrates the strength of beliefs that common understandings of key terms and phrases are, in fact, considered reliable knowledge. The realisation that there were different meanings which had been used against the wrongly accused and convicted took a long time to be accepted, such was the resistance to the possibility that those commonly held meanings were not reliable, and nor did they provide the protections expected. Once accepted, however, that realisation became a source of deep resentment and loss of faith in the CJS as a whole.

Police investigations

It is not necessarily a presumption of guilt which drives police investigations in these directions, but merely a pre-decided strategy to ‘clear up’ a crime in the most efficient and expeditious way possible (Martin 2008). Senior officers ‘manage’ investigations,

deciding what is, and is not, to be considered relevant, with an ever conscious eye on media coverage and public responses (Reiner, 2010, Martin, 2008). Accused persons and their family members, however, have no understanding that the investigation is not necessarily an attempt to get to 'the truth' (as they understand it) or to 'solve' the crime, and so they attempt to 'help' police investigators in any way they can, unaware that everything they say and do can be deconstructed from its given context, and later reconstructed to fit the prosecution case.(Green 2008). On the basis that they have 'nothing to hide,' accused persons submit to humiliating and degrading strip searches, medical 'examinations,' photographing of their bodies, and they and their family members allow investigators to ransack homes, and take any items they choose, from cars to mobile phones and computers; the simple rationalisation for 'going along' with these events is that investigators can not possibly find anything incriminating, and the failure to turn up incriminating evidence will 'prove' that the accused person is innocent.

This study highlighted instances of individuals allowing homes to be searched without warrants, and individuals being removed from their homes by what they assumed to be police officers, without checking identities or authority. The level of trust in police officers was not only extremely high, but continued over time, even where events had been vastly different from those expected.

A different approach, however, is being taken by investigating officers. Items, information, statements and other data 'recovered' in investigations are not classified in terms of 'proving' innocence or guilt, but in terms of whether they are relevant to the central aim of the investigation (i.e. whether they can be utilised to support the chosen

direction of the investigation) (e.g. Green, 2008, Reiner 2010). There is no contextual framework within which accused persons and their family members can conceive of proof of innocence (as supported by a dearth of anything incriminating) as ‘irrelevant.’

Yet the belief that innocence, in and of itself, would be enough to “prove” that investigators were focusing on the wrong person not only influenced events in terms of what wrongly accused individuals did not do (checking identities and authorities, ensuring adequate legal advice, exercising the right to remain silent), but also what they did do – handing over mobile phones, car keys, home computers, speaking at length to investigating officers at length, agreeing to medical examinations, photographs, and so on, all of which allowed information to be gathered for later reconstruction and use as evidence.

The specialist knowledge held by investigating officers allows for actions taken by accused persons and their families (on the basis of beliefs and perceptions held as knowledge) to be manipulated to specific ends. The common practice of taking statements from immediate family members, thus rendering them ‘prosecution witnesses,’ is possible precisely because those family members believe they are helping police with an enquiry that they (family members) believe must ultimately exonerate their loved one. The result of such statements can be devastating, with family members unable to discuss events with accused persons (because they are prosecution witnesses), increasing the sense of isolation and helplessness for both accused persons and their family members.

Such approaches by police officers can be understood from two specific perspectives. The re-casting of police and policing in the economic model, with ‘performance targets’ as evidence of efficiency, effectiveness and expediency, focuses police attention on the ‘most efficient’ approaches to ‘clearing up’ serious crimes, within the practices and procedures available to them (Martin 2008). A strategy of ‘beginning at the end’ and working backwards is likely to save time and resources by avoiding unnecessary or unguaranteed endeavours – seeking only information which supports the central contention is both logical, and the most efficient approach (Peirce 2010). Police culture, with its emphasis on officers as upholders of the law and protectors of the innocent, can lead to overconfidence in abilities to recognise dishonesty, and create a self-fulfilling prophecy situation where investigating officers’ conviction that they are pursuing the ‘right’ person can blind them to any other possibility (Reiner, 2010, Kassin & Fong 1999). This is of particular importance when a crime has received ‘high profile’ coverage in the media, and police forces are under intense pressure to ‘solve’ the crime quickly.

The difference in objectives, understandings and approaches is clear. Whilst the wrongly accused and their families participate willingly and voluntarily in a process they believe to be a search for the truth of what has happened, police investigators strategically elicit and collect (or disregard) information with which the goal of “clearing up,” rather than “solving” crimes, can be obtained.

Specialist knowledge

The power available to those with access to the specialist knowledge of the significance of common terms and understandings in their legal settings, to manipulate and mislead

those without such knowledge, is invisibly embedded in every stage of CJS processes. ‘Common sense’ understandings, widely circulated throughout public beliefs and opinions, ensure that the specialist knowledge underpinning that power remains hidden; even though there is a public acceptance that a specialist knowledge exists (police investigatory processes, legal protocols, etc.), little is known of what the specialist knowledge is, or how it is utilised. Therefore, members of the wider public remain ignorant of the extent of the power of such specialist knowledge which can be used against them (Green 2008, JUSTICE 2002, Mansfield 1993).

New legislation, ‘joining up’ and closer co-operation between CJS agencies¹⁰², and public attention focused on the lurking dangers of serious crime, allows communication in, and circulation of, specialist terms and understandings, within all aspects of CJS processes, yet, because terms used are identical to those used by members of the wider public (same words, different understandings), there is a strong public belief that lay people ‘know’ how the CJS works – what constitutes evidence, truth, innocence and so forth.

For example, interview data in this study demonstrated a strong public belief that the purpose of trials is to discover ‘the truth’ about circumstances, and to ‘prove’ the innocence or guilt of the accused person. Accused persons (and their family members) proceed from the beginning of police investigations on the basis that truth and innocence will be both important elements in any part of CJS proceedings, and self evident to CJS actors. There is no comprehension that the terms ‘truth,’ ‘proof,’ and ‘innocence’ have different meanings and significance in legal terms, and CJS processes

¹⁰² Government White Paper ‘Justice for All’ 2003

rarely enlighten lay people regarding their (flawed) assumptions (Balkin 2003). The oath taken by witnesses and accused persons alike is to swear to tell ‘the truth, the whole truth, and nothing but the truth,’ within a system which routinely and strategically elicits specific and selective ‘truths’ for its own purposes, and is designed to ‘close off’ other ‘truths.’ Few people know or understand that the oath, taken in court, is impossible to uphold – even if there were a ‘whole truth’ to be told, CJS processes are configured in such a way that it could not be told (Green 2008, McEwen 1998).

What emerged strongly from this study is the extent to which specialist knowledge influences every stage of CJS processes, from information gathered (or disregarded) during police investigations, through the selective and strategic presentation of that information as evidence in trials, to the “secret code” of legal processes and practices (Ward 2004), and the highly technical language of expert witnesses and evidence (Fisher 2008).

The gap between lay understandings of key CJS concepts and their specialist counterparts was marked, the disadvantage of those without access to that specialist knowledge, and the effects of that disadvantage on incidences of wrongful accusation and conviction, evidenced by the cases covered by this study.

Concepts of evidence, truth and trials

A very strong public perception of the trial as a means to examine ‘all of the evidence’ and get to ‘the truth’ about crimes, and to properly convict those responsible, underpins not only public responses to those convicted, but also continued belief, trust and faith in

the trial process (for wrongly convicted individuals and their families) that innocence will be recognised. The accused persons and their families who participated in this study reported approaching trial with little or no idea what to expect, or what the legal representatives planned to utilise in the accused person's defence. Two factors emerged strongly from experiences of trials. Firstly, disbelief and lack of understanding regarding evidence used and not used. Witnesses lying on the stand were brought to the attention of legal representatives, who were said to either ignore or dismiss the concerns of their clients and family members, on occasion claiming that witnesses' lies in those circumstances were 'irrelevant.' Other witnesses, considered vitally important by accused persons and their families were not called, and no explanation offered for the failure to call them.

Concepts of 'all of the evidence' were demolished, for accused persons and their families, at trial, with many complaining bitterly that there was so much evidence which was simply not used, and much of what was introduced as 'evidence' was of no relevance to the charges. Despite assurances from legal representatives that evidence not used either could not, legally, be introduced, or that it would have made no difference to the outcome of the trial, several of these families later discovered that the evidence *could* have been used¹⁰³, and may well have made a significant difference to the outcome. Later attempts to argue at appeal that irrelevant evidence should not have been allowed at trial, and may have had a detrimental effect (the jury being 'swayed' by such evidence, even though it was of no relevance or significance to the charges brought), generally failed. Appeal judges' justifications for rejecting such appeals tended to be an opinion that the points raised would not have significantly impacted on

¹⁰³Some families which managed to obtain case papers received independent legal advice that evidence in those files could have been used at trial, but, by the time this advice was received, the evidence could not be used for appeal under the "new evidence" restrictions

the jury's decision; criticisms of appeal judges 'second guessing' juries have had no effect in terms of changing or halting those practices as yet.

Perceptions of the trial process as the end of a 'journey' towards truth and justice, the point at which all of the perceived mistakes and misunderstanding would be rectified and truth and justice restored, evaporated at the point of conviction. Belief in trials as the 'most important' part of the whole process (even for those individuals whose charges were dropped), reflects wider public perceptions of trials as the arena in which the truth is ascertained, the properly guilty are convicted, and the innocent exonerated.

There are two aspects to wider public perceptions of trials as a search for the truth, and the arena in which 'all of the evidence' is heard. Firstly, based on lay beliefs that common terms and phrases are self-evident in meaning, a trial which ends in a conviction elicits predictable responses – the person has been found guilty by processes deemed to be fair and proper, and therefore the conviction must be correct. Secondly, there is a belief that all of the evidence heard in court is all of the evidence which was available to be heard. This is particularly important when members of the victims' families sit through court proceedings. Unaware that what they are hearing is only strategically chosen information, presented in a highly technical framework, victims' families are convinced that 'all of the evidence' has properly proven the accused person's guilt. (Green, 2008, Fisher, 2008, McEwen 1998). On the basis of this belief, calls to curtail access to appeal processes from victims' families, on the grounds that such processes only prolong the grief and pain for those families, add weight to public beliefs and perceptions about the 'rightful' place of victims at the heart of the justice system. This is but one example of how information, shaped and manipulated by

specialist knowledge, is circulated throughout the wider public, that information itself coming to be held as ‘knowledge,’ which is then the basis for calls for tighter controls and restrictions of rights. In this manner, controls, restrictions, and erosion of rights and protections are not seen to be imposed by powerful elites, but as democratic responses to the ‘will of the people’ (Peirce, 2010, Mitchell & Schoeffel, 2003).

Another important factor regarding ‘all of the evidence’ is the effect of funding restrictions on defence representations (restrictions which, generally unknown to the wider public, do not apply to prosecution representations). In particular, where expert witnesses are used, defence teams must apply to the Legal Aid Board for funding to challenge expert witnesses brought in by the prosecution. One view of the Legal Aid decision makers, as part of the drive for efficiency and saving, is that an expert report, paid for by legal aid, should be sufficient to allow defence counsel to cross examine prosecution expert witnesses in court, and therefore, funding to bring defence expert witnesses into court may be refused or restricted.¹⁰⁴ In cases where this occurs, there are several consequences.

Firstly, it requires counsel to understand the intricacies and technicalities of the expert witness testimony they must cross examine (and, by obvious implication, to understand the intricacies and technicality of the countering report obtained by the defence). The shortcomings in such an approach are clear – counsel failing to understand or, perhaps worse, as reported in several cases, failing to prepare in advance, and therefore unable to properly cross examine prosecution experts, gives the impression that arguments against the expert evidence are weak, and perhaps non-existent. The failure to call

¹⁰⁴ House of Commons Select Committee on Science and Technology, Seventh Report, May 2004.)

defence experts is often seen by members of the public as ‘evidence’ that the prosecution experts were correct, and that no expert could be found to counter their evidence. As with other aspects of Legal Aid funding, the illusion of ‘equality of arms’ is maintained (the accused being provided with the means of ‘defending’ him/herself), when the reality is that massive inequalities are already present; from police investigations to trial, the prosecution has access to virtually unlimited resources, whereas defence funding is strictly controlled.

Initial beliefs held by participants in this study, that Legal Aid funding would ensure that they were properly advised and represented, gave way to a loss of faith in the Legal Aid system, and perceptions that Legal Aid funded defences (and representatives) were inferior to privately funded representation. A conclusion reported by a number of participants was that money to pay for “top” lawyers would have made a significant difference to the outcome of their cases. (However, a small number of participants, whose defence had been privately funded, demonstrated that this was not necessarily the case.)

Communication with legal representatives

Factually innocent, wrongly accused individuals mistakenly believe that their legal representatives ‘believe’ in their innocence, and are ‘fighting to prove’ that innocence in court. There is little understanding that defence teams will, of necessity, engage in tactical manoeuvres designed to undermine prosecution contentions, without, necessarily, regard to the perceived guilt or innocence of their clients (McEwen, 1998). Similarly, members of the wider public, believing that defence representatives have ‘fought to prove’ the innocence of their client, and failed, are likely, on the basis of

commonly held perceptions regarding the trial process, to concede that the client must have been guilty.

Lack of knowledge or understanding of the differences between lay concepts, beliefs and expectations, and their legal counterparts, led accused persons and their family members to depend on their legal representatives to 'do the right thing,' to properly inform them of the prosecution case, the planned defence strategy, and to communicate in language and terms understood by the clients.

A dual difficulty in communicating with legal representatives arose for several wrongly accused persons and their families in this study. Attempts to instruct legal representatives (for example, requests to call certain witnesses, or to have specialists engaged to provide scientific or medical evidence) were either ignored or dismissed, with no explanations offered as to why. When, however, convicted persons later attempted to appeal on the basis that their legal representatives had advised them poorly (or in some cases, incorrectly), the court approach was that the convicted persons had had 'ample opportunity' to instruct their legal representatives prior to, and during trial. (This example of the self protective power of different CJS practices is a central feature of the use of specialist knowledge and understandings to maintain and strengthen the status quo.)

Following arrest, wrongly accused individuals and their families are reliant on a legal system about which they know virtually nothing. For many, the only point of reference they have regarding legal representation in criminal investigations comes from the media, often in fictional portrayals. Again, however, it is an unquestioned belief that

defence lawyers will believe in the client's innocence, and will do 'everything they can' to ensure that client's innocence is recognised, and the client acquitted (should the matter eventually go to court), which informs actions taken or not taken by wrongly accused persons and their family members.

Whereas police officers are believed to be 'speaking the same language' as accused persons and their family members, there is a tendency to believe that legal representatives will use specialist terminology in the legal setting, but will translate into lay terms for their clients. Therefore, when solicitors use terms such as 'irrelevant,' 'evidence,' etc, clients believe it is the lay, rather than the legal meaning which is being used. The gap in understandings between accused persons and their families, and legal representatives, is marked, and leads to serious misunderstandings about actions and strategies believed to be being taken by legal representatives, and the actual actions and strategies being utilised. On the one hand, there are solicitors who, through a number of factors from laziness, arrogance or incompetence, to over-commitment, lack of experience, or restrictions within CJS rules and regulations, fail to protect their clients' best interests, or to properly prepare a case for trial. On the other hand, clients, through a combination of ignorance, deference and fear, continue to trust that their legal representatives are being honest with them, and are doing 'everything they can' to ensure the client's innocence is recognised (Green, 1996, 1997).

This study uncovered incidences of solicitors giving incorrect advice, engaging in apparently unlawful and unprofessional practices, failing to properly assess and understand critical points of cases, lying to clients, and making deals without informing clients that deals had been struck.

Throughout, however, clients were unaware of these events, continuing to trust, instead, that their legal representatives ‘knew what they were doing,’ and would, by the time of trial, fully protect the clients’ rights, and ensure they were exonerated. This trust persisted even when legal representatives failed to meet with clients (especially clients on remand), in part because of encouragement from legal representatives to leave everything to them, because everything was ‘in hand.’ The communication difficulties introduced by the different understandings of common terms and concepts were compounded by lack of communication, legal representatives often refusing, or simply omitting, to discuss tactical or technical aspects of the case with clients. Accused persons and their families, however, accepted this lack of communication in part because there was no alternative, in part because of a strong belief that legal representatives were automatically assumed to be ‘on the side of’ the client, and in part because accused persons and their families did not know what questions to ask about the tactical and technical aspects of their case.

Even where legal representatives had acted unprofessionally, negligently or dishonestly, accused persons and their family members in this study were unable to have those acts addressed, other CJS agencies either ignoring or refusing to act upon this information.

The conclusions of many wrongly accused/convicted persons and their family members, that CJS agencies will protect each other in certain circumstances, regardless of issues of what the wider public would consider ‘justice,’ is strongly supported by many reports received in this study. That is not, however, to say that such protection is necessarily secured by breaking rules or engaging in other forms wrong-doing; the use of legal concepts and understandings, coupled with wide-ranging discretion in many

CJS agencies, means that such protective actions are already built into the processes and practices of the CJS.

Media, science and law

A failure by defence representatives to factor into consideration the effects of media coverage also had serious impacts on some cases. Viewing their involvement from a purely legal perspective, some legal representatives are reported to have told their clients not to take the stand, because it was for the prosecution to prove guilt, and not for the defence to prove innocence. Where these clients were the subject of high profile media coverage, this decision fed directly into popular public perceptions that the accused person must have had ‘something to hide,’ rooted in beliefs that innocent people would want to declare their innocence in court. There was also a strong tendency for defence representatives to advise clients (and their family members) not to engage with media personnel, although few gave any explanations as to why. Although there are risks involved in discussing cases with the media before trial (the risk of being charged with contempt, for example, or of prejudicing the trial), in many cases, both the prosecuting team and the police were already engaging with the media, allowing a ‘one-sided’ portrayal of events to emerge. The tendency of media coverage to lean towards presumptions of guilt, and prejudicial reporting about accused persons remains, therefore, unchallenged (e.g. Jewkes 2011, Geis, 2008).

Another area of media influence is that concerning forensic science. Poor understandings of, but faith in, the reliability of so-called scientific evidence, impacted in several significant ways on the cases featured in this study. The realisation, once in court, that what was previously believed to be scientific (and therefore irrefutable)

evidence, was often little more than opinion (Fisher, 2008), caused distress, disbelief, and a sense of helplessness – by the time this realisation was made, there was nothing accused persons or their families could do to counter the information which had already been presented in court. At the same time, there was a realisation that the jury, and the wider public, would accept the information as presented, in ignorance of the manner in which such evidence is introduced and presented in court cases.

On the other hand, there was, prior to trial, a strong belief that scientific evidence would be able to prove, beyond doubt, that the accused person was innocent, even though accused persons and their families themselves had poor understandings of the science underpinning that evidence. Media portrayals of forensic science as ‘infallible’ (especially in fictional presentations) are reflected in reporting of ‘scientific evidence’ in real life court proceedings, the tone and content of those reports carrying the unmistakable impression that scientific evidence presented in court is conclusive (Fisher, 2008, Deutsch & Cavender, 2006).

Other media portrayals, either in high profile cases, or through sustained focus on specific types of crime (for example, paedophilia) have a knock on effect through public reactions to certain convicted individuals, either on the basis of the demonization of them personally, or because they have been convicted of a type of crime which has received sustained, high profile attention (Jewkes, 2011).

The response to calls for stiffer penalties for gun crime, for example, was a change in the mandatory minimum sentence structures for crimes in which guns were involved,

leaving judges no discretion in sentencing.¹⁰⁵ Those convicted of murder in which a gun was involved, for example, will automatically receive a longer sentence than one in which knives or other weapons have been used. The extended use of Joint Enterprise in England and Wales was originally utilised in response to public calls for ‘something to be done’ about the perceived threat posed by gangs of youths.

More recently, in Scotland in particular, calls to curtail the right to appeal have received high profile coverage, the centrality of victims once again evident – convicted persons applying for permission to appeal are portrayed as remorseless and cruel, creating further suffering for the victim’s family; yet the information (held as knowledge) on which these families and others base those calls is flawed.

Even after conviction, wrongly accused/convicted persons and their family members continue to believe that their situation can be properly resolved (the innocence of the convicted person recognised and acknowledged, and the conviction overturned) at some stage within CJS processes. In spite of official denials, there is a great deal of information to support claims that convicted persons who refuse to participate in training programs aimed at ‘addressing offending behaviour’ (on the basis that, since they have not offended, they have no offending behaviour to address) are prevented from progressing through the prison system, refused enhanced status, and held beyond tariff, sometimes for many years, for failing to ‘demonstrate reduction in risk of re-offending;’ the official denials of these practices demonstrating an example of Cohen’s ‘literal denial’ (Cohen 2001).

¹⁰⁵ In England and Wales.

That these people continue to maintain innocence for years and take the risk of being held for many years over tariff by refusing to participate in offender training courses, is another indicator of the strength of belief that factual innocence can, and should, be recognised and acknowledged, that it is an important factor within CJS processes, and that steps taken to demonstrate factual innocence will eventually be successful, regardless of previous experiences to the contrary.

The consolidation of a core message that prison works, and strong government is ‘tough on crime,’ coupled with a huge expansion of the prison industrial complex, and public calls for crime and criminals to be dealt with harshly, along with the erosion of the presumption of innocence, the unpopularity of human rights for those deemed to have relinquished their rights by offending, and public fear and anger repeatedly driven by sensationalist media coverage, has shaped public perceptions and beliefs regarding CJS matters.

Beliefs that ‘criminals’ are easily identifiable from ‘law-abiding citizens,’ that police investigations follow rigorous and thorough procedures, that popular concepts of the aims and objectives of CJS agencies are the *actual* aims and objectives of those agencies, that innocence is evident and provable, and that CJS actors would not knowingly target innocent individuals, create trust and faith that innocent individuals have nothing to fear from the CJS.

Factually innocent, wrongly accused persons and their families are ‘ordinary’ members of the public up to the point of accusation, and proceed on the basis that their beliefs and expectations represent reliable and factual knowledge. Unaware that common

concepts and phrases have different meanings and interpretations in the legal arena, these individuals are unable to communicate meaningfully with those investigating them, those prosecuting them, or those whose purpose it is to defend them. At the same time, the wider public believe these individuals have been investigated and prosecuted by fair, transparent, and 'known' (to the public) processes and procedures. Both wrongly accused/convicted persons and their families, and the wider public proceed from beliefs and perceptions, held as factual knowledge, about the CJS which differ in several respects from the actual aims, objectives and processes of the CJS. The many consequences of such fundamental misunderstandings and erroneous perceptions impact significantly not only on incidences of wrongful conviction (and the process between wrongful accusation and conviction) but also as a factor in the difficulties of having such wrongful convictions rectified.

The differences between lay and CJS understandings of key terms, and the effect to which those differences are put to use by CJS agencies appears as a demonstration of the powerful controlling the means of knowledge production and dissemination, and the law, in order to protect their own interests (Mitchell & Schoeffel, 2003), and the acceptance of erroneous information as 'knowledge,' a reflection of Gramsci's theory of cultural hegemony. At the same time, the invisibility of the power of specialist knowledge and understandings, hidden throughout CJS agencies, echoes Foucault's theory of disciplinary power, that it is, through a variety of techniques, applications and procedures, '*capable of making all visible, as long as it could itself remain invisible*' (Foucault 1991, p.214).

In spite of Foucault's de-emphasising of the role of the state: '*[it]is no more than a composite reality, a mythicised abstraction whose importance is a lot more limited than many of us think*' (Foucault, 1991, p.103), state influences in every aspect, and at every level of, the CJS in the UK cannot be ignored. Police forces (and therefore police investigations) are state funded, on the paradoxical basis that police officers and forces have wide ranging discretion (Jefferson & Grimshaw 1984), at the same time as being required to 'meet' state imposed targets. That these targets are largely economic in nature, and are neither comparable nor compatible with the assumed requirements of police forces to 'clear up' crimes (i.e. to properly identify and apprehend the correct perpetrators) (Young 2008, Green 2008), creates the conditions in which shortcuts and cutting corners are tacitly approved and encouraged (Peirce 2010) and the innocent can be targeted as the quickest and most economical route to 'clearing' crimes; 'getting a result' being more important than ensuring crimes are fully and properly investigated. The discretion afforded police officers allows many of their decisions and actions to be 'covered up' (JUSTICE 2002b), aided by a 'complex discourse of denial' (Scraton 2002, p77), which runs through each level of CJS processes.

State funding, in the form of Legal Aid, of both prosecution and defence legal representatives, as well as forensic and other expert examinations, reports and testimony, and particularly the huge imbalance between funding available to prosecutors and that available to defence teams, demonstrates the extent to which state influences dominate CJS processes, even whilst the illusion of 'independence' of the judiciary is maintained (e.g. Lord Bingham 2010, Peirce, 2010).

Political rhetoric emphasising the centrality of law and order, and the threat posed by ‘dangerous criminals,’ the emphasis on the prison industrial complex, creating further connections to massive state funding and influence, and an increasing involvement of successive governments in ‘law-making,’ coupled with the ability of the state to restrict and influence media reporting (e.g. the previously mentioned cases of Jordan Cunliffe, Suzanne Holdsworth, Sion Jenkins and Eddie Gilfoyle), all highlight a centralising of power and control over CJS processes.

At the same time, the inaccessible code of CJS processes remains firmly within the ken of those working within the CJS itself, remaining largely unknown to the general public; the successful maintenance of the ‘illusion’ of commonly held information as factual knowledge demonstrating the extent to which this code remains protected; hidden in plain view. Such protection is neither accidental nor happenstance, as can be seen from the findings of this research – the ‘specialist knowledge’ held by those within the CJS can be quite deliberately employed both to create circumstances in which convictions can be obtained, and also to maintain flawed public perceptions of that knowledge as ‘factual information.’

The maintenance of public beliefs and perceptions, rooted in ever increasing government interventions as responses to public opinion (e.g. Peirce, 2010, Scraton, 2007) fed by portrayals of ‘criminals’ as barely human, and of little social value (e.g. Garland 2006), is dependent, therefore, upon information produced, disseminated and controlled by the powerful, but accepted and internalised by the general public. Green’s theory of revelatory knowledge demonstrates the extent to which specialised understandings of key concepts, terms and procedures, with regard to police

investigations in particular, are utilised to achieve specific ends, and it is in this context of an unknown, and unknowable form of communication, understanding and process that wrongly accused, factually innocent individuals must somehow attempt to engage meaningfully. That it takes so long, and so many apparent failings (in comparison to beliefs and expectations) before these individuals even begin to comprehend the existence of a 'parallel universe' in which the actors speak exactly the same words, but are using a different language, is testament to the strength and power of accepted and internalised information as reliable and trustworthy 'knowledge.' The wider public, not having the experience of wrongful accusation and/or conviction, have no reason, comprehension nor motivation to question deeply held beliefs and perceptions, or whether those beliefs and perceptions constitute reliable knowledge.

Reliance on media representations about the CJS (e.g. Garside, 2003) for information about the CJS, coupled with biased and incomplete media coverage (e.g. Scraton, 2007, Mitchell & Schoeffel 2003), tends towards maintenance of the status quo – for the majority of 'ordinary' members of the public, there is little available information that their beliefs and perceptions may be flawed.

The raft of new legislation introduced from 2001 onwards raises questions as to whether politicians properly understand legal terminology and processes, or if this is another area where 'different languages' lead to irreconcilable differences. Government promises, for example, to place victims at the 'heart' of the CJS, ignore the legitimacy of circumstances in which prosecutions are to be sought on the basis of available facts, without bias. Promises of longer sentencing, harsher punishments, and criminalisation of different actions and behaviours, ride roughshod over a long tradition of legislation

emerging via precedent, and the independence and impartiality of the judiciary (e.g. King and Wincup, 2008).

However, the increased use of the internet to publicise cases of wrongful conviction, and emerging campaign and support groups are beginning to expose some of the hidden practices utilised within the CJS, thereby increasing the possibilities of members of the general public learning about the aims, objectives and operations of the CJS. There is, however, the attendant risk that discontent and protest may be sparked as a result, and here Indermaur and Hough's reminder that '*The rule of law requires public consent, and governments ignore the crisis of confidence in justice at their peril*' (2003, p.198) may be apt.

Further research

The range of factors influencing wrongful accusation and conviction of the factually innocent, and the role of public perceptions and beliefs held as factual knowledge therein, is extensive. A greater understanding of the influences, behaviours, regulations and applications and understandings (or misunderstandings) of specialist knowledge within CJS processes and procedures, and their consequences, is required to assist in the formulation of future policy strategies to tackle the problems posed by wrongful convictions of factually innocent individuals. To this end, future research exploring the following areas may provide broader and deeper understandings:

Media:

An in-depth analysis of media coverage of high profile cases, in order to ascertain the extent to which, and the manner and tone in which, biased reporting, non-reporting and inaccurate reporting circulates incorrect information about CJS processes, and convicted individuals maintaining innocence, may give some insight into how public perceptions relating to claims of factual innocence and wrongful conviction are maintained and reinforced. An exploration of the extent to which issues surrounding wrongful conviction of factually innocent individuals are reported (or not), may provide further understanding of the lack of support for, and the difficulties faced by, factually innocent individuals attempting to have their convictions re-examined, and wrongful convictions overturned. The interaction between government policy and media coverage and the effects of both on legislation impacting incidences of wrongful conviction (and the likelihood of future wrongful convictions) could also be explored.

Imprisoned, wrongly accused individuals:

Direct access interviews with imprisoned individuals maintaining innocence, in order to examine the lived experiences and immediate and longer term consequences of wrongful conviction for convicted persons themselves, was not possible as part of this study, as permission to interview prisoners was refused. Such a study may provide insight and understanding of the costs – financial, emotional, social and psychological - of wrongly incarcerating innocent individuals, and the particular obstacles and difficulties faced by them. In particular, the implications for prison policy which requires prisoners to “address their offending behaviour” via specific courses, and the impossibility of innocent individuals meeting this requirement (because they have no “offending” behaviour to address) can be examined.

Legislation:

An analysis of legislation, particularly legislation introduced within the last decade, may identify if, or where, such legislation may have increased the likelihood of wrongful conviction of factually innocent individuals. A greater understanding of how such changes in legislation may be eroding rights and safeguards, and the potential future difficulties such erosions may create (especially with regard to compliance with ECHR requirements), could provide opportunities to re-assess legislative changes, particularly in response to high profile representations of “public opinion.”

Internet advocacy groups:

The development of this relatively new form of advocacy has not been researched to any significant degree, and the impact, effectiveness and importance of internet campaigns is not known. A longitudinal study to assess the impacts of internet based groups and campaigns on public opinions, political and judicial approaches, and the progress of cases claiming factual innocence and wrongful conviction may provide valuable insights, representing a body of opinion which previously consisted of scattered and isolated groups and individuals. Legislative restrictions on what can and cannot be disseminated via internet campaigns, and the impacts of such restrictions on the processes of internet campaigning, may highlight further examples of “truths” being selectively influenced and shaped by powerful forces, and the strategies employed by those attempting to disseminate alternative truths, to overcome such restrictions.

Victims' families:

Victims' families are often portrayed as being further victimised by post conviction processes which are said to prolong their pain, and deprive them of "closure."

Interviews with victims and victims' families to assess why they remain convinced (or otherwise) of the guilt of the convicted person – on what information, beliefs, etc, are those opinions based, where was that information obtained, etc.- may uncover a number of potentially valuable factors – are portrayals of families feeling further victimised by post conviction processes accurate, and, if so, how do those families come to feel that way? Such research may highlight a need for clearer, more accurate and more reliable information about the processes of the CJS to be made available to victims and their families.

Historical cases of wrongful conviction:

Several participants in this study expressed a belief that the factors which had caused high profile miscarriages of justice in the past had been addressed, so that such MoJs were much less likely in current times. A comparative study of historical cases of wrongful conviction (The Birmingham Six, the Guildford Four, the Cardiff Three, etc) to identify similarities and differences in beliefs (held at that time), CJS procedures and practices, lived experiences and consequences, may highlight deeply rooted, long term issues which continue to feed into the wrongful accusation and conviction of factually innocent individuals.

Such research covers a broad range of factors, all of which impact upon, or are consequences of, wrongful accusation and conviction of factually innocent individuals, and cumulatively, may provide greater understanding of the many causes and effects therein.

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Appendix I – Core Interview Schedule

BACKGROUND/HISTORY

Relationship to accused/convicted person (if any). Total time in custody/age when first detained. Length of custody pre-trial?

THOUGHTS/BELIEFS AT THE TIME OF THE ORIGINAL INVESTIGATION

1. How did you first come to talk to the police?

2. What did you believe was happening at that time?

(Invite examples – what did you think your role was, when did you realise the person involved was being treated as a suspect – thoughts and feelings about these events at the time)

3. Did you ever speak to the police without a solicitor present to advise you? Did the accused/convicted person?

(Invite examples of dealings with solicitors – e.g. If yes, why? What effects do you believe this had? When was it decided to get a solicitor, how did you choose, did you understand what they were telling you?)

4. Did you, at that stage, believe the accused/convicted person might go to jail? Why/why not?

DIFFERENCES IN BELIEFS AND ACTUAL EVENTS

5. Prior to becoming involved in this investigation, what did you believe you knew about police investigations? (Questioning, searches, arrest, rights, solicitors, etc)

6. Where did you learn this from?

7. Were there any occasions where the police did things differently to what you believed they would do in an investigation? (If yes, Invite examples)

8. Do you believe the accused/convicted person recognised and understood what the caution meant at the time?

9. Were there any things you did, believing that you were helping the investigation, that were later used against you or the accused/convicted person (If yes, invite examples)

10. How did you believe the police would come to realise the accused/convicted person was innocent?

(if necessary at this stage, review comparisons between original beliefs/ expectations and actual events to ascertain which beliefs, if any, proved to be erroneous, and how this might have impacted later events. Also, have beliefs changed as a result? Which beliefs – what is believed now?)

ARREST/CUSTODY/PRE-TRIAL

11. What happened when the accused/convicted person was arrested?

(Thoughts, feelings, beliefs about what was happening. Time between arrest and trial)

12. Prior to these events, what did you believe you knew about the defence of innocent people who had been accused of a crime they did not commit?

13. Where did you learn this?

14. How did your actual experience compare with what you believed would happen?

(information from defence, satisfaction with the case being prepared, details included/not included by defence team, understanding of processes)

15. Who was most active in making decisions about how the defence case would be constructed, and what evidence/witnesses, etc would be called – the accused/convicted person, family members, the defence team, or about equal? Why do you think this was?

(If necessary, as above, review comparisons between original beliefs/expectations and actual events to ascertain which beliefs, if any, proved to be erroneous, and how this might have impacted later events. Also, have beliefs changed as a result? Which beliefs – what is believed now?)

TRIAL AND VERDICT

16. Prior to the trial, what did you believe you knew about trials? (what they are for, what should happen, what is allowed/not allowed, etc)

17. Where had you learned this from?

18. Did you understand what was happening throughout the trial? (Invite examples for both yes/no answers)

19. Were there any occasions where events in the trial differed from what you had believed would happen? (If yes, invite examples)

20. How did you feel about the performance of the defence team?

21. Did everything you expected to come out at the trial come out? (If no, invite examples)

(22. If No to 21, why did you think this was?)

23. How did you think the jury would realise the accused person's innocence?

24. What were your thoughts and feelings when the verdict was returned?

(If necessary, as above, review comparisons between original beliefs/expectations and actual events to ascertain which beliefs, if any, proved to be erroneous, and how this might have impacted later events. Also, have beliefs changed as a result? Which beliefs – what is believed now?)

THE ROLE OF THE MEDIA

25. Prior to these events, what did you believe you knew about the media? (what is allowed to be reported/published, the accuracy of reporting, what happens if articles which are inaccurate or perhaps damaging are published, etc)

26. Where did you learn this?

27. What were your actual experiences of media coverage, and in what ways, if any, did this differ from your previous beliefs and expectations?

(Pre-trial, during trial, post trial – how was your life affected pre arrest/trial? How was the accused/convicted person's life affected?)

28. In what ways, if any, do you believe media coverage affected the trial and the outcome?

29. In what ways, if any, do you believe media coverage since conviction affected attempts to have the conviction re-examined, and the accused/convicted person's innocence established?

(If necessary, as above, review comparisons between original beliefs/expectations and actual events to ascertain which beliefs, if any, proved to be erroneous, and how this might have impacted later events. Also, have beliefs changed as a result? Which beliefs – what is believed now?)

EXPERT/SCIENTIFIC EVIDENCE

230. Prior to these events, what did you believe you knew about scientific and expert evidence in criminal trials?

31. Where did you learn this?

32. Was scientific or expert evidence a significant feature in the trial? (If yes, invite examples)

33. Did any events featuring scientific or expert evidence differ from what you had originally believed would be the case? (If yes, invite examples).

34. How important did you believe the role of scientific or expert evidence would be in proving the accused person's innocence?

35. Did you understand the scientific/expert evidence which was led in the trial? (invite examples)

36. Were there any surprising or unexpected events concerning scientific or expert evidence in the trial? (If yes, invite examples)

(37. If yes to 36, were you satisfied with the way in which the defence dealt with this? Why/why not?)

(If necessary, as above, review comparisons between original beliefs/expectations and actual events to ascertain which beliefs, if any, proved to be erroneous, and how this might have impacted later events. Also, have beliefs changed as a result? Which beliefs – what is believed now?)

POST CONVICTION

38. What did you know (if anything) about the appeals procedure? Did you think appeal was an automatic right? What has been your experience, if any, of appeals processes?

39. Prior to these events, how likely did you think it was that a completely innocent individual could be imprisoned for a crime they did not commit?

40. What do you believe now?

41. In summary, what would you say are the main beliefs that you held before which you now no longer believe? (And what do you now believe instead?)

42. What have been the most difficult aspects in trying to have the accused/convicted person's innocence recognised?

43. How do you think the accused/convicted person's innocence will be recognised?

44. Are there any other important thoughts or beliefs you held about the criminal justice system prior to these events that have been changed as a result of what has happened?

If this interview brings up factors which you remember later, and would like to have included, a follow up interview can be arranged. Please contact me should this situation arise

Appendix II - Questionnaire

The following Questionnaire forms part of a Post Graduate study funded by the Scottish Centre for Crime and Justice Research.

No identity details are requested or required – all participants are anonymous.

Please circle the answer closest to your personal understanding, knowledge or belief.

Thank you for your time and co-operation.

About the Justice System in the UK

(1) Wrongful conviction of innocent people occurs only very rarely in Britain

Strongly Agree Agree Don't Know Disagree Strongly Disagree

(2) Any person, if detained by police, always has the right to have a solicitor present before answering any questions

True False Don't Know

(3) Someone who has been wrongly accused of a crime has adequate opportunity to state their innocence before trial

True False Don't Know

(4) Someone who has been wrongly accused of a crime has adequate opportunity to state their innocence *during* trial

True False Don't Know

(5) The prosecution is bound, by law, to disclose everything in its possession to the defence, before trial

True False Don't Know

(6) The courts will recognise and disallow evidence obtained by wrongful or unfair means, by breaking rules, or by serious errors or breaches of procedures during investigations

True False Don't Know

(7) Judges remain impartial throughout trial proceedings and when directing juries

True False Don't Know

(8) The purpose of the trial process is to uncover the truth in order to prove the guilt or innocence of the defendant

True False Don't Know

(9) The trial process will normally acquit an innocent person

True False Don't Know

(10) A 'guilty' verdict from a jury is usually the correct verdict, in that the defendant is, and has been properly found to be, guilty

True False Don't Know

- (11) **The jury, in serious cases, hears all of the evidence available, both for and against the accused.**

True False Don't Know

- (12) **A failed appeal proves that the original conviction was correct – i.e. the person is guilty**

True False Don't Know.

About the Media

- (1) **Media coverage does not significantly affect the outcome of court proceedings**

Strongly Agree Agree Don't Know Disagree Strongly Disagree

- (2) **It is acceptable for the media to name and display photographs of accused people before and during court proceedings.**

Strongly Agree Agree Don't Know Disagree Strongly Disagree

- (3) **Gross exaggerations or untruths in UK media reporting of criminal cases are rare**

Strongly Agree Agree Don't Know Disagree Strongly Disagree

- (4) **People who are the subject of exaggerations or untruths published in the media are able to stop these things being published.**

True False Don't Know

- (5) **The media are restrained, by law, from printing or broadcasting exaggerations or untruths in serious court cases.**

True False Don't Know

- (6) **The media are restrained, by law, from publishing or broadcasting material which may be detrimental to a suspect.**

True False Don't Know

- (7) **Newspaper reports in the UK are generally factual and accurate.**

Strongly Agree Agree Don't Know Disagree Strongly Disagree

Please state which publications you read most often:

(8) TV News reports in the UK are generally factual and accurate.

Strongly Agree Agree Don't Know Disagree Strongly Disagree

Please state which news channels you watch most often:

About Police Procedures and Rights

(1) People who have done nothing wrong have nothing to fear from police investigations

Strongly Agree Agree Don't Know Disagree Strongly Disagree

(2) Anyone detained by police can exercise their legal rights immediately

True False Don't Know

(3) Innocent people have no need to exercise their legal rights because they are innocent

Strongly Agree Agree Don't Know Disagree Strongly Disagree

(4) I learned about my legal rights from.....

.....
(If you do not know your legal rights, please state.)

COMMENTS:

For statistical purposes, please complete the following details:

Gender M/F

Age

Occupation

Ethnic Origin

Thank you for spending your valuable time completing this questionnaire. Your cooperation is very much appreciated.

Appendix III – Survey Results

Questionnaire

ABOUT THE JUSTICE SYSTEM IN THE UK

		Strongly Agree	Agree	Don't Know	Disagree	Strongly Disagree	True	False`	Don't Know
1	Wrongful conviction of innocent people occurs only very rarely in Britain	4.8	40.1	34.0	18.1	3.0			
2	Any person, if detained by police, always has the right to have a solicitor present before answering any questions						76.2	13.6	10.2
3	Someone who has been wrongly accused of a crime has adequate opportunity to state their innocence before trial						57.5	15.4	27.1
4	Someone who has been wrongly accused of a crime has adequate opportunity to state their innocence <i>during</i> trial						69.6	11.7	18.7
5	The prosecution is bound, by law, to disclose everything in its possession to the defence, before trial						50.0	25.9	24.1
6	The courts will recognise and disallow evidence obtained by wrongful or unfair means, by breaking rules, or by serious errors or breaches of procedures during investigations						70.5	12.7	16.8
7	Judges remain impartial throughout trial proceedings and when directing juries						69.0	14.8	16.2
8	The purpose of the trial process is to uncover the truth in order to prove the guilt or innocence of the defendant						90.7	7.8	1.5
9	The trial process will normally acquit an innocent person						64.8	14.2	21.0
10	A 'guilty' verdict from a jury is usually the correct verdict, in that the defendant is, and has been properly found to be, guilty						63.0	18.3	18.7

11	The jury, in serious cases, hears all of the evidence available, both for and against the accused.						63.0	16.5	20.5
12	A failed appeal proves that the original conviction was correct – i.e. the person is guilty						40.1	38.3	21.6

ABOUT THE MEDIA

		Strongly Agree	Agree	Don't Know	Disagree	Strongly Disagree	True	False	Don't Know
1	Media coverage does not significantly affect the outcome of court proceedings	0.9	28.0	18.4	38.3	14.4			
2	It is acceptable for the media to name and display photographs of accused people before and during court proceedings.	0.9	18.4	19.3	45.2	16.2			
3	Gross exaggerations or untruths in UK media reporting of criminal cases are rare	0.3	19.3	25.9	40.7	13.8			
4	People who are the subject of exaggerations or untruths published in the media are able to stop these things being published.						24.4	41.9	33.7
5	The media are restrained, by law, from printing or broadcasting exaggerations or untruths in serious court cases.						48.5	28.9	22.6
6	The media are restrained, by law, from publishing or broadcasting material which may be detrimental to a suspect.						34.5	35.2	30.3
7	Newspaper reports in the UK are generally factual and accurate.	0.6	21.1	16.5	42.2	19.6			
8	TV News reports in the UK are generally factual and accurate.	2.1	48.2	19.0	25.6	5.1			

ABOUT POLICE PROCEDURES AND RIGHTS

		Strongly Agree	Agree	Don't Know	Disagree	Strongly Disagree	True	False	Don't Know
1	People who have done nothing wrong have nothing to fear from police investigations	3.0	44.0	13.0	34.3	5.7			
2	Anyone detained by police can exercise their legal rights immediately						51.5	18.7	29.8
3	Innocent people have no need to exercise their legal rights because they are innocent	0.0	16.6	20.0	48.5	14.9			

Appendix IV Campaign Groups

Groups to support the wrongly convicted and their families, and to protest and lobby against injustice generally, have been in existence for some time.

JUSTICE, founded in 1957, was originally set up ‘promote the rule of law and to assist the fair administration of justice,’ its influence being a significant feature in the creation of the Criminal Cases Review Commission in 1997. JUSTICE was, until that point, the most influential group challenging individual cases of wrongful conviction but, following the implementation of the CCRC, changed focus, and ceased investigation such cases (in the understanding that the CCRC, as an independent body, was now in place to continue that work.)

INNOCENT, founded in 1993, aimed to support and campaign for the wrongly convicted, and ‘to bring together families, friends and supporters in order to help each other.’ INNOCENT also acts as an umbrella organisation for smaller United Against Injustice groups around the UK.

Liberty, also known as the **National Council for Civil Liberties** was founded in 1934, as ‘a cross party, non-party membership organisation at the heart of the movement for fundamental rights and freedoms in the UK’ Having taken the public stance that individuals have the right to a fair trial, Liberty can no longer assist innocent individuals who have been wrongly convicted if the trial has followed due process which renders it, legally and technically ‘fair.’

Miscarriages of Justice Organisation (MOJO) was founded in 2001 by Paddy Hill of the Birmingham 6, John McManus, and others, with the twin aims of raising awareness of the problem of wrongful convictions, and providing support and assistance for innocent prisoners released following lengthy sentences. MOJO also advocates for individual cases.

Appendix V

A detailed application was submitted to, and received clearance from, the Ethics Committee of the Department of Applied Social Science, University of Stirling.

Having outlined the aims, scientific background, participants, and proposed research methods, a summary of potential issues and how they would be addressed was presented as follows:

“In ensuring informed consent is obtained, it will be necessary to advise participants as to the extent and scope of this study, in particular, ensuring that participants are fully aware that involvement in this study in no way offers possibilities of case review, campaign involvement or any other action which may ‘raise hopes’ of furthering individual cases. (See Appendix III Consent Form, and “Informed Consent” below.)**

Arrangements will be made to provide links (telephone numbers, addresses, web addresses) to support organisations and mechanisms for prisoners and families who participate in the study (for example, Miscarriages of Justice Organisation (MOJO,) Wrongly Accused Persons Organisation, Innocent, etc), in the event that participation causes distress.

Obtaining access to prisoners presents particular considerations. Firstly, the problems of ensuring any degree of privacy, in which participants can feel confident of speaking freely. Whilst some prisons may allow “closed” or “privileged” visits (in sight, but not in hearing of prison officers), some may not. Secondly, participation may have negative consequences, within the prison regime, for participants. Informal interviews, however (carried out under the guise of “family and friends” visits), are undesirable, as recording equipment would not be available. Participants will be offered the opportunity to provide additional information by letter, in an attempt to overcome the difficulties involved in lack of privacy. However, this raises the very real issue of securing confidentiality, as prison personnel have the right to censor mail for all Category A prisoners. A request to have mail relating to this study afforded “privileged” status may be a possible solution.

From the researcher point of view, it has to be acknowledged that interviews are with individuals *alleging* wrongful conviction and factual innocence, but who are, from a legal point of view, convicted offenders.

Recordings of interviews will be stored in a password protected, encrypted format to ensure maximum security of data, and every care will be taken to ensure individual participants cannot be identified, including steps to remove or obscure case details which may reveal clues to the identity of participants or others to whom they may refer in interviews.

Informed Consent (See Appendix III, Consent Form.)**

Potential participants will be identified initially via public campaigns or family support groups maintaining long term innocence of individual persons. These groups will be approached by letter, with an outline explanation of the proposed research, a copy of Appendix II (Consent Form)** for their information, and a request for permission to contact the individual being supported by that campaign or organisation.

Initial contact with prisoners will also be by letter, explaining the objectives of the research, and outlining the limits and scope of the research. Prisoners then expressing an interest in participating will be provided with the full consent document (Appendix II, above)** for their consideration.

It is envisaged that further potential participants will be identified/introduced through initial participants in a “snowball” process – following such introduction, the same process of making formal contact by letter to outline the proposed research, etc, will be implemented. Contact details will be provided for any prisoners who have further questions or concerns which may arise before a decision to participate can be taken.

Subject to participants’ agreement, at the beginning of the interview, a verbal confirmation of the details of consent (as specified in the “Informed Consent Form”) will be digitally recorded.

Should second interviews be required – for example, if a participant later remembers something not included in the original interview- participants will again be reminded of the information contained in the initial consent form, and asked to confirm their consent to continue participating. Again, this will be recorded both physically (by hand signature on the form itself), and digitally, in an oral review.)

Information regarding proposed uses and dissemination of data will be provided to potential participants at the consent stage. (see “Dissemination and Feedback” below.)

Risks to researchers.

One potential risk is that of becoming a focal point for families who are campaigning to have individual cases re-examined, perhaps on the basis that these families may believe that the researcher has access to, or influence upon, bodies which may be able to help them. This also can be addressed by continuous reinforcement of the fact that the research itself is limited in scope, and that the researcher’s involvement is defined by the scope of the study.

Given the emotive nature of the subject matter, and the requirement for close involvement with individuals in quite desperate circumstances, there is always a risk of an emotional impact on the researcher, and it is envisaged that a support network of friends and family, who can provide alternative points of focus should the emotional impact become problematic, will be in place. Also, the support of my academic supervisors, which has already been invaluable, would continue to be available, and would be a source of guidance should the need arise.

Dissemination and Feedback

Initially as a PhD Thesis, it is expected that the final report will give rise to journal articles and future conference/seminar papers. The final report will also be available to the Prison Services of both Scotland and England and Wales.

Interview participants will be offered feedback in the form of either the final report itself, or a summary of findings.

Confidentiality, Privacy and Data Protection

Survey data will collect only socio-economic and geographic indicators, so that there will be no information with which individual participants could be identified.

Digital recordings of interviews will be stored in a password-protected, encrypted format. Transcribed interviews will be amended to delete or obscure any references which may identify participants or those to whom they may refer in interview.

Where any particular case is so “high profile” that no amount of obscuring or deleting references would ensure anonymity (for example, where the actual details of the crime are so well known), then the individuals concerned will be given the opportunity to examine the report as it refers to them, and to indicate whether or not they agree to the information being published in the form offered.

Where possible, permission will be sought for prison interviews to be conducted as “closed” or “privileged” visits, whereby they are carried out within sight, but out of hearing of prison personnel.

Families of individuals claiming wrongful conviction will be offered a choice of venues for interview, to ensure privacy, and to encourage a sense of confidence to speak openly. However, this choice of venues will not include home-based interviews; the United Against Injustice network, for example, has meeting rooms at several points in England and Wales which could be utilised for this purpose, as do several of the other campaign groups.

Additional Information

A substantial part of the proposed research involves securing access to prisoners. Applications have been made to both the Scottish and English/Welsh Prison Service to facilitate interviews with prisoners, although application procedures clearly request that ethical review of the proposed research be included with the application.

However, should permission to conduct these interviews be refused, an alternative approach would be to contact prisoners in writing, and provide details of the interview schedule, for prisoners to answer in writing. Whilst this is not ideal, and raises issues of confidentiality, past experience has shown this to be an effective method of communication with prisoners where direct visits could not be arranged.

A further application to have mail connected with this research treated as “privileged” is one possible solution to this problem, as is an approach via the 20 or so Innocence Projects currently in operation across the UK.

Otherwise, the study may have to be restricted to those who have been released from prison, either by having their convictions overturned, or by being released on licence, but still attempting to clear their names.”

Permission to carry out research in prisons, in both Scotland and England and Wales, was refused.

**Forms and appendices to the full Ethics application have not been reproduced here.

This research was carried out following guidelines within the Code of Ethics of the British Society of Criminology:

Code of Ethics

Code of Ethics for Researchers in the Field of Criminology

The purpose of this Code is to offer some guidance to researchers in the field of criminology in keeping with the aims of the Society to value and promote the highest ethical standards in

criminological research. The Code of Practice is intended to promote and support good practice. Members should read the Code in the light of any other Professional Ethical Guidelines or Codes of Practice to which they are subject, including those issued by individual academic institutions and by the ESRC (see Further Information section below).

The guidelines do not provide a prescription for the resolution of choices or dilemmas surrounding professional conduct in specific circumstances. They provide a framework of principles to assist the choices and decisions which have to be made also with regard to the principles, values and interests of all those involved in a particular situation. Membership of the British Society of Criminology is taken to imply acceptance of these general principles and the need to be aware of ethical issues and issues regarding professional conduct that may arise in people's work.

The British Society of Criminology's general principle is that researchers should ensure that research is undertaken to the highest possible methodological standard and the highest quality in order that maximum possible knowledge and benefits accrue to society.

1. General Responsibilities

Researchers in the field of criminology should endeavour to:

- i) advance knowledge about criminological issues;
- ii) identify and seek to ameliorate factors which restrict the development of their professional competence and integrity;
- iii) seek appropriate experience or training to improve their professional competence, and identify and deal with any factors which threaten to restrict their professional integrity;
- iv) refrain from laying claim, directly or indirectly, to expertise in areas of criminology which they do not have;
- v) take all reasonable steps to ensure that their qualifications, capabilities or views are not misrepresented by others;
- vi) correct any misrepresentations and adopt the highest standards in all their professional relationships with institutions and colleagues whatever their status;
- vii) respect their various responsibilities as outlined in the rest of this document;
- viii) keep up to date with ethical and methodological issues in the field, for example by reading research monographs and participating in training events (see Further Information section below);
- ix) check the reliability of their sources of information, in particular when using the internet.

2. Responsibilities of Researchers Towards the Discipline of Criminology

Researchers have a general duty to promote the advancement and dissemination of knowledge, to protect intellectual and professional freedom, and therefore to promote a working environment and professional relationships conducive to these. More specifically,

researchers should promote free and independent inquiry into criminological matters and unrestricted dissemination of criminological knowledge. As part of this, researchers should endeavour to avoid contractual conditions that limit academic integrity or freedom. Researchers should endeavour to ensure that the methodology employed and the research findings are open for discussion and peer review.

3. Researchers' Responsibilities to Colleagues

Researchers should:

- i) recognise fully the contribution to the research of junior colleagues and avoid exploitation of them. (For example, reports and publications emanating from research should follow the convention of listing contributors in alphabetical order unless one has contributed more than the other(s));
- ii) actively promote the professional development of research staff by ensuring that staff receive the appropriate training and support and protection in research environments which may jeopardise their physical and/or emotional well-being;
- iii) not claim work of others as their own; the use of others' ideas and research materials should be cited at all times, whatever their status and regardless of the status of the ideas or materials (e.g. even if in draft form);
- iv) promote equal opportunity in all aspects of their professional work and actively seek to avoid discriminatory behaviour. This includes a moral obligation to challenge stereotypes and negative attitudes based on prejudice. It also includes an obligation to avoid over-generalising on the basis of limited data, and to beware of the dangers of failing to reflect the experience of certain groups, or contributing to the over-researching of certain groups within the population.

4. Researchers' Responsibilities towards Research Participants

Researchers should:

- i) recognise that they have a responsibility to ensure that the physical, social and psychological well-being of an individual participating in research is not adversely affected by participation in the research. Researchers should strive to protect the rights of those they study, their interests, sensitivities and privacy. Researchers should consider carefully the possibility that the research experience may be a disturbing one, particularly for those who are vulnerable by virtue of factors such as age, social status, or powerlessness and should seek to minimise such disturbances. Researchers should also consider whether or not it is appropriate to offer information about support services (e.g. leaflets about relevant self-help groups);
- ii) be sympathetic to the constraints on organisations participating in research and not inhibit their functioning by imposing any unnecessary burdens on them;
- iii) base research on the freely given informed consent of those studied in all but exceptional circumstances. (Exceptional in this context relates to exceptional importance of the topic rather than difficulty of gaining access). Informed consent implies a responsibility on the part

of the researchers to explain as fully as possible, and in terms meaningful to participants, what the research is about, who is undertaking and financing it, why it is being undertaken, and how any research findings are to be disseminated. Researchers should also make clear that participants have the right to refuse permission or withdraw from involvement in research whenever and for whatever reason they wish. Participants' consent should be informed, voluntary and continuing, and researchers need to check that this is the case. Research participants have the right to withdraw from the research at any time and for any reason without adverse consequences. Research participants should be informed about how far they will be afforded anonymity and confidentiality. Researchers should pay special attention to these matters when participation is sought from children, young, or vulnerable people, including consideration of the need for additional consent from an adult responsible for the child at the time participation is sought. It is not considered appropriate to assume that penal and care institutions can give informed consent on research on young people's behalf. The young people themselves must be consulted. Furthermore, researchers should give regard for issues of child protection and make provision for the disclosure of abuse. Researchers should consider the possibility of discussing research findings with participants and those who are the subject of the research;

iv) where there is a likelihood that identifiable data may be shared with other researchers, the potential uses to which the data might be put should be discussed with research participants. Research participants should be informed if data are likely to be placed in archives, including computer archives. Researchers should not breach the 'duty of confidentiality' and not pass on identifiable data to third parties without participants' consent. Researchers should also note that they should work within the confines of current legislation over such matters as intellectual property (including copyright, trademark, patents), privacy and confidentiality, data protection and human rights. Offers of confidentiality may sometimes be overridden by law: researchers should therefore consider the circumstances in which they might be required to divulge information to legal or other authorities, and make such circumstances clear to participants when seeking their informed consent;

v) researchers should be aware, when conducting research via the Internet, of the particular problems that may arise when engaging in this medium. Researchers should not only be aware of the relevant areas of law in the jurisdictions that they cover but they should also be aware of the rules of conduct of their Internet Service Provider (including JANET - Joint Academic Network). When conducting Internet research, the researcher should be aware of the boundaries between the public and the private domains, and also any legal and cultural differences across jurisdictions. Where research might prejudice the legitimate rights of respondents, researchers should obtain informed consent from them, honour assurances of confidentiality, and ensure the security of data transmission. They should exercise particular care and consideration when engaging with children and vulnerable people in Internet research;

vi) researchers should be aware of the additional difficulties that can occur when undertaking comparative or cross-national research, involving different jurisdictions where codes of practice are likely to differ.

5. Relationships with Sponsors

Researchers should:

i) seek to maintain good relationships with all funding and professional agencies in order to achieve the aim of advancing knowledge about criminological issues and to avoid bringing the wider criminological community into disrepute with these agencies. In particular, researchers should seek to avoid damaging confrontations with funding agencies and the participants of research which may reduce research possibilities for other researchers;

ii) seek to clarify in advance the respective obligations of funders and researchers and their institutions and encourage written agreements wherever possible. They should recognise their obligations to funders whether contractually defined or only the subject of informal or unwritten agreements. They should attempt to complete research projects to the best of their ability within contractual or unwritten agreements. Researchers have a responsibility to notify the sponsor/funder of any proposed departure from the terms of reference;

iii) seek to avoid contractual/financial arrangements which emphasise speed and economy at the expense of good quality research and they should seek to avoid restrictions on their freedom to disseminate research findings. In turn, it is hoped that funding bodies/sponsors will recognise that intellectual and professional freedom is of paramount importance and that they will seek to ensure that the dissemination of research findings is not unnecessarily delayed or obstructed because of considerations unrelated to the quality of the research.

<http://www.britisoccrim.org/codeofethics.htm>