

The Production of Acquiescence in the Courtroom: An Analysis of the Experiences of People with Learning Difficulties and Mental Health Conditions in UK Courts.

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Abstract

This research explores how the experiences of people with learning difficulties and mental health conditions in court are products of power relations. Through employing constructivist methodology and applying Foucauldian and disability theories, this study questions how social barriers to participation in court are reproduced. Discourses of ‘abnormality’, risk and security emerging from three semi-structured interviews function to subjugate defendants’ knowledges and produce acquiescence. The court produces a variety of contradictory effects, most notably, how performing acquiescence to professional power/knowledge is the most effective means to resist and impact discourses in court.

Introduction

‘The court is the bureaucracy of the law’ (Foucault, 1980c:27). The reproduction of this bureaucracy’s processes and powers requires interrogation. Focusing on the experiences of people with mental health conditions (MHCs) and learning difficulties (LDs), this dissertation examines the contradictions and effects of UK civil and criminal Magistrates’ courts. Through theoretical and qualitative analysis, this research argues that acquiescence – the silent or passive compliance with measures (OED, 2011) – is often the means of resistance to courts’ discourses and knowledges. This study reveals the production, not essentialism of acquiescence, and includes other resistance forms. The research includes people who have been labeled with a ‘learning difficulty,’ people wanting to learn, but facing particular problems in exclusionary institutional practices (Goodley, 2004), or a ‘mental health condition,’ also a socially constructed, rather than individual problem (Scott and Codd, 2010).

First, this dissertation briefly examines recent policy-based research on people with LDs and MHCs in courts. Second, it provides the theoretical foundations of the Social Model of Disability, its postmodern critics, and critical legal studies. Foucault’s triangular theory of power as sovereign, disciplinary and security-focused, is also explored. Third, qualitative methods to conduct three interviews are analysed, and fourthly briefly interview findings and contexts are stated. Fifth, the qualitative and theoretical findings are unified to present the paradoxical thesis of acquiescence as a mode of resistance. Finally the respondents’ recommendations and the research’s conclusions are shared.

1. People with LDs and MHCs in UK Courts

a) *The Social Phenomenon*

Around 20-30% of offenders have a LD or a similar impairment ‘of intellect and/or adaptive functioning that interfere with their ability to cope with the criminal justice system’ (Jones and Talbot, 2010:1). Hean *et al.* (2010:94) report 90% of people in prison, and also 25% of the general UK population have a MHC. If one is not capable of understanding one’s responsibility for committing wrongful act (otherwise known as a *mens rea*, guilty intention) then the individual will be diverted from the justice system and held unaccountable (Jones and Talbot,



2010:3). However, the legal and medical complexity of assessing responsibility increases with people with ‘mild’ LDs or MHCs (Jones and Talbot, 2010), thus indicating the significance of this sociological analysis of their court experiences. Although court experiences vary widely, people with MHCs and LDs are subject to similar social barriers, policies like the Mental Health Act (2007) and Disability Discrimination Act (1995), and reports concerning their judicial treatment, as discussed below.

b) Recent Policies and Reports

This section summarises the literature recently written about people with LDs and MHCs in the UK judicial system. Six Ministry of Justice reports (McLeod *et al.*, 2010a; 2010b) and the Bradley Report (2009) reviewed systematic problems these court users face. Issues raised included the intimidating environment and need for adequate justice staff and police training to identify and support people with MHCs and LDs. Since police stations lack a national procedure for identifying people with LDs, appropriate support and diversion are weaknesses (Beebee, 2010). Currently the MHC and LD assessments for diversion and ‘fitness to plead’ guilty/innocent in court require the self-disclosure of disabilities (Jones and Talbot, 2010; Beebee, 2010; James *et al.*, 2010). Barriers to self-disclosure, such as lack of awareness of responsibility for disclosure or its relevancy to the justice system are problematised in all these reports.

In order to fulfil Disability Equality Duties and appropriately accommodate people with difficulties (Disability Discrimination Act, 1995), they require identification and support by agencies like the Criminal Justice Liaison Service (Jones and Talbot, 2010). The Liaison Service, available in one third of English courts, assesses, recommends appropriate sentencing, and seeks to divert people with MHCs at any stage in the criminal justice system and place them into more health-based services (Hean *et al.*, 2010; Scott and Codd, 2010). People meeting the criteria for treatment under the Mental Health Act (2007; 1983) are judicially mandated to hospital admittance, if not ‘disposed’ of by another means; ‘all links between the convicted person and the criminal justice system are thereby severed’ (James, 2010:242; Prins, 1995). The diversion processes are not as well established for people with ‘mild’ LDs and MHCs. Only three court liaison practitioners specialise in LDs in the UK and the lack of ‘easy-read’ leaflets in courts



compound the difficulties people face in understanding the court proceedings, ‘which are rarely adapted to enable them to participate appropriately’ (Jones and Talbot, 2010:4), thus jeopardising ‘their right to a fair trial’ (Beebee, 2010:36).

However, increasingly the overrepresentation of people with LDs as crime victims raises concerns (Williams, 1993; Kebbell *et al.*, 2001). Disability hate crimes in particular lack recognition, reporting and enforcement (Sherry, 2010; Hughes, 2011). ‘More than one quarter of persons with SMI [severe mental illness] had been victims of a violent crime in the past year, a rate more than 11 times higher than the general population rates’ (Teplin *et al.*, 2005). Yet Roulstone *et al.* (2011) argue that disabled people are seen as victims and inherently ‘vulnerable’ and ‘incompetent’, stereotypes, which can exclude people from acquiring full legal protection.

c) Existing Court Services to Reduce Barriers

To address the disadvantages people with LDs and MHCs face in courts, the DirectGov (2011a) website outlines specific accommodations for people with MHCs or LDs if prior notice is given. Accommodations include having someone speak for or accompany the person, such as a support worker or independent Registered Intermediary to facilitate witnesses providing evidence. Intermediaries can also ask for clarification when questions are inappropriate or difficult to understand. ‘Court users also reported that the presence of an intermediary offered moral support in the courtroom’ (McLeod, 2010a:21), yet this support is limited by the intermediary’s ‘impartial’ role. The Witness Protection Service also provides support for all witnesses via accompanying, updating them about the case, and allowing visitations to the court before the trial date so they feel more comfortable in court (McLeod *et al.*, 2010a; DirectGov, 2011b).

2. Theoretical Foundations

a) Social Model of Disability

Despite these safeguards, courts continue to intimidate and silence some people with LDs and MHCs, reinforcing acquiescence to the dominant, ableist legal discourses. To interrogate these exclusionary barriers to justice, the social model of disability is discussed, followed by the Foucault-inspired critical disability studies approach; a combination of these theories constitutes



this study's theoretical basis. Against the medical model of disability pathologising the 'impaired' individual, various activists and academics instead redefined disability (Oliver, 1983). In Britain, the *Union of Physically Impaired Against Segregation* (UPIAS) viewed disability as the disadvantages or restrictions caused by social, political and economic barriers to inclusion (Barnes and Mercer, 2003). Layered on top of physical, mental or sensory impairments, disability is socially constructed by exclusionary structural and attitudinal barriers (Barnes *et al.*, 1999; Thomas, 2008). Rejecting the hegemonic notion of disability as a personal tragedy formed the social model of disability in the academy (Barnes and Mercer, 2003; Oliver, 1983; Charlton, 2006). This Marxist-inspired standpoint politicised the category 'disabled' and identified their socio-historical oppression (Linton, 2006). The social model provides a means to identify social disadvantages faced by people with MHCs (Mulvany, 2000) and LDs (Chappell *et al.*, 2001). It has become a basic framework to develop theories, rather than a theory within itself (Oliver, 1996; Goodley, 2011).

b) Postmodern Critiques of the Social Model of Disability

Despite this, some of the strongest proponents of the social model now fundamentally critique it. For example Shakespeare (2006b) now views disability as both constructed by the individual body and social context. Comparing disability studies with feminism, Campbell (2009) classifies the academic attacks on social model as the 'second-wave' of disability studies, following the 'first-wave' that privileges studying the social over the personal. 'Second-wave' postmodern critics like Shakespeare (2006b) declare the social model neglects theorising impairment, thus continuing to frame the bodies as bio-medical objects and normalise certain 'truths' about human ability and competency. Against such reification of impairment, postmodernists intertwine personal, bodily, and social experiences to conceptualise the regulation and domination of disabled people (Corker and Shakespeare 2002; Philips, 2005; Tremain, 2005). Inspired by Foucault's (1991; 2001) analysis, some postmodernists view the body as constituted by discourse and power (Butler, 1990; Goodley, 2011; Tremain, 2002; 2005). These writers situate individual experiences of impairments as products of macro-scale power relations, a technique this study also employs. Instead of taking sides in the first vs. second-wave disability theory debates, this research uses both the social model and its critics to analyse the judicial process producing acquiescence.



Postmodern 'second wave' writers may problematise the social model's lack of *theory* in identifying the reproduction of disablism; yet was not intended as an all-encompassing theory, but rather a political tool (Thomas, 2008). Shakespeare (2006b), a postmodern critical realist, attempts to draw a sharp distinction between the rights and wrongs of disability theory and disregards the social model. This divisionary tactic ignores the historical indebtedness of disability studies, activism and legislation to UPIAS and the social model of disability. For example, in securing the Disability Discrimination Act (1995). Shakespeare thus neglects a Foucauldian emphasis on how the present is historically constituted (Koch, 2008).

c) Uniting the Social Model of Disability and Its Critics

Despite critiques, there are a number of significant similarities between the social model of disability and its critics. Moreover the social model can be used as an umbrella term for theory and research on the social construction of disability and impairment (Thomas, 2008; Crow, 1996). The social model simply identifies social barriers, which can include internal, interpersonal or (bio-)physical barriers in addition to environmental and structural discrimination. More social model proponents are contributing to the sociology of the body (Barnes and Mercer, 2003). Collectively, critical disability theorists seek to counter the Cartesian hegemonic dichotomies of the social/body, mind/body and reason/emotion (Pothier and Devlin, 2006). This includes politicising the function of the 'dis/ability' binary to reinforce the construct of 'normal' (Goodley, 2011; Campbell 2009). They challenge claims to 'truth' governed by institutions that pathologise impairments (Barnes and Mercer, 2003; Davis 2007) and frame disability as a fluid, not bio-medical or static category (Goodley and Rapley, 2002). The heterogeneous disability studies approaches seek to resist the hegemony of ableism and expand equality and social justice for people with disabilities and MHCs.

d) Critical Legal Studies Approach

This research also draws from critical legal studies (CLS) to identify social barriers to justice. This tradition of research that demonstrates the reproduction of implicit power dynamics, cultural prejudices and hierarchical social relationships embedded in legal institutions and their false claim to apolitical neutrality (Tushnet, 1991; Minow, 1990; Morton, 2009; Rasmussen, 1990). Such an analysis is demonstrated in Carlen's (1976) *Magistrates' Justice* through how practicing



‘justice’ reproduces unjust social hierarchical divisions of labour. More than a theatrical performance, the court constitutes a repressive social control mechanism to prevent ‘absolute social justice’ (Carlen, 1976). The strict regulations in court perpetuate professionals’ control of the court, but also provide the means for expression. In the justice framework,

such expression and repression results in judicial performances which, without detracting from the pre-existent frame of assumed values, can be presented as celebrations of pluralism and individualised justice. (Carlen 1976:129)

This demonstrates how the law, court structure, and judicial performances are simultaneously emancipatory and oppressive. Such legal contradictions are analysed by many critical theorists such as Weber (see Feldman, 1991), Habermas (2007) and Campbell (2006; 2009). Using Foucauldian terms, Campbell (2006) extends Carlen’s analysis to disability studies, revealing how disability performances reinforce the sick/well and dis/abled binaries and the frameworks circumscribing what is knowable about a disability or legal case. Despite the judicial system claiming to celebrate the individual, it actually functions to restrict individual thought and action and reinforce acquiescence to the system (Carlen, 1976). Thus CLS adopt Foucault’s focus on the functions, rather than intentions of institutions (Douzinas *et al.*, 1994). Research aims to elicit the ‘repressed voices of lawyers, visionaries, outsiders and rebels that inhabit the boundaries of the institution’ (Douzinas *et al.*, 1994:15). Critical legal and disability studies attempt to reactivate subjugated knowledges and oppose ‘the scientific hierarchisation of knowledges and the effects intrinsic to their power’ (Foucault, 1980:85).

e) Foucault’s Analysis of Power

i. Main Themes: Discourse, Truth and Power/knowledge

Foucault’s theories of power and discourse have profoundly shaped the recent work of social model, postmodern and critical legal theorists. Moreover Foucault’s work, has transformed the disciplines of criminology (see Garland, 1999) and law (Minkinen, 2011) and their intersections with medical power (Sim, 1990). The widespread use of his theories justifies their application in this research, concerning how discourse and medical/legal power produce acquiescence in



courts. Before describing the different modes of power in the courtroom, a brief outline of Foucault's analytical framework warrants discussion.

Foucault (1998) views power not as a possession, but rather as a productive and intrinsic element in all social relations and knowledge. Power is exercised not through top-down practices, but as contested, fluid and 'bottom-up' discourses. Discourses, embedded in power relations, are linguistic structures policing and influencing what is possible to know (Foucault, 1991). Thus discourses can exercise power through capillary techniques and institutions of social control, which function to silence particular knowledges (1980a). Power and knowledge imply each other – where there is knowledge, there is power (1980b). Nexuses of power/knowledge construct discourse and define what is validated as 'true' (1998). Through studying genealogies of institutions, such as the 'insane asylum' (2001), medical clinic (2008), and prison (1991a) Foucault (1980a:118) revealed 'historically how effects of truth are produced within discourses which themselves are neither true nor false'. Since Foucault's genealogies trace histories of the present, current truths about people with LDs and MHCs in court are historically produced by discourses silencing their knowledges. Thus truths emerge from contested process, since 'where there is power, there is resistance' (1998:94). This is demonstrated by disability resistance movements' success in defying dominant medical and legal discourses and redefining disability as a social construction (Barnes and Mercer, 2003). Like disability activists and scholars, Foucault (1980) aims to reveal the multiple forms of on-going domination and subjugation.

ii. *The Triangle of Sovereign – Disciplinary – and Governmental/Security Power*

As an analytical framework, this research employs Foucault's (2007) perspective that power could be viewed as a triangle of sovereignty, discipline and government through security apparatuses. These forms of power, described in detail below, construct subjects with LDs and MHCs' acquiescence to the courtroom discourse and their means of influencing what is seen and said about them. Garland (1999) analyses how this triangular power functions to control crime. Although each mode of control is distinct, they work in conjunction as an intricate web of power and knowledge. The individual is simultaneously a constructed effect of power and its vehicle (Foucault, 1980).

iii. *Sovereign Power*

Sovereign power dominated during feudal monarchies and administrations, symbolised in the figure of the king in the Middle Ages until the 18th Century (Foucault, 2007). In *Discipline and Punish*, Foucault (1991a) describes the *ancien regime* as manifesting sovereign or judicial power, in which the gaze of the people is directed upwards, for example onto the scaffold executing the condemned body. Sovereignty was inseparable from judicial power, producing the obedience to laws through repression (1991). This judicial-sovereign power became legitimised through sovereign rights and the legal obligation to obey them (1980a). As CLS also examines (Minow, 1990) the judge continues to be an effect of sovereign-legal power; like the king, the judge is an ‘objective’ arbitrator of ‘truth’ and enforces the boundaries of what is permitted/prohibited in a particular territory (Foucault, 2007). Yet in the 18th Century, the notion of sovereignty translated into the State and the court became a technique of discipline and government (2007). The judge role became more than simply ‘judging’ deviant acts, it categorised people according to an abnormal/normal binary (1991). Thus disciplinary and governmental technologies accompanied the sovereign because if power was only repressive, ‘if it never did anything but to say no, do you really think that one would be brought to obey it?’ (1980b:99).

iv. *Disciplinary Power*

In the 17th and 18th centuries disciplinary power emerged to reinforce acquiescence to laws and norms through regulating individuals’ everyday beliefs and behaviour (Foucault, 1980). Legal and medical institutions exercised disciplinary power to create, normalise and control ‘dangerous’ bodies (Foucault, 2007). Through discourse, medical and legal power/knowledge, ‘came to constitute itself as the authority responsible for the control of ‘abnormal individuals’ (Davidson, 2004). The role of the medical expert provides ‘true’ scientific knowledge – for example, in verifying an ‘insanity plea’ – to help the judge apply the law (Foucault, 2004). Experts also determine the ‘correct’ place of confinement: hospital or prison (Foucault, 1991). Thus medical professionals’ knowledges have a quasi-legal form as certifiers of abnormality and incapacity (Campbell, 2006). Classed as mentally ‘abnormal’, the individual may be exempt from legal responsibility as a result of the expert’s opinion (Foucault, 2004). This translation of ‘abnormality’ into legal ‘incapacity’ (Barnes *et al.*, 1999) replaces legal responsibility with



inherent pathology. Instead 'humanitarian' intervention and paternalistic care aim to identify and cure 'maladjusted individuals' who are incapable of deciding 'what is best for them' (Scott and Codd, 2010; Linton, 2006; Foucault, 1991a).

The rise of professionals' disciplinary power strictly regulates the lives of people with MHCs and LDs through the 'hegemony of normalcy' (Davis, 2010; Barnes and Mercer, 2003). With the birth of statistics and eugenics, the deviant criminal act became inextricable from the 'abnormal' mind and body; medical and legal knowledge averaged deviancy and exacted the costs of professional identification, intervention, and rehabilitation for those who were 'below standard' (Foucault, 2007; Miller, 2008; Barnes *et al.*, 1999). Pathologisation of disabled, 'mentally ill' and criminal people are inextricably intertwined in institutions of control and surveillance of the 'incurable' (Foucault, 2001;1991a). For example, psychiatry produced psychopathology and associated classifications to claim its knowledge of mental health, providing 'treatments' (Hughes, 1991; Wilson and Beresford, 2002).

v. *Panopticism*

Foucault (1991a) explores how deviant subjects acquiesce to the dominant legal/medical discourse and power/knowledge through a process of internalising their 'abnormality' under the gaze of the panopticon. Symbolically using Jeremy Bentham's panoptic prison containing cells all facing a central tower, Foucault (2007:66) claims panopticism 'involves putting someone in the center – an eye, a gaze, a principle of surveillance,' which forms 'absolute' sovereign power over all those it sees. Thus the panopticism exhibits both archaic judicial-sovereign and modern disciplinary power as a means to normalise inmates' moral and physical conduct through the possibility of being watched (Davidson, 2004; Barnes *et al.*, 1999). The panoptic gaze, observation and judgement of the sovereign is internalised and produces the homogeneous effect of submission (Foucault, 2008; Sim, 1990). Through the panoptic disciplinary power of professionals and judges, 'the legal subject is both constituted and defined, captured, circulated and judged' (Douzinas *et al.*, 1994:14).

vi. *Government and Security*

Foucault's (1998; 2007) later work analyses the historical, productive interrelationship between



the three modes of power – sovereignty, discipline, and governmental management – each employing security mechanisms for ‘the treatment of the uncertain,’ hence calculating unknown risks. Security has no ‘inherent’ meaning, yet it functions to predict and manage potentially ‘dangerous’ people (Valverde, 2011). Security relies on ‘governmentality’, the government of one’s self and others through organised practices and knowledges (institutions, medical statements, etc.), which exercises biopower, the power over life – bodies and populations (Foucault, 1991c). Surveillance, diagnosis and classification of mental structures and pathologies of ‘risky individuals’ compose a disciplinary series employing security mechanisms (Foucault, 2007). Focusing on security and risk capture the productive, not repressive aspects of sovereign and disciplinary power excluding the ‘abnormal’ based on the permitted/prohibited binary (Foucault, 2004). For example, the police apparatus demonstrates dispersed, capillary technologies of power that not only cure and repress, but also manage the risks of criminality and disability (Foucault, 2007). Rose (2001) examines the risk framework’s function in psychiatry to understand, embrace and manage madness and minimise the risks the ‘pathological’ individuals pose to the community. As this research will demonstrate, courtroom defendants with LDs and MHCs are also profoundly shaped by apparatuses of security through a powerful triangle of ‘sovereignty, discipline, and governmental management’ (Foucault, 2007:108).

3. Research Methods

a) Constructivist Interviewing Methodology

In addition to a theoretical analysis of the powers in court discourses, I conducted three semi-structured interviews with people with LDs and MHCs who had experiences in court. Qualitative research is valuable for voicing the opinions of those who are often the subject of discourses, but denied from constructively participating in them (Charlton, 2000). Conducting interviews can voice knowledges subjugated by systems of domination (Briggs, 2003). Qualitative methods can reveal the practical significance of disability and critical theories.

This research employs a constructivist methodological approach to interviewing, inspired largely by Holstein and Gubrium’s edited volumes *Inside Interviewing* (2003) and *Handbook of Constructionist Research* (2008). Weinberg (2008) interprets constructivism as a fluid and socio-



historically conscious process aiming to replace fixed, universalist constructions. Foucault's theories have influenced the view of interviews as a technology of the self, in which people are constructed and regulated through this confession practice (Holstein and Gubrium, 2003; Miller, 2008). Also the researcher's self (the Interviewer Effect) may affect the data (Denscombe, 1998). This contrasts the traditional positivist view of the sociological interview as a virtual window to 'true' reality (Weiss, 1994), 'an authentic gaze into the soul of another' (Silverman, 2001:94). Postmodernists challenge researchers' 'objective authentic gaze' and argue that interviews cannot provide the singular 'authentic voice' free from power dynamics (Kong *et. al.*, 2003). Researchers should question how experiences are determined and meanings are constructed (Silverman, 2001; Bryman, 2008). Thus my research questions how discourse and power determine the court experience.

Moreover interviewing can be a disciplinary power technique 'of physicians to illuminate madness and define sanity, of lawyers and courts to construct criminals and invent crimes' (Briggs, 2003:504). A Foucauldian perspective identifies a function of the interview as regulating and silencing subjects, but the technology can also facilitate people's resistance to constraints through participating in research that can 'amplify these subjugated voices' (Miller, 2008:258). Through viewing participants as active producers of meaning, the interview can provide a space to collectively reflect on social phenomena (Gubrium and Holstein, 1997;1995). Thus qualitative research should include flexible, open-ended questions and encourage the respondents to actively participate in research.

b) *Research Process*

To expand the possibility of conducting interviews, I decided to research people who were placed in either the mental health or learning difficulty categories. Originally I intended to study only women with MHCs or LDs, but the lack of research (Hearn *et al.*, 2010) and fewer numbers of women in the criminal justice system (Scott and Codd, 2010) required that the study include people of all genders. Although the two categories may produce different courtroom experiences, this research only concerns the similarities produced by a common medical/judicial discourse defining the subject.



After contacting over twenty advocacy and service organisations for people LDs or MHCs, three decided to participate in the study: Leeds Advocacy, Touchstone and Leeds Involving People. I met with the organisation managers to explain and receive feedback on the research proposal and learn about the potential participants who had ‘legal capacity’ (see Dimond, 2008). This meeting allowed me to psychologically prepare for encountering the issues the participants would raise, such as sex offending and forced adoption of children. Next I provided further information, including the interview questions and summaries of the study to the potential participants’ keyworkers/advocates and suggested that participants could contact me regarding any questions prior to the interview. Conducting a pilot study consisting of two interviews with able-bodied people about their experiences of detainment in police stations not only helped me prepare for the research interviews, but also improved the quality of interview questions (Glesne, 1999). One student and one alumni of the University of Leeds were pilot respondents and described experiences of alienation and vulnerability in police stations. They had different demographics (able-bodied, never been to court) than the research cohort because of the difficulty in contacting people from the research category, which was evidenced on the four occasions when the interviews were delayed (Robson, 2000).

Although the interview was audio-recorded, I wrote down unclear concepts, and non-verbal body language (Denscombe, 1998). However note-taking could be intimidating for respondents and during the interview at Leeds Advocacy, I stopped writing notes because the participants were attempting to read what I wrote, which detracted from the process. All interviews closed with a discussion about which organisations I should send the research to and how I could benefit the organisation, such as helping with publicity of a parents’ group at Leeds Advocacy (Glesne, 1999). I will share my research findings with groups at Leeds Advocacy and Leeds Involving People and provide all participants with copies of the dissertation.

c) *Ethics*

To prevent risks of causing harm to the participants or researcher, the interview took place in office of the participating organisation, to provide a safe and familiar environment (Robson, 2000). To support the main participant in case of the research causing re-traumatising experiences, their keyworker or advocate was present during the interview and answered two



questions regarding their perceptions and suggestions for the courts (Charmaz, 2003). The practitioner perspective enriched the discussion and made the main participant feel more comfortable. However, there are potential problems with this approach, as in one case where the practitioner's voice seemed to dominate the interview. Since the research included 'vulnerable people,' my research proposal required an approval from the Sociology Department's Ethics Committee. Thus certain ethical precautions were taken into account when conducting the qualitative research, such as ensuring the safety of the 'vulnerable' interviewees by having a practitioner present. For my safety, I provided a timetable of arranged interviews to a 'minder,' a close friend, and notified them after each interview to let them know that I was safe (Shah, 2007). These safety requirements of ethical research conduct with 'vulnerable people' are indicative of the security apparatus and dominance of the risk discourse that Foucault (2007) described.

Due to university ethical regulations, the research excludes those who lack 'legal capacity' because of the protocol stating participants need to provide both written and verbal informed consent (Megone, 2004; Robson, 2000). Dimond (2008) explains the Mental Capacity Act's approach to determining legal capacity, which I briefly discussed with the participating organisations' managers prior to conducting the research. These mental capacity requirements for ethical research may 'safeguard' people from harmful methods of inquiry, yet it also impedes qualitative study of the barriers to equal justice faced by a significantly marginalised group.

Before commencing the interview, I explained the participant's rights as stated in the consent form (see Appendix:65) such as confidentiality of the data, unless illegal acts not already known to the police would need to be reported (Kent, 2000). All interview data was stored in secure location, such as the university server and the participants' names were kept anonymous by changing the names in the research (Megone, 2004). The participants consented to the real name of their organisation to be used in the writings. I further reiterated that participants could withdraw from the research at any time and choose to not answer or critique any of the interview questions, though none of the participants did so (Bergen, 1993; Robson, 2000; de Vaus, 2001).

d) *Interview Questions and Transcriptions*



Interviews provide people the opportunity to affect research (Charmaz, 2003) which could contain therapeutic qualities for participants and researchers, especially in semi-structured interviews where there is more flexibility and constructing the discussion around what the interviewee wishes to express (Denscombe, 1998). Contrary to this belief, after I posted my research question on the Disability Studies Discussion List, a respondent felt that the research could harm interview participants. Taking these concerns into account, I shaped my interview questions around the treatment in courts and excluded questions about why the person appeared in court.

The interview questions shape the results and strength of the research, thus articulating and ordering the questions is significant (Charmaz, 2003; Robson, 2000; Eichler, 1991). Clear, interconnected questions directed my understanding the complex phenomena of court experiences (Glesne, 1999). Charmaz's (2003: 315-316) basic grounded theory research framework for questions helped formulate my questions into three parts (see Appendix:66). Open initial questions allowed the participants to explain their general court experience, followed by intermediate questions about understanding the court processes and the ways in which court professionals spoke about and treated the interviewee. The questions ended with a positive note on the improvements they would make and advice they could give to someone in a similar situation (Charmaz, 2003). This structure accompanied by twenty questions helped guide the semi-structured interview. Not all of the questions were asked; these provided the basis for a dynamic discussion without forcing people to recall traumatic memories (Charmaz, 2003). Closed and leading questions were avoided because they failed to capture the experiences and opinions of the participants (Glesne, 1999). Critiques from the pilot respondents improved my questions. For example, I eliminated questions that were too broad, such as 'What was going on in your life when you were in court?' and those that were confusing, such as about court rationality/irrationality.

Writing a 'memo', transcription and summary followed each interview. Memos are a means to reflect and clarify emergent themes and important statements from the data (Robson, 2000; Charmaz, 2003). Transcribing expanded my understanding of what was said and how I could improve the next interview (Glesne 1999). Using King and Horrocks' (2010) transcription method, I noted participants' body language, pauses and emphases. The transcriptions, audio



recordings and summaries of main themes were sent to the interviewees to check their accuracy and consent to continue participating in the research (Denscombe, 1998). Writing summaries greatly enhanced the process of articulating codes to analyse the interviews (Glesne, 1999). Some qualitative research themes were security and risk, speaking in court, and support. Qualitative interviewing provided a means for subjugated knowledges to inform an analysis of power and resistance in the courtroom.

4. Summary of Interviews

Before analysing the qualitative findings, the three interviews and contexts are summarised in this section. Instead of clear instances of wrongful treatment in the court, the respondents described a general disconnection from the court process, rules and verdict. However, participants raised profound concerns with their treatment in police stations, prison and social services. The varying medical categories of the interviewees captured the fluidity of the boundaries between disabled/able-bodied and LD/MHC (see Goodley, 2011).

Sarah, a 55-year-old white British woman diagnosed with a MHC, had experience in courts for thirty years, but mainly discussed two recent incidents. One involved a fight with a neighbour that was acquitted because the neighbour did not attend court. The other dealt with a derogatory comment Sarah made to a police officer when she was protesting her arrest and confinement under the Mental Health Act (2007). Sarah expressed the most profound injustices when dealing with the police, including the police wrongfully detaining her, stealing her jewellery, and injuring her during the arrest. Michael, a Leeds Involving People staff member, accompanied Sarah during the interview.

Over the course of twenty years, Phil, a 43-year-old white British man with a 'mild' LD and MHC and a background in sex offending, mainly discussed his recent court case, which produced a 'lucky' outcome. Calum, his Touchstone keyworker, also participated in the interview. Like Sarah, he revealed problems with the police. Under the Mental Health Act he was detained for three days without his medication. He also shared that fifteen years earlier while in custody, he signed blank papers on which the police after wrote up fake convictions used to convict him.

Julia, a white British 19-year-old woman who was temporarily diagnosed with LDs and MHCs,



described her civil law case to prevent her child from being adopted by another family, as the social services recommended. She emphasised her negative experiences in court – social services had unfairly assessed her parenting evaluation and denied her parental visitation rights. Despite this, Julia praised her positive support from Leeds Advocacy and her advocate Andrea accompanying her in court.

5. Research Analysis

a) Structuring the Court: Disciplinary and Judicial-Sovereign Power and Discourse

The interviewees' (2011) experiences resemble a Foucauldian disciplinary process of gaze, observation and judgement excluding them from the discourses and decisions about them. This structured gaze renders the subject an objectified spectacle through listening, observing and judging what is 'known' about them, which produces their acquiescence to that dominating discourse (Foucault, 2008; Sim, 1990). As Foucault (2008:132) explains, the clinical gaze has 'paradoxical ability to hear a language as soon as it perceives a spectacle.' In court, professional observers impose a legal language and knowledge of the individual/spectacle through categorising them based on their deviant act, disability or mental health. This process carves a scientifically structured discourse about a subject through silencing all contrary knowledge, thus minimising the subject's ability to assert their knowledge (Foucault, 2008; 1991; Tremain, 2005; Christensen, 1996). As Julia (2011) described, 'I just had to sit there... they were all surrounding me, I were scared to ask a question.'

Professionals monopolise the 'true facts' of what is seen, said and relevant to the case through knowledge and operation of restricted, secretive linguistic code and rules (Carlen, 1976; McBarnet, 1981). Yet how 'objective' are these facts, when 'normal' professionals selectively see and hear (Goffman, 2006)? As Julia (2011) stated, they 'don't even look at us or speak to us.' Additionally, judicial-sovereign and panoptic hierarchy manifests in the physical, architectural, and linguistic structures permitting and prohibiting certain people's speech (Foucault, 1980; Rock, 1993). Disciplinary and sovereign powers are embodied in the courtroom's techniques controlling conduct and producing acquiescence to the dominant discourse.

b) *Control through the Performance of Rationality*

The legal professional gaze, observation and judgement require acquiescence by all actors for the court to function. Acquiescence can be considered a means to perform rationality to positively influence the dominant judicial discourse. Legal actors perform a ‘systematic manipulation of temporal, spatial and linguistic conventions’ to evidence their rationality and convince the sovereign judge ‘beyond reasonable doubt’ (Carlen, 1976:128; Resnik, 2006). In effect, they internalise the codes of conduct.

The research participants, when acting as defendants, were silenced in court through constraining, panoptic surveillance. They constitute the court’s focus, which has an intimidating effect (Foucault, 1991a; 2007). Although witnesses and defendants may not know the unspoken court rules, routine and etiquette, their performances are constrained by those boundaries of acceptability (McBarnet, 1981; Davidson, 2004). All three interviewees (2011) feared transgressing these unknown codes of conduct, especially Julia who was scared of even asking for a toilet break during the trial. Ethnographic research in an English Crown Court revealed performances are controlled, disciplined and staged (Rock, 1993); this normalised procedure is also described in the DirectGov (2011a) website’s step-by-step guide to what occurs in court and what the subject should do and say. The exercise of disciplinary power to constrain the performance of the court actors renders it rational to conform to the behavioural norms and acquiesce to the dominant legal discourse. Yet this performance also produces irrational, ableist barriers, which subjugate knowledges of people with LDs and MHCs and privilege experts’ knowledge (Linton, 2006).

c) *The Production of Acquiescence*

The dominant professional discourse not only objectifies the legally and mentally deviant person, but (re)produces the defendants’ acquiescence to that power/knowledge. All interview participants (2011) explained how the court procedure lacked space to express their concerns or disagreements with what was said by court professionals. Labelled as ‘abnormal’ and ‘inferior,’ people with LDs and MHCs acquiesce to the dominant discourse that constructs them (Goffman, 2006). According to Charlton (2006:225) disabled people acquiesce to power because of the hegemonic ideology of normality that ‘compresses difference into classification norms (through



symbols and categories).’ The oppression of the ‘abnormal’ produces acquiescence, it is not inherent (Charlton, 2005). The dangers of resisting the implicit courtroom decorum, may be that they are rendered ‘doubly deviant,’ both ‘mad’/‘incompetent’ as a person with a MHC or LD and ‘bad’ as someone disobeying courtroom norms.

Performing rationality demonstrates acquiescence to the dominant discourse, whereas people outside of the moral and legal bounds are conceived as irrational and incompetent (Foucault, 2007). Yet Carlen (1976:129-130) even claims that ‘a defendant in a magistrates’ court is, by definition, an incompetent member of society’ because they have transgressed legal codes. Despite this, people medically certified as ‘mentally ill’ or ‘learning disabled’ are presumed incompetent in court as a result of their stigmatised attribute (Goodley, 2011; Booth, 2000). Yet Rose (2000) examines how in the security apparatus ‘abnormal’ people are no longer rendered *completely* incompetent, but rather managed, identified and supported as ‘risky’, warranting increased professional surveillance and silencing through specific support mechanisms (see McLeod *et al.*, 2010b).

Much of disability and mental health literature on acquiescence problematises the concept of ‘acquiescence bias’, which assumes that people with learning difficulties inherently agree with professionals when in doubt of an answer (Goodley, 2011; Gabel, 2005). Specific, sometimes coercive questioning styles by professionals produce the notion of acceptance, when the subject actually provides competent answers given the context, for example the powerful position of the solicitor (Pilnick *et al.*, 2010). This concept functions to entrench the ‘notion that people are unreliable reporters of their own subjectivity’ and that people in authority should assume people consent to decisions made about them (Goodley and Rapley, 2002:131). The ‘acquiescence bias’ of professionals renders people with LDs and MHCs ‘incompetent’ and devalues their statements. Disagreements with the gaze, observation and judgement are more likely to be dismissed as ‘irrational’ performance than for the able-bodied (Goodley and Rapley, 2002). The advocate Andrea (2011) described how court officials ‘tend to sort of answer and make decisions for them.’ This demonstrates the gaze’s silencing of the spectacle. However ‘the appearance of universal acquiescence makes it virtually impossible to empirically determine whether consensus is genuine or enforced’ (Prideaux, 2004:26). Despite the problematisation of the ‘acquiescence bias’, this research employs the term acquiescence to signify that people with LDs and MHCs are



not completely submissive to the dominant legal discourse, but rather may pragmatically uneasily, accept it (Prideaux, 2004).

d) *Courts: Ableist, Exclusionary and Feared*

Acquiescence to power is produced by ableist and intimidating processes inhibiting understanding and resistance (Sampson, 2006). Exclusion manifests in professionals not explaining the court process, as Phil (2011) describes:

CPN [Community Psychiatric Nurse] and solicitor do explain some things, but they don't explain everything. And if you don't understand it, you're left wondering what's happening. This time because I was well enough, I did understand everything and judge said I couldn't be convicted.

Phil demonstrates the correlations between being well, comprehending the situation, and escaping acute disciplinary power because he no longer poses a security 'risk'. The difficult judicial process and language exemplifies an exclusionary barrier to justice. Moreover, a police search before entering the court under the gaze of professionals in wigs and gowns constructs an intimidating environment for defendants and witnesses (Julia, 2011). Judicial-sovereign symbols, such as robes and honorific language, increases the likelihood of acquiescence to dominant legal discourses (Gibson *et al.*, 2010).

The interviewees' acquiescence to the court proceedings also results from the social barrier of not knowing their rights during the hearing. As Phil (2011) explained, 'they should inform you of your rights and they don't; they should be explained before or during court.' The interview participants especially felt excluded and disconnected from their rights since they had no 'right' to participate in the decision-making that would dramatically affect their lives, such as if a mother could parent her child. Julia (2011) said:

me solicitor was there doing most of the rights for me, because I was so upset and crying that (pause) I didn't feel like my rights were heard by the judge, the judge never asked me how I feel or spoke to me.

The disconnect between Julia and her sovereign rights demonstrates the courtroom discourse's



effect of disciplinary power to constrain the individuals' speech and knowledge of rights (Rock, 1993).

e) *Contradictions of Speaking and Resistance in Court*

The negative consequences of speaking 'out of order' reproduce subjects' acquiescence to the dominant discourse of what is 'known' in court. For people with LDs and MHCs, resistance may become 'explained' as consequences of individual medical problems and casts people as 'incompetent' (Goodley, 2011), as Sarah (2011) depicts:

I've been shouting out in court 'that is not true! I can't remember!'
And she (the judge) just said 'Sarah, you'll have your say in five minutes.
The solicitor will speak on your behalf and you can speak for yourself.
Just don't keep jumping in.' And they were just saying 'Well she does
suffer from a [viable?] condition,' which means if you want to talk,
you bloody talk.

This passage demonstrates the contradictory nature of speaking in court, in which one is caught in the discursive framework controlling the defendant's expression through the sovereign and disciplinary gaze. If the linguistic codes are transgressed, instead of listening, court officials blame resistance on their condition or disability. Judicial dialogue is simultaneously constructed 'as the source of 'oppressive' nature of court-room interaction, and 'other' – the Other as a means of ensuring the efficient and proper conduct of cases' (Atkinson and Drew, 1979:vii). Speech is a technique of power to support or undermine the defendant, especially when the only space provided is through an intimidating cross-examined testimony (Kennedy, 2005).

Fearing the cross-examination scrutiny reinforces the defendant or witness's acquiescence to disciplinary and sovereign powers. Julia and Phil (2011) expressed their desire to speak on their own behalf in court, but the opportunity was also frightening because of potentially being cross-examined, acting too emotional, or unsuccessfully convincing the judge. The 'risks' to their credibility are compounded by the MHC or LD stigma, which devalues speech (Goffman, 2006). Not only could judges and courts professionals hold pre-existing prejudices against people labelled with a LD or MHC (Julia 2011), but also render their knowledge inaccurate, as Phil

(2011) indicates:

With people with mental health issues anyway, it's harder to explain themselves, rather than somebody like Calum, that hasn't got mental health issues (*Calum smiles*), and even if he can explain himself, it doesn't mean that the judge or prosecution are gonna believe him. Which... is a bit unfair, because I think that people with mental health illnesses SHOULD BE listened to... for people like me, that have got themselves well over the past 12 years, should be given a chance and should be listened to. They should not always have to do it through a psychologist or a psychiatrist.

Phil's phrase 'given a chance' demonstrates how people's speech is shaped by professionals' discourses, which dominate the knowledge constructed about him and excludes Phil's claims to self-knowledge. McGowan (1998) reports that in New York Mental Health Courts, a similar exclusion of resistance to the experts' knowledge occurs.

The professional discourse and rules produces the silence of the defendant, as Phil's solicitor told him 'if I had to stand on the stand, I could have made it worse for me-self' (Phil, 2011). For witnesses like Julia (2011), the traumatic 'grilling' cross-examination process, inadvertently or intentionally instils fear of the court and social barriers to testifying. Sarah's (2011) fear of the court, 'confession,' and sentence amounted to dropping charges of abuse against a partner and a police officer. Thus people acquiesce to power and discourse because the formal testimony, as the only means of legitimate verbal resistance, is an intimidating process that can devalue the speaker. Kebbell *et al.*'s (2001) analysis of 32 court transcripts indicate the coercive questioning techniques used by some lawyers, which negatively impacted testimonies, especially for witnesses with LDs. All interview participants attempted to avoid courts because of the legacy of damages they caused. Julia fears the court proceedings her son may endure:

In the same way, I was adopted – court proceedings from the age of 1, up until I was 5, when I was adopted. And the same is gonna happen to my son, which means he's...gonna click on and think 'What on

earth is going on?' And he's gonna go down exactly the same route
I went down.

f) *Professionals' Statements of 'Truth' in Court*

i. *Relying on 'Risk Professionals' to be Heard*

The 'risk professional' (Rose, 2001) role of the housing, mental health, or other specialist worker to accompany someone with a LD or a MHC to court is complex (McLeod *et al.*, 2010b). Through security focused power/knowledge nexuses, the support worker functions both to support and potentially undermine the subject by framing them as a risk/danger to themselves or others (Rose, 2001; Gray *et al.*, 2002). Sarah (2011) demonstrates how she worked within the security discourse, using her support worker and character witness to verify that she was not dangerous to herself or others.

I always go with a support worker. I would not DARE go to court
by me-self, because I'm not a person who goes around causing
trouble... trouble finds me!

Yet the worker's presence has the contradictory effect of making the court aware of the stigmatising mental health condition warranting, increased security and/or disciplinary power (Prins, 1995). Victim Support and Witness Protection services indicate courts' security/risk focus, shown in video for witness: 'don't worry, we look after your security very carefully in court, you will be safe at all times' (DirectGov, 2011b). Also Sarah and Phil both pointed to the importance of professionals in writing letters describing their good behaviour and personality to validate their claims to innocence (Kennedy, 2005). However professionals can simultaneously legitimise and delegitimise defendants: in Julia's (2011) case, the children's social worker had a delegitimising function, whereas Leeds Advocacy played a legitimising role to ensure she was correctly understood, protected, and heard, yet the LD stigma was also attached to this support. Professionals produce verbal or written statements of 'truth' about the accused; 'truth,' defined as when power attaches itself to rules, is embedded in procedures and operations of statements (Foucault 1980:133).

ii. *The Medical Record*

A medical certification of ‘abnormality’ not only silences the defendants’ knowledge of themselves, but also contributes to the objectification of the individual as ‘incompetent’ or ‘risky’ (Gray *et al.*, 2002). The medical record is a statement of the dominant discourse defining an individual as deviant or disabled, contributing to the subject’s acquiescence to that category (Foucault, 2008). This statement is an effect of the hierarchical gaze, observation and judgment process structured by the sovereign power of the doctor, disciplinary power to ‘treat’ the subject, and security power to ‘know’ their ‘risks’ (Foucault, 2008; 2004). Observation is organised and rendered valid through documentation – the deviant’s record becomes the ‘truth’ about the person. Taylor and White (2000:ix) point to documents’ capacity to form an (over)simplified stagnant statement, ‘freeze’ events and transport them in a particular form into the future.’ This occurrence was expressed in the interview with Phil (2011), whose criminal record was ‘frozen’ and transported as evidence to prosecute him for a new offence.

Observing one’s criminal or medical record views the subject according to a pre-existing professional judgement, which may hierarchically structure out other ‘truths’ contrary to the specially diagnosed problems, such as positive attributes of a person (Wilson and Beresford, 2002; Taylor and White, 2000). The interviewees’ (2011) experiences assert Morton’s (2009; 2006) conclusions that the privileging of medical and scientific statements as ‘objective’ authorities, inadvertently functions to further subjugate and dismiss subjects’ claim to correctly know themselves.

Both Phil and Sarah (2011) explained how their mental health conditions inscribed in records objectified them as ‘truly’ ‘mentally ill’, although their condition did not affect their alleged offence. The medical record contributes to the discourses describing the individual as deficient and abnormal regardless of their consent (Booth, 2000; Minow, 1990). The individual’s identity is constructed by the medical/legal discourse, as Foucault analysed: ‘do not ask me who I am...leave it to our bureaucrats and our police to see that our papers are in order’ (Foucault in Miller, 2008:269).

g) *Contradictory Effects of ‘Abnormal’ Identity*

Perceiving impairment as natural, through a fixed biomedical lens, functions to obscure how



power relations define impairments (Tremain, 2002). Disability and impairment categories inscribe modern welfare state's social and professional hierarchies (Stone, 1984; Campbell, 2009; Meekosha and Jakubowicz, 1996). A Foucauldian approach employed in Critical Disability Studies explores the political and historical processes in which individual bodies become objectified as 'officially disabled' through social policy (Pothier and Devlin, 2006; Foucault, 2008). The categorisation of disability, mental health and crime historically demonstrate social control and 'management' through the law and political economy (Foucault, 2004; Oliver, 1990).

Categorising and 'treating' someone as disabled or mentally ill increases the surveillance of that individual through fixing knowledge of them and requiring specific care (Foucault 1991;2004). Such panoptic surveillance may produce an internalisation of that deviant category and thus acquiescence to the dominant medical/legal power that constructed the identity. Identification of a MHC or LD can be both a method to resist discourses and be stigmatised as a 'risky person.' For Sarah (2011) her mental health specialist solicitor explained that using her MHC could result in a lighter sentence, because her act certified 'irrationality.' Thus Sarah acquiesced to this 'abnormal' identity as a means to positively impact the legal discourse and receive her desired outcome. She was 'expected to play the deviant role' (Barnes *et al.*, 1999:23) which required her stigmatised attribute be openly discussed in court. Performing this identity contributes to people's fear of the uncertain consequences of 'knowing that in their hearts the others may be defining him in terms of his stigma' (Goffman, 2006:136). Thus the interview participants (2011) were uncertain how their deviant category would be used in judicial discourses.

'It is assumptions and ways of talking about disability that are crucial to the production of persons as incompetent' (Goodley and Rapley, 2002:127). The construction of disability and impairment through medical/legal discourses is a consistent theme in all three interviews, but especially in Julia's case. 'When social services got with me, they labelled me with EVERYTHING, absolutely everything under the sun' (Julia interview, 2011). A year later, after multiple tests, Julia was not found to actually have any permanent MHC or LD and her record was 'cleaned' from the labels that social service professionals had originally inscribed. This demonstrates how the social services' assertion constructed her as disabled affected the courts. The disabled identity provided her moral and cognitive support through Leeds Advocacy, but



also contributed to the view of her as an incompetent, abnormal parent (see Booth, 2000; Swain and Cameron, 2003). Thus the label of learning difficulty provided Julia access to support that she would probably not have otherwise received. Julia and Sarah demonstrate the importance of disclosing a certified ‘abnormal’ identity as a means to claim rights to the state to receive differentiated accommodations to support them in an ableist society (Stone, 1984).

Julia’s case shows how professional biopolitical discourses of risk can produce contrasting effects: repressive, through social services assuming a disability and incompetent parenting; and supportive, by accessing Leeds Advocacy and medically certifying able-bodiedness. Julia’s medical examinations were a means to resist the prosecutor and social service discourses to assert her appropriate parenting capabilities. Despite this, her relations with the baby’s abusive father produced another stigmatising attribute – potential risk to the child – rendering her a deviant and ‘inept’ parent. The security apparatus produces this discourse of ‘dangerousness,’ which disciplines subjects as incompetent and a threat to the population. Thomas (1997) demonstrates the pervasiveness of the risk discourse for disabled mothers faced with the potential dangers reproduction may have on themselves or others.

h) *Contradictions of Identification in Security Apparatuses*

All interviewees (2011) resented that their stigmatising medical conditions were discussed openly in court, yet also realised this identification allowed them access to support services they needed to understand the court process and to strengthen their case. The contradicting effects reveal a security apparatus embracing, not only punishing risk (Foucault, 2007; Rose, 2000). The identification of an ‘abnormal’ person is often elicited through thinking “‘Is this individual dangerous?’”; a ‘question that postulates a natural kinship between illness and transgression’ and measures someone by their *potentials*, not actions (Foucault, 2004:325). Yet acquiescing to dominant medical and labels of ‘abnormal’ provided some benefits. Some authors problematise the lack of self-disclosure of MHCs or LDs and locate the barriers in individuals failing to recognise how identification may improve their case (Hean *et al.*, 2010) or the lack of a police procedure for identifying people with disabilities (Beebee, 2010). Without identification, services such as the Criminal Justice Liaison Service cannot adequately divert people with LDs and MHCs from the justice system or make recommendations about sentencing. The emphasis on



launching a scheme for early identification and assessment of problems (Bradley, 2009; McLeod *et al.*, 2010a) is indicative of both governmental management and responsabilisation of risks (Foucault, 2007) and medical model pathologisation of impairments (Barnes and Mercer, 2003). This abnormal persons approach in courts (Minow, 1990) emphasises preventing risks of misunderstanding or resisting the court process through early intervention and identification of an ‘impairment’ (see Bradley, 2009).

Despite the possible benefits of identification in receiving support and diversion from the civil or criminal justice system, the interviewees revealed their fear of their mental health or learning difficulty functioning to delegitimise their perspective and warrant confinement through disciplinary and security apparatuses:

It always seems to be the person with mental health problems is the one that gets locked away and that has to stop! The police can’t just say, well he’s got a problem, so we’ll lock him up, and let the other person off.

(Phil, 2011)

Phil’s statement affirms Purlin’s (2009) assertion that prejudice of ‘mad people’ as dangerous assumes culpability and incompetence in knowing ‘what is best for them.’ Stigma acts as ‘an ideology to explain his inferiority and account for the danger he represents’ (Goffman, 2006:132-133). All three interview participants (2011) expressed concerns with being labelled as both bad, transgressing legal codes, and mad or disabled, transgressing social ableist norms (Prins, 1995). Yet Foucault’s genealogies of the madness (2001) and prisons (1991a) demonstrate the concepts are both products of the same sovereign, discipline, security triangle of power that continues to dominate them.

Yet in triangle of power does the ‘risky’ label of having MHC or LD provide the subject more leeway or more likelihood of conviction? Both processes of positive and negative discrimination emerge. All interviewees (2001) agreed that people with LDs and MHCs were probably treated more stringently than able-bodied people because of the alleged increased risk they posed. Booth (2000) and Swain and Cameron (2003) also draw this conclusion in relation to mothers with LDs whose children are removed because of their parental ‘risky’ ‘incompetencies’. As Sarah (2011) said in reference to the police station, people with LDs and MHCs are

DEFINITELY *trat* different. And they don't treat you more better, because for us, we're MORE paperwork, more hard work, and they've got a lot more... people to tell that you there.

Although it is rational to provide support, there are also unintended, irrational effects of identification of LDs and MHCs, notably the prolonged police detentions and more bureaucracy for police, which may not help the detainees.

they don't ask you about your medication til you're coming out and you sign. And I'm asthmatic and they have never ever given me my medicine. But they do ask you for the paperwork – and that is all it is, paperwork – write it all down... So you don't get it when you're in there, and that's when you probably do need it... Which is bang out of order, innit?
(Sarah, interview 2011)

Sarah and Phil's denial of medication whilst in police custody demonstrates the paradoxes of the risk discourse, the contradictory effects of identification bureaucracy in a criminal justice system continuing to fail the people it claims to protect from society (McBarnet, 1981). Jones and Talbot (2010:2) show these effects in prisons lacking adequate medical service, which produces 'a perverse disincentive to identify a person with special needs, as this would bring statutory responsibilities which prison staff felt unable to fulfil.' These irrationalities of bureaucratic 'humanitarian' interventions to survey and govern 'risky people' begs the question, whose security is protected (Valverde, 2011)? Rose's (2001) explanation of psychiatric risk assessments protecting mental health worker's liability more than their patient's could also apply to the scenario Sarah described above, or the contradictory effects of support and rights in court safeguarding the institution, rather than the accused (McBarnet, 1981).

i) Contradictions of Support and Resistance

Support could be considered a security mode of governance of the self and others – governmentality (Foucault, 1991), as it is both pacifying and productive (Goodley, 2011). The participants also revealed some of the contradictions of this courtroom security apparatus, such as when support workers failed to intervene in the judicial process to support the individual in

need. Julia (2011) described when she testified as a witness against her ex-boyfriend:

Julia: My solicitor was there and I had Witness Protection with me during the court proceedings, but they couldn't really say nothing, they were just there to support ya, and they can say 'Right, were stopping this!'

Rosalee: But they never did?

Julia: The judge said, 'right this is enough, she's getting too upset'.
So we had a break for a bit to calm down.

Despite the two 'risk professionals' (Miller, 2008) supporting Julia, it was the sovereign judge who intervened when Julia acted outside of the appropriate conduct. This indicates continued importance of judicial-sovereign power within a courtroom security framework, since 'getting these systems of security to work involves a real inflation of the juridico-legal code' (Foucault, 2007:7). Yet Julia (2011) also wished she'd received more support when testifying, despite the solicitors and Witness Protection failing to protect her from the risks of being 'burnt alive' and labelled as 'the baddie, the one that made him beat me up and do all the horrible stuff to me...' Julia's experiences demonstrate how sovereign-legal powers exercised by court officials (the judge and victim's solicitor in this case) can have both repressive and oppressive (twisting the witness's speech to portray her as a 'baddie') and supportive effects, such as the judge intervening on behalf of the witness.

Despite safeguards to prevent risks of 'vulnerable' people not understanding or participating in the court process by providing support such as Witness Protection (Gray *et al.*, 2002; DH, 2009), the implementation of the security measures manifest contradictions. When Phil (2011) faced apparent difficulties in understanding the court process, he received no support from security professionals. Phil and Julia (2011) expressed the limited ability of these support workers to improve the intimidating courtroom environment.

i. 'Risky' Resistance

How is resistance constructed in the security apparatus? This section briefly deviates from the



courtroom environment to elaborate on how interviewees' resistance to professionals' capillary powers reinforced their 'riskiness' and acquiescence. Professional discourses can render 'what may, for another group, be glossed as 'disagreement' is constructed as 'an essentialised incompetence' for people with MHCs and LDs (Goodley and Rapley, 2002:129). Sarah (2011) encountered such discrimination when police used her resistance to a wrongful arrest as evidence of her 'dangerous' mental health condition and incompetence that 'necessitated' police confinement. The consequences of defying and questioning the authority of professionals, such as police officers, may produce severe consequences. The stigma and 'riskiness' of mental health has been a means for her neighbours, boyfriend and police to arrest Sarah, even when she was well. Sarah (2011) described this situation in reference to a conflict she had with her neighbour and the police were called:

I was the one putting my rights forward, you can't arrest me, this that and other – I got arrested because of my mental health issues. They believed that I would go and take an overdose. They have NO proof of this, but it is down on my history that I have got mental health problems. ... It's not going to court this one. And she said it's because I were on high risk of mental health that we got to be putting you in a place of safety.

This passage illustrates how individual resistance to technologies of the security apparatus like the police can translate into 'incompetence' and presumed deviancy for people with MHCs and LDs. They were detained in the name of the community they threaten and the conventions of the sovereign 'rule of law' are wavered in the name of securitising communities against them (Rose, 2000). Asserting rights has the contradictory function of both supporting and detaining 'vulnerable' people (Prins, 1995). Sarah's isolated resistance to her wrongful arrest was undermined by her mental health record, which legitimised enacting section 135 and 136 of the Mental Health Act (2007; 1983): sanctioning someone posing a potential risk to themselves or others to a 'place of safety', often a police station for 72 hours maximum (Prins, 1995; James, 2010). However resisting police powers and claiming rights proved successful with the help of Sarah's support workers. Her positive relationship with a number of services has not only helped prove her case in court, but also has served to improve the police's behaviour – no longer can they arrest her in her home without first contacting Sarah and her Community Psychiatric Nurse. Hence acquiescing to the professionals' powers was the means to resist the discourse of

‘dangerousness’.

Julia (2011) expressed resistance to her foster placement where she was assessed for three months on her parenting skills:

Apparently I’ve got to stick by rules of a book, it is a piece of paper, it can easily be burnt. What is the point in having rules when basically, he is your son, and basically you have got to stick to these rules ... It’s like REALLY, REALLY, you want to tell me how to look after my son?! You won’t speak to my face and you give me a book? It can be burnt, I’ll look after my son the way I want to look after my son!’

Julia’s frustration with rules and institutions’ interventions in her life also demonstrates an awareness that abiding by those regulations was the means to keep her child. Yet social services translated her resistance into ‘incompetence’. Both Julia and Sarah demonstrated how their isolated resistance worsened their situation and cooperating with the professionals who construct the dominant discourse of what is seen and said about them was a more ‘secure’ technology to impact decisions. Phil (2011) employs this approach to resistance, but also makes it clear that he does not need the support:

Rosalee: When you came out of prison, was there enough support?

Phil: I think it were the case of they were insisting ON support, and if you don’t want it, you shouldn’t be forced to accept it. If people want to go their own way, people should be left to the choice of doing that.

Calum: You don’t mean us [Touchstone] do you, Phil?

Phil: Well, ya (smiles).

This conversation indicates Phil’s subtle resistance to Touchstone’s services, but recognition of the importance of cooperation and acquiescence to Touchstone and medical institutions to



improve the prospects of shortening his Probation sentence. Although Phil wished to separate himself from panoptic disciplinary technologies after prison, the powers continue 'to supervise the individual, to neutralise his dangerous state of mind, to alter his criminal tendencies, and to continue even when this change has been achieved' (Foucault, 1991a:18). Thus successful resistance to disciplinary or legal-sovereign power can arise from cooperating with professionals to help ensure security, 'embrace risks,' and internalise one's own potential threat (Rose, 2000).

ii. Bounded Resistance

Cooperating with professionals and services that specialise in mental health, learning difficulties or abuse seemed to be a necessary step in achieving the outcome Sarah, Julia and Phil desired. This especially became clear in the participants' responses to 'What advice could you give to someone in a similar situation than you?' The interviewees all highlighted the importance of listening to professionals, but also explained the need for 'experts' to also listen to their opinions. As Sarah (2011) recommended, 'don't let it rest, get as many people on your side as you can.' Sarah's friendly relationship with a number of support services has improved the validity of her claims in court. As Barnes *et al.* (1999) state, both participants in the lay-professional relationship gain advantages when obeying their role responsibilities.

Julia (2011) described the knock-on effect of accessing multiple services (Victim Support, domestic abuse, childcare etc.) since working with Leeds Advocacy, which has also strengthened her confidence and discouraged self-blame for her circumstances. 'I probably would have had me son now if I would have had this support a long time ago,' Julia said. Thus seeking and cooperating with support is a means to improve the discourses about them, which enhances the likelihood of a favourable court sentence. The success of the defendant or witnesses' opposition to the dominant discourse is defined by how well they cooperate and convince professionals of their innocent, moral, 'normal' personality. 'The legal setting is a potential sphere of influence for professionals in the disability field' since they serve as advisors, advocates and expert witnesses (Morton, 2006). Thus self-regulation of behaviour towards professionals becomes a mode to resist the expansion and renewal of more intervention in the individual's life, such as in prison. This is clearly demonstrated in Phil's (2011) advice:

If people bothered to listen to the right people who say this will make you

well, and you will STAY OUT from being locked up in hospital or prison, then they'd stand a better chance.

Cooperating with the 'right people' can prove to the court that the individual is not at risk of harming themselves or others. Thus effective resistance is bounded to what is seen and said in the professional sphere. Acquiescence to power and discourse as the means of resistance and impacting the major decisions made about people with MHCs and LDs is also mechanism of managing particular 'deviant' populations. However, Finkelstein's concept of Professionals Allied to the Community could help unite professionals and people with disabilities and MHCs and ensure they gain more control over the interventions in their lives; thus 'turning the gaze back at the potential or pitfalls of environmental responses to difference' (Goodley, 2011:173).

Conclusions

a) Participants' Recommendations

Interview participants shared a variety of suggestions to improve the court system, many which have been *acknowledged* by governmental reports and institutions, though not implemented. Julia suggested clearer and simplistic language and rules in court would improve the courts (2011; McLeod *et. al.*, 2010a). Phil (2011) called for financial compensation when people are wrongly accused of crimes and put through the criminal justice system when they have not transgressed the law. Consistent with the Bradley Report's (2009) recommendations, Phil and Sarah (2011) argued that people with MHCs should not be confined in police stations. All interviewees indicated the need for more justice officials to be trained around mental health and disability issues, as also noted by Beebee (2010), McGuire *et. al.* (2000), and Hean *et al.* (2010). This may improve professionals' understanding and compassion towards people with LDs and MHCs. Moreover all participants felt the need for more opportunities to speak and raise concerns without the fear of a cross-examination.

b) Research Conclusions

Through qualitative interviews and a Foucauldian and disability studies approach, this research identifies how acquiescence of people with LDs and MHCs is produced in court through



discourse and the triangle of sovereign, disciplinary and security power. Power and discourse also rely on acquiescence to function. This framework of power also became apparent in the method of interviewing. Particular sovereign rights, such as confidentiality, were protected and the interview process was marked by security, for example the professional's presence 'monitored' the risks for both the participant and researcher.

Critical Legal Studies' insight that practicing 'justice' often reproduces social injustices, hierarchies and barriers to speaking in the courtroom (Carlen, 1976) was demonstrated in this research. The study revealed a number of contradictions profoundly impacting people with LDs and MHCs. The court actors can be seen as performing rationality in which they acquiesce to the dominant code of conduct and discourse under the gaze, observation and judgement of sovereign, disciplinary and governmentality power. Yet this produces a variety of irrational social barriers for people with LDs and MHCs to equal participation in the courtroom discourse, such as fear of speaking and cross-examination. Moreover, their resistance to what is seen and said may be ignored because their acts are attributed to their MHC or LD. These social barriers and silencing techniques reinforce acquiescence, which is also produced by 'true' professional and legal statements about the individual and specific support they receive as a result of their disability or mental health. These identifications and objectification of 'abnormal'/'risky' individuals produces the contradictory effects of diversion from court or stigmatisation and support in court. The key paradox revealed is how 'successful' resistance, achieving a desired outcome, is bound to the dominating professional discourse determining what is known about the individual; the subject acquiesces to that power/knowledge to impact the decisions about their lives made by professionals. Resistance attacking the dominant discourse renders the individual 'dangerous' or 'incompetent' in court. These power relations and discourses operate through Foucault's (2007) triangle of power analogy, but most notably in the security technology. This research indicates the significance of scrutinising discourse and power relations through a Foucauldian lens to provide a means to voice subjugated knowledges, a task supported with critical legal and disability theories.

c) Areas for Further Research

The court, as the bureaucracy of the law, exemplifies one 'security apparatus' out of the many that exist in the participants' lives. The wider contexts in which the subjugation of people's



knowledges through the gaze, observation and judgement require further study. For example, Julia (2011) describes the panoptic eye in the social services: 'I felt like I was being watched 24/7.' The Foucauldian framework of power: sovereignty, discipline and governmental security, is an important analytical tool for future research into domains such as the Court of Protection's exercise of biopower to sterilise people who lack 'legal capacity' to make 'the right decision' (Hirsch, 2011). Another 'risky' phenomenon warranting further interrogation is the UK's Fixated Threat Assessment Centre (FTAC), a joint police-health care unit that aims to manage threats from people with MHCs and 'pathological fixations' who pose a 'danger' to public figures and celebrities (James, 2010). Whose security is 'protected' in the Court of Protection and FTAC? Through analysing the experiences of people with LDs and MHCs, this research has demonstrated how acquiescence to power and discourse produces a means of resisting and transforming what is seen, said and known.

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Interview Consent Form

My name is Rosalee Dorfman and the purpose of this consent form is to tell you of your rights as a participant in this study and of the procedures involved in the collection and keeping of data about yourself. I am interested in how people with learning difficulties and mental health problems are treated in the courts in the UK justice system I would be very grateful for your participation in this study.

What you need to know about the research:

-
- It is your right not to answer any question that you are asked
 - You may ask the researcher any questions you have
 - You are free to end your participation in the interview at any time without giving a reason and without any consequences
 - Your name and identity will be changed so no one will be able to recognise you in the study and you are guaranteed confidentiality in any discussions and publications in agreement with the Data Protection Act 1998
 - No information will be passed onto anyone connected with you, including parents or school
 - The only information I may have to tell someone is, if you are under 18, and you inform me that you are being physically, mentally harmed or abused in anyway, which will be passed on to the appropriate persons
 - The interview will be recorded using audio tape and all notes and tapes will be kept in a safe place
 - You have the right to access the data about yourself and to ask for it to be returned to you at any time
 - I have read this consent form in full. I have had the chance to ask questions concerning any areas that I did not understand. I consent to being a participant in the study:
-

Signature of participant:.....

Printed name of participant:.....

Date of interview:.....

Signature of interviewer:.....

-
- If you want to confirm that I am a research student at the University of Leeds, Department of Sociology and Social Policy, please contact Patrick Macartney p.macartney@leeds.ac.uk
-

Research Interview Questions

Research Topic: The treatment of people with learning difficulties and mental health problems in the criminal and civil justice system in the UK, specifically in the courts.

Setting: The semi-structured interview will be held at the organisation from which I contacted the people (Leeds Advocacy, Leeds Involving People, or Touchstone). At the interview will be the person with a learning difficulty and/or mental health condition that has experienced the criminal or civil justice system as well as a staff member of the organisation who knows the main interviewee well, such as a their keyworker or advocate. The interview should take about an hour.

1. First chat about who we are, where we are from, etc. to establish a friendly interview environment.
2. Research Statement:
 - a) I want to hear about your experiences in the criminal and/or civil justice courts.
 - b) You do not have to tell me about why you were in court. I'm mostly interested in how you were treated in court by the lawyers, judges and other people in the justice system.
 - c) As a researcher, I am not going to judge you and what you say will be confidential. Your real name will not be in the report.
 - d) Also, whenever you want we can take a break from the interview.
 - e) Although I have given you a paper with the questions, we may not answer them all or in the order that they are currently in.
 - f) I'm going to break down the interview into two sections: first about your experience and secondly, what you think should change about the justice system.
 - g) You do not have to answer questions you do not want to.
 - h) Is it ok if I also ask Colin a couple of questions?
 - i) Would you like to start the interview now?'



3. Written consent form for participants (explain that I'll only have to pass information on if you tell about a crime that has not been known before to the police)

Initial Questions

1. Tell me about your experience in the criminal or civil courts in the UK.
 - a) Please describe how you were treated in the justice system.
 - b) If you don't mind me asking, when did you first experience the courts?/ (How many times have you been to court?) Have you ever been the subject of a court proceeding without attending? If yes, why?
 - c) What did you know about your rights in court? How did you learn about your rights?
 - i. How did people help you understand the court process? Who?
 - d) Was there anything about the court that was especially difficult to understand or deal with? For example, were there language barriers? Did you ask for any assistance? Did you receive it?
 - i. (Did you seek assistance in communicating with your lawyer/court officials?)
 - e) Was there anything in the court proceedings that you disagreed with or felt was unfair?
 - i. If yes, (how) did you express your feelings at the time or after the court?
 - ii. Were you handcuffed or restrained on the way in or out of the court? (Were you provided or withheld medication while in custody?) How do you think this affected the court process?
 - iii. *Are you happy to continue the interview?*
 - f) How did the judge talk to you? How did the judge talk about you to others? (What were the attitudes of other court officials to you?)
 - g) How did the witness(es) talk about you? (Or if you were a witness: How was what you said discussed in court?)
 - h) How did the opposing lawyer treat you in court?



- i) How did your lawyer talk about you to others? How do you feel your lawyer listened to you?
- j) Did you want to testify (explain your perspective) in court? If so, was there an opportunity to?
- k) Did a guardian ever act on your behalf during the court case?
- l) Did you see yourself as having a mental health condition or learning difficulty when you were in court? Do you see yourself differently now?
- m) At the time, did you think the people in court believed you had a mental health condition or learning difficulty? What made you think that? (Now do you think the same as when you were in court?)
- n) Question for staff member and main participant: Do you feel that people with disabilities or mental health service users are treated differently than other people in the legal system? If so, how?

- o) *Would you like to take a break now? Are you ok to continue?*
- p) Describe your relationship with any services that helped you before or during your time in court. For example, Victim Support or the social services. Remember you do not have to tell me if you don't want to.
- q) What happened immediately after court?
- r) Sorry, but I have to ask a couple of questions about how you identify yourself. What is your gender? What is your ethnicity? How old are you?
- s) Now we are going to move on to the final set of questions:

Ending Questions

- 2. Question for staff member and main participant: How do you think we can improve the criminal justice system?(esp. For people with LDs and MHCs?)
 - a) After having these experiences, what advice would you give to someone who is going through the same court process?
 - b) What do you want lawyers and other legal professionals to know about your experience? (What do you want judges to know about your experience?)

- c) Is there anything you would like to ask me?
3. (Culminating statement:)
- a) I was pleased to learn about your experience and thoughts about the criminal justice system.
 - b) I will send you a summary of the interview and the main points that I will be using in my research paper in several days.
 - c) Remember your real name will not appear anywhere in the report. Also only I and my research supervisor will have access to the recorded interview.
 - d) If you want the whole interview or any part of the interview not to be included in my report, please let me know. [Pause for response].
 - e) Would you like me to send you an electronic copy or CD of our interview? Feel free to get in contact with me anytime.'

(Discuss what ways the research can/ should benefit the participant. I will try to publish the report. Is there something I can do to support you personally? I will send you a paper and electronic copy of my final report.) (If person seems a bit traumatised from interview, then mention getting in contact with a counselling service – such as *Leeds Counselling*)