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## ORIGINAL ARTICLE

# Socio-legal studies and criminal justice: Reflections on ‘participation’

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## Abstract

The *Journal of Law and Society* (JLS) is nationally and internationally recognised for its ground-breaking contribution to shaping understandings of the relationship between law and society. We relished the opportunity to come together to reflect upon ‘participation’ and its relationship to criminal justice as part of the JLS 50th anniversary celebrations. In this paper, we examine the concept of participation from both a ‘socio’ and ‘legal’ standpoint, highlighting the intersection between the two, and explore the ways in which the theme of participation has been approached by existing JLS contributors. We do this by discussing the themes of doctrinal approaches to effective participation, access to justice, legitimacy, and procedural justice; and conclude by considering avenues for future research.

## 1 | INTRODUCTION

We were delighted to be asked to contribute to the 50<sup>th</sup> anniversary celebrations of the *Journal of Law and Society* (JLS), hosted by the Centre of Law and Society at Cardiff. This provided a wonderful opportunity to come together to reflect upon the role that the JLS plays in our work and its impact on the wider socio-legal community. Our academic backgrounds are quite different, yet we are equally interested in how the criminal justice system operates; the classic ‘law in action’ (as opposed to ‘law in the books’) approach of socio-legal studies.<sup>1</sup> One of us (Kirby) is a criminologist

<sup>1</sup> D. Nelken, ‘Law in Action or Living Law? Back to the Beginning in Sociology of Law’ (1984) 4(2) LS 157–174.

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and is immersed in sociological methods to examine the criminal justice system and criminal justice policy. The other (Welsh) is a lawyer by qualification who employs theory and method drawn from sociology rather than doctrinal approaches to researching law. Together we share a strong interest and expertise in the theme of ‘participation’ in criminal justice, specifically in the criminal courts.

In this context, we use the term ‘lay participant’ to denote members of the public who attend a criminal court hearing in a non-professional or adjudicatory capacity, such as a defendant, victim or witness. We are interested in what lay participants understand, perceive and experience during the court process and what can facilitate or limit their participation, alongside how lay people interact with the law and legal officials. We do this by examining four interconnected theoretical frameworks: effective participation, access to justice, procedural justice and legitimacy and, in doing so, set out how socio-legal ‘law in action’ approaches enrich our field of understanding. Before we begin this discussion, we set out to examine the current landscape of the field and reflect upon the JLS’s contribution to ‘participation’, criminal justice and the socio-legal community.

## 2 | THE JOURNAL OF LAW AND SOCIETY AND CRIMINAL JUSTICE

The JLS has made a groundbreaking contribution to the field from its inception in 1974 to the present day. These contributions include a clear commitment to education and pedagogy,<sup>2</sup> as well as methodological and disciplinary debates<sup>3</sup> which help to build a sense of community for those with an interdisciplinary focus. The JLS has played a formative role in shaping our understandings of the relationship between law and society and in developing our expertise. For Kirby, participating in the inaugural Socio-Legal Masterclass at Cumberland Lodge in 2016, chaired by Linda Mulcahy and designed to bring together PhD researchers with established socio-legal scholars, led to finding a ‘home’ in socio-legal studies. Contributors included many names and faces familiar to readers of the JLS, including Rosemary Hunter, Mavis Maclean and Phil Thomas. This reflects the commitment that the JLS, and its contributors, have shown to nurturing early career researchers. This includes a strong track record of publishing PhD research,<sup>4</sup> such as the first article from Welsh’s own PhD.<sup>5</sup> The rigour and reach of the JLS makes it a very attractive place for publication, its impact and influence heightened by a fruitful relationship with the Socio-Legal Studies Association (SLSA).

Regarding the substantive theme which we were invited to discuss, a search for ‘criminal justice’ in the JLS returns 679 articles. This includes studies from diverse jurisdictions, such as Chile,<sup>6</sup>

<sup>2</sup> See A. Francis and I. McDonald, ‘After Dark and Out in the Cold: Part-Time Law Students and the Myth of “Equivalency”’ (2009) 36(2) JLS 220–247; P. McAuslen, ‘The Coming Crisis in Legal Education’ (1989) 16 JLS 310.

<sup>3</sup> Ranging from I.D. Wilcock’s ‘Getting on with Sociologists’ (1974) 1 JLS 3 – in the first article of the first issue – to more recent methodological debates, such as the two supplementary issues on socio-legal methods in 2021–2022.

<sup>4</sup> See, P. Carlen, ‘Remedial Routines for the Maintenances of Control in Magistrates’ Courts’ (1974) 1 JLS 101; D. McBarnet, ‘“Magistrates” Courts and the Ideology of Justice’ (1981) 8(2) JLS 181–197; J. Gormley, ‘The Inefficiency of Plea Bargaining’ (2022) 49 JLS 277–293.

<sup>5</sup> L. Welsh, ‘The Effects of Changes to Legal Aid on Lawyers’ Professional Identity and Behaviour in Summary Criminal Cases: A Case Study’ (2017) 44 JLS 559–585.

<sup>6</sup> I. Arriagada, M. González Le Saux, J. Wilenmann and F. Águila, ‘“No, buddy, I will not speak to the press – I am working!”: Criminal Justice and the Interprofessional Dynamics of Communication Production in the Chilean Public Prosecutorial Office’ (2023) 50 JLS 185–207.

Ethiopia<sup>7</sup> and France,<sup>8</sup> about the roles of a range of parties, from victims to defendants to lawyers. As predicted by Phil Thomas during the JLS's 40th anniversary, the journal continues to offer 'a vehicle for scholarship which has something special to say about the issues of the moment'.<sup>9</sup> Much of the work published in the JLS has had a long-standing influence on our work about democratic processes in criminal justice, human rights, access to justice and civil participation within a changing society. These influential works include original and innovative research on a range of socio-legal and criminological topics, such as criminal procedure and sentencing,<sup>10</sup> and contemporary responses to critical social issues, evident in special issues on a range of topics. For example, Kirby remembers being absorbed by a special issue on the 1985 miner's strike when writing an undergraduate essay for a module on 'protest'.<sup>11</sup>

Examining the contribution that the JLS has made specifically on the subject of 'participation' helps to lay the foundation for our subsequent discussion. Recognising the importance of understanding the impact of the law and criminal justice actors on those subject to (and often marginalised within) it runs throughout the history of the JLS. Two articles published in the infancy of the JLS, which have had a significant influence on our work, are those by Carlen and McBarnet. Carlen, in the second ever issue of the JLS, described how the high level of social control in the magistrates' court, such as 'taken-for-granted rules' and the suppression of 'common modes of communication', marginalises defendants.<sup>12</sup> McBarnet coined the term 'ideology of triviality' to describe the fallacy of magistrates' courts being perceived as trivial in law and society when, in reality, the work of the magistrates' courts is often serious in nature and consequence for defendants.<sup>13</sup> This fallacy of triviality continues to pervade contemporary magistrates' justice and is something of a preoccupation for each of us.<sup>14</sup> Understanding of the role of professional actors, such as the clerk, in relation to lay participants in magistrates' courts was developed further in another JLS article by Hilary Astor.<sup>15</sup>

The JLS has also provided a platform for discussion on the methodological challenges, reflections and questions that arise when conducting empirical research on lay participation in criminal justice. In discussing the political and legal controversy surrounding the publication of 'negotiated justice' – which shed light on the systemic use of plea-bargaining – Baldwin and McConville described the ambivalence and mistrust by those in authority of the very notion of eliciting the perspectives of those subject to the law: 'The main criticism of the research concerned the extent

<sup>7</sup> R.H. Wandall, 'Trust and Legal Governance: A Case Study of Ethiopian Criminal Justice' (2015) 42 JLS 283–307.

<sup>8</sup> J. Hodgson, 'Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations' (2002) 29 JLS 227–257.

<sup>9</sup> P. Thomas, 'The Journal of Law and Society at 40: History, Work, and Prospects' (2015) JLS 6.

<sup>10</sup> J. Hodgson, 'Adding Injury to Injustice: The Suspect at the Police Station' (1994) 21 JLS 85; C. Tata, 'Ritual Individualization: Creative Genius at Sentencing, Mitigation and Conviction' (2019) 46 JLS 112.

<sup>11</sup> Wade's article on the impact of the media on perceptions of the strike was particularly influential. E. Wade, 'The Miners and the Media: Themes of Newspaper Reporting' (1985) 12(3) JLS 273–284.

<sup>12</sup> Carlen op. cit., n.4 at 101–108.

<sup>13</sup> McBarnet op. cit., n.4.

<sup>14</sup> J. Townend and L. Welsh, *Observing Justice: Digital Transparency, Openness and Accountability in Criminal Courts* (Bristol University Press 2023); A. Kirby, 'No TV Programme is Made about Boring Magistrates' Cases': Revisiting the Ideology of Triviality in Magistrates' Justice' (2025) 64(2) HJCL 231–251 <<https://doi.org/10.1111/hojo.12587>>

<sup>15</sup> H. Astor, 'The Unrepresented Defendant Revisited: A Consideration of the Role of the Clerk in Magistrates' Courts' (1986) 13(2) JLS 225–239.

to which it was proper to seek and publish views of defendants involved in criminal cases'.<sup>16</sup> While those doing empirical research in the courts still often encounter issues surrounding access, ethics and recruitment, the idea that we should seek the views of defendants themselves is now arguably much less contentious. In addition to – and often alongside – interviews, court observations are a methodological staple of those conducting empirical research on lay participation in the courts.<sup>17</sup> Raine and Willson's 1993 work on organisational culture in the courts neatly summed up what it is like – to this day – to sit in court as an observer:

The [observer] sits and witnesses a sequence of small expressions of personal and social tragedies which have been eloquently described by writers on jurisprudence, criminology, and the nature of society.<sup>18</sup>

In the early decades of the JLS, the lay participant under study was often the defendant. This is perhaps unsurprising given the extremely marginalised role of complainants at this time.<sup>19</sup> However, Doak's paper serves as an example of the gradual shift in focus towards thinking about victim participation in the courts.<sup>20</sup> Written at a time of political focus on 'victim's rights' and talk of 'rebalancing the justice system',<sup>21</sup> Doak noted that the 'very concept of victim participation would appear to be a direct corollary of a modern, liberal criminal justice system that purports to follow emergent trends in best practice'.<sup>22</sup> An increased policy focus on victim participation, though not without its limitations, has helped to promote access to justice, particularly for vulnerable and intimidated groups.

More recently, McKeever et al. discussed the 'snakes and ladders' of legal participation for litigants in person.<sup>23</sup> This astute analysis, which draws upon McKeever's earlier work,<sup>24</sup> describes participation as being on a 'ladder' ranging from non-participation (isolation, segregation) and tokenism (placation, obstruction) to participation (engagement, collaboration, being enabled). This socio-legal work highlights the multifaceted and fluid experience of participation, which is not binary 'with individuals either participating or not', but 'covers a range of experiences, none of which are static'.<sup>25</sup> It also brings into focus another theme common within recent discussions of

<sup>16</sup> J. Baldwin and M. McConville, 'Plea Bargaining: Legal Carve-Up and Legal Cover-Up' (1978) 5 JLS 230.

<sup>17</sup> For recent examples and discussion, see L. Flower and S. Klosterkamp, *Courtroom Ethnography: Exploring Contemporary Approaches, Fieldwork and Challenges* (Bristol University Press 2023).

<sup>18</sup> J.W. Raine and M.J. Willson, 'Organization Culture and the Scheduling of Court Appearances' (1993) 20 JLS 237.

<sup>19</sup> J. Shapland, J. Willmore and P. Duff, *Victims in the Criminal Justice System* (Gower 1985).

N. Christie, *Conflicts as Property* (1977) 17(1) *Br. J. Criminol.* 1–15.

<sup>20</sup> J. Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) JLS 294–316.

<sup>21</sup> See M. Tonry, 'Rebalancing the Criminal Justice System in Favour of the Victim': The Costly Consequences of Populist Rhetoric' in A. Bottoms and J.V. Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Routledge 2010).

<sup>22</sup> Doak op. cit., n.20 at 315.

<sup>23</sup> G. McKeever, L. Royal-Dawson, E. Kirk and J. McCord, 'The Snakes and Ladders of Legal Participation: Litigants in Person and the Right to a Fair Trial under Article 6 of the European Convention on Human Rights' (2022) 49(1) JLS 71–92.

<sup>24</sup> G. McKeever, 'Comparing Courts and Tribunals through the Lens of Legal Participation' (2020) 39(3) CQJ 217–236.

<sup>25</sup> McKeever et al., op. cit., n.23 at 78.

lay participation in the JLS and beyond: the impact of court processes on unrepresented litigants and defendants.<sup>26</sup>

This selected history of the JLS's contribution to advancing debates around 'lay participation' highlights the continuum of socio-legal analyses on which the journal sits. Together, these significant works illustrate the interdisciplinary nature of the JLS, which allows scholars in a range of capacities to develop and refine perspectives on how criminal justice systems are experienced by lay participants.

### 3 | PARTICIPATION IN CRIMINAL JUSTICE

On that continuum, between us, we can approach the topic of participation in criminal justice from the disciplines of law and the social sciences, acknowledging the spectrum within this and embracing the intersections between the two. Uniting our approaches is the principal understanding that 'participation is essential to the delivery of justice'<sup>27</sup> and the use of inductive approaches to understand what it means to participate in the court process from the perspective of a lay individual. This includes through qualitative methods, such as in-depth interviews, narrative interviews and observations of court proceedings. Approaches to participation can be framed through several theoretical lenses: doctrinal understanding of effective participation, access to justice, legitimacy and procedural justice. Each has been prominent within socio-legal and criminal justice scholarship during the last 25–30 years, and we discuss each lens in turn.

#### 3.1 | Doctrinal understandings of effective participation

As noted above, our work has concerned participation in criminal justice from the perspectives of defendants, victims and/or witnesses. Doctrinal approaches tend to focus on defendant participation, with Article 6 of the European Convention on Human Rights guaranteeing an accused's right to effective participation in a trial.<sup>28</sup> A right to effective participation is not only the right to be present during the case but also to be able to follow proceedings, and to prepare notes to assist in the preparation of a defence. There remains, however, scope to impose restrictions on participation to the extent that may be necessary and proportionate in particular cases. Through case law which applies those principles, we can see that the ability of defendants to participate in the criminal process remains a complex matter, consisting of issues that include – but are not limited to – rules of evidence that effectively force defendant participation while undermining their right to be presumed innocent,<sup>29</sup> the ability of vulnerable defendants to be afforded the same protections as vulnerable witnesses<sup>30</sup> and the role of the Criminal Procedure Rules which reshape

<sup>26</sup> K. Leader, *Litigants in Person: In Their Own Words* (Hart Publishing 2024); C. Walker, 'The Pains of Going to Court: Unrepresented Defendants' Ability to Effectively Participate in Proceedings' (2024) *Criminology and Criminal Justice* (online first).

<sup>27</sup> J. Jacobson and P. Cooper (eds), *Participation in Courts and Tribunals: Concepts, Realities and Aspirations* (Bristol University Press 2020) at 1.

<sup>28</sup> *Murtazaliyeva v. Russia* [GC], 2018, § 91.

<sup>29</sup> A. Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge 2017).

<sup>30</sup> S. Fairclough, 'Using Hawkins's Surround, Field, and Frames Concepts to Understand the Complexities of Special Measures Decision Making in Crown Court Trials' (2018) 45 JLS 457–485.

the role that defendants and their lawyers play in the system.<sup>31</sup> Adjustments are often required to support effective participation, including access to interpreters (though imperfect),<sup>32</sup> or making necessary reasonable adjustments for people who need them.<sup>33</sup> However, as Owusu-Bempah has noted, there has been little doctrinal scrutiny about the exact meaning of effective participation in recent years.<sup>34</sup>

There has, nonetheless, been judicial recognition that mere presence in proceedings is insufficient to ensure effective participation. While presence might facilitate effective participation, it does not guarantee that a defendant will be treated with respect to their needs as an autonomous individual. Judicial reasoning indicates that effective participation requires that a defendant can hear, understand and follow proceedings,<sup>35</sup> but Byrom goes further and tells us that

[a]n effective hearing requires that individuals are able to present the information necessary to enable a decision-maker to make a determination based on applying the law to the facts of the case, *and* that the decision maker is able to comprehend this information (original emphasis).<sup>36</sup>

To Byrom, then, not only must the individual be encouraged to present their information but the decision maker must ensure they have understood the points being made by an individual. This would perhaps encourage a more dialogic approach than traditionally expected in the criminal process. As Owusu-Bempah points out, though the courts require only that the defendant can ‘maintain a level of general understanding and active engagement throughout the trial’.<sup>37</sup> Even though many practitioners strive to actively facilitate participation in the justice system through respectful treatment, the assumption in case law that defendants can effectively participate through their lawyers,<sup>38</sup> according to Owusu-Bempah, excludes defendants from proceedings and effectively undermines their role in the process.<sup>39</sup>

Even where judicial scrutiny of the meaning of participation has occurred, we need to understand how such doctrinal principles play out in practice. The value of socio-legal work in this field is in examining the day-to-day realities of the criminal justice system, and identifying where space for improvement exists. Jacobson and Cooper’s work, which outlines a framework for participation based on interviews with practitioners, policy analysis and court observations,

<sup>31</sup> E. Johnston, ‘The Adversarial Defence Lawyer: Myths, Disclosure and Efficiency – A Contemporary Analysis of the Role in the Era of the Criminal Procedure Rules’ (2020) 24(1) E&P 35–58.

<sup>32</sup> A. Aliverti and R. Seoighe, ‘Lost in Translation? Examining the Role of Court Interpreters in Cases Involving Foreign National Defendants in England and Wales’ (2017) 20(1) New Crim LR 130–156.

<sup>33</sup> J. Talbot and J. Jacobson, ‘Adult Defendants with Learning Disabilities and the Criminal Courts’ (2010) 1(2) J. Learn. Disabil. Offend. Behav. 16–26.

<sup>34</sup> A. Owusu-Bempah, ‘The Interpretation and Application of the Right to Effective Participation,’ (2018) 22(4) IJE&P 321–341.

<sup>35</sup> *Lee Kin* [1916] 1KB 337; *Stanford v. UK* (ECHR, 23 February 1994); *SC v. UK* (2005) 40 EHRR 10.

<sup>36</sup> N. Byrom, ‘Where Has My Justice Gone?’ (2024) The Nuffield Foundation <<https://www.nuffieldfoundation.org/wp-content/uploads/2024/Where-has-my-justice-gone.pdf>> at viii.

<sup>37</sup> Owusu-Bempah, op. cit., n.34 at 325.

<sup>38</sup> As Tata discusses in his response to this paper, the idea that lawyers facilitate participation is a core part of their professional identity. This applies even when research challenges the reality of this picture, as Hodgson notes in her response.

<sup>39</sup> Owusu-Bempah, op. cit., n.4, at 325.



provides an excellent example of this.<sup>40</sup> Meanwhile, the JLS offers a vital resource for driving these debates forward by publishing important work on this topic. Our research has found that doctrinal interpretations of participation can be especially problematic when set in the more socio-legal context of efficient working practices demanded of criminal court practitioners and the organisational culture adopted by the workgroup.<sup>41</sup> Where procedural aspects of the court process silence defendants (and other lay participants), they (further) disempower people from the already marginalised sections of society of which many defendants are drawn.

### 3.2 | Access to justice

Turning to the relationship between participation and access to justice, we find numerous interpretations of the latter phrase. The concept of access to justice itself emerged as a social right in the 1970s,<sup>42</sup> and in interrogating the meaning of this social right it is important to avoid the tendency to synonymise access to justice and legal aid.<sup>43</sup> The ability of people to access timely and accurate information and legal advice is closely connected with their ability to secure access to justice. This does not, however, as Carlen<sup>44</sup> and McBarnet<sup>45</sup> predicted, operate to completely rectify lay exclusion from the process because of the way in which laws and procedures designed to encourage efficient case management became absorbed in workgroup culture.

Access to justice can be interrogated through the lenses of the meaning of access versus the meaning of justice, which itself can be considered through procedural, substantive,<sup>46</sup> and normative lenses.<sup>47</sup> Adams-Prassl and Adams-Prassl, for example explained that short deadlines, case complexity, access to representation, complicated application forms and absent opportunities to engage meaningfully with the process can each have a different impact on a person's ability to access justice.<sup>48</sup> These factors – which have been found to be present in our research<sup>49</sup> – appear to have reinforced the professional networks operating in the courtroom via greater recourse to, for example, the completion of standardised forms that relate to case management and encourage the use of plea negotiations.<sup>50</sup> Standardised documentation of such procedures can cause lay

<sup>40</sup> Jacobson and Cooper, op. cit., n.27.

<sup>41</sup> L. Welsh, *Access to Justice in Magistrates' Courts* (Bloomsbury Publishing 2022); A. Kirby, 'Effectively Engaging Victims, Witnesses and Defendants in the Criminal Courts: A Question of "Court Culture"?' (2017) 12 Crim LR 948–968.

<sup>42</sup> M. Cappelletti, B. Garth and N. Trocker, 'Access to Justice: Comparative General Report' (1976) 40(3/4) *RabelsZ* 669–717.

<sup>43</sup> Notably, though as legal aid has fallen away since the turn of the 21st century, more defendants appear to be unrepresented in court. This means that there may be more of the types of direct engagement between judges and defendants that Hodgson discusses in her response to this paper.

<sup>44</sup> P. Carlen, *Magistrates' Justice* (Martin Robertson 1976).

<sup>45</sup> McBarnet, op. cit., n.4.

<sup>46</sup> Welsh op cit n.41.

<sup>47</sup> T. Cornford, 'The Meaning of Access to Justice' in E. Palmer, T. Cornford, A. Guinchard and Y. Marique (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Bloomsbury Publishing 2016) 28.

<sup>48</sup> A. Adams-Prassl and J. Adams-Prassl, 'Systemic Unfairness, Access to Justice and Futility: A Framework' (2020) 40(3) *OJLS* 561–590.

<sup>49</sup> Welsh, op. cit., n.41.

<sup>50</sup> L. Welsh and M. Howard, 'Standardization and the Production of Justice in Summary Criminal Courts: A Post-Human Analysis' (2019) 28(6) *Social S&LS* 774–793.



participants to suffer further exclusion as non-members of the professional network, which operationalises these processes through the use of jargon and legalese. Indeed, Flynn and Hodgson's edited collection on access to justice highlights how both legal aid budget cuts *and* increasingly bureaucratic approaches to criminal justice lead to unmet need in the justice system.<sup>51</sup> Through these processes, the culture of criminal courts can intensify the marginalisation of lay participants, who are – as Carlen noted – unable to fully engage in the proceedings as a result of a number of factors including courtroom layout, and jargon and signalling between court personnel, alongside bureaucratic requirements to process cases at speed.<sup>52</sup> Legalese plays a significant role in the marginalisation of lay participants.<sup>53</sup> Implicit references to legal provisions by professional members of the court offer lay participants fewer opportunities to understand and engage with the cases that they are involved in.

As will be apparent, while we value diverse approaches to access to justice, each of our research goes beyond outcomes and vindication of rights, and considers the ability of lay participants to fully understand and engage in the criminal justice process as a key part of access to justice that enhances the legitimacy of criminal proceedings. Indeed, Tyler's extensive work (below) has demonstrated the importance of perceptions of legitimacy in the criminal process for defendants, victims, and society at large.

### 3.3 | Legitimacy

The study of 'legitimacy' and its conceptualisation has been prominent across a variety of disciplines in recent decades, including the social sciences, law and humanities. Broadly speaking, it is argued that for institutions to maintain a valid claim to authority, they need to be regarded as legitimate by the citizens subject to that authority.<sup>54</sup> Legitimacy sets limits on power<sup>55</sup> and can promote voluntary cooperation among members of the public.<sup>56</sup> Crucially, legitimacy is 'dialogic' in nature – entailing an ongoing 'conversation' between those in power and those subject to it<sup>57</sup> – and context-specific.<sup>58</sup> Scholars have sought to distinguish between conceptualisations of 'objective' or 'normative' legitimacy, in which the focus is on the degree to which institutions of the state meet ethical standards in practice, and 'subjective' legitimacy, whereby the focus is on citizens' perceptions.<sup>59</sup> The focus here is on the latter, both in recognition of the 'dialogic' nature

<sup>51</sup> A. Flynn and J. Hodgson, *Access to Justice and Legal Aid* (Bloomsbury Publishing 2017).

<sup>52</sup> Carlen, op. cit., n.44; Welsh, op. cit., n.41.

<sup>53</sup> Welsh, op. cit., n.41.

<sup>54</sup> D. Beetham, *The Legitimation of Power* (1st edn, Springer 1991); T.R. Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 *Annu. Rev. Psychol.* 375–400.

<sup>55</sup> I. Loader and R. Sparks, 'Unfinished Business: Legitimacy, Crime Control and Democratic Politics' in J. Tankebe and A. Liebling (eds), *Legitimacy and Criminal Justice* (OUP 2013) 105–126.

<sup>56</sup> Tyler, op. cit., n.54.

<sup>57</sup> A. Bottoms and J. Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) 102(1) *J. Crim. L. & Criminology* 19–170.

<sup>58</sup> M. Radburn and C. Stott, 'The Social Psychological Processes of "Procedural Justice": Concepts, Critiques and Opportunities' (2019) 19(4) *CRJ* 421–438.

<sup>59</sup> M. Hough, *Good Policing: Trust, Legitimacy and Compliance* (Policy Press 2021).

of legitimacy<sup>60</sup> and because subjective legitimacy can be empirically measured.<sup>61</sup> Moreover, the study of legitimacy provides a rationale for examining lay participation that goes beyond legal procedure and is rooted in wider questions of societal structure.

Using qualitative data, comprising interviews with lay participants and observations of court proceedings, Kirby devised a framework for understanding legitimacy in the criminal courts through the lens ‘engagement’.<sup>62</sup> Here, ‘engagement’ is defined as the extent to which a lay individual (i) is aligned with the court process and (ii) participates in it. This can be located within existing discussions of empirical legitimacy,<sup>63</sup> whereby alignment reflects ‘shared values’ between citizens and authorities, and participation reflects ‘expressed consent’ for authority. Participation – the degree to which an individual understands proceedings and expresses themselves – is thus a core dimension of this framework, acting as a behavioural indicator of the individual’s expressed consent for the court’s authority. This, in conjunction with examining an individual’s degree of alignment with the court process, helps us to better understand legitimacy in the courts.<sup>64</sup>

High levels of engagement, such as when an individual cooperates voluntarily, understands proceedings and can express themselves where necessary, is indicative of strong legitimacy. Weak levels of engagement or disengagement – such as when an individual’s participation is based on fatalism, instrumental motivations (such as fear of sanction) or expressed in terms of active resistance to, or withdrawal from, court processes are indicative of strain or deficit within the legitimacy dialogue.<sup>65</sup> Sources of strain need to be grappled with if the courts are to maintain a valid claim to power.<sup>66</sup>

### 3.4 | Procedural justice

Questions about how to address sources of strain in the legitimacy dialogue between lay participants and those in a position of authority within the courts highlight the need to understand what drives legitimacy. Existing research has pointed to several drivers, or sources, of legitimacy, including procedural justice, distributive justice and effectiveness.<sup>67</sup> Here we will focus on procedural justice because (i) this is widely regarded to be the central driver of legitimacy,<sup>68</sup> and (ii) it lends itself well to the theme of ‘participation’.

<sup>60</sup> Bottoms and Tankebe, op. cit., n.57.

<sup>61</sup> Hough, op. cit., n.59.

<sup>62</sup> A. Kirby, ‘Witnessing (Dis)engagement: A Framework for Understanding Legitimacy in the Criminal Courts’ (2024) 64(1) Br. J. Criminol. 34–50.

<sup>63</sup> Such as Beetham, op. cit., n.54; J. Jackson, J.K. Pósch, T.R. Oliveira et al., ‘Fear and Legitimacy in São Paulo, Brazil: Police-Citizen Relations in a High Violence, High Fear City’ (2022) 56 LSR 122–145.

<sup>64</sup> Kirby, op. cit., n.62.

<sup>65</sup> Id.

<sup>66</sup> Beetham, op. cit., n.54; Bottoms and Tankebe, op. cit., n.57; Kirby, op. cit., n.62.

<sup>67</sup> J. Sunshine and T.R. Tyler ‘The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing’ (2003) 37(3) LSR 513–548; M. Hough, J. Jackson and B. Bradford, ‘Legitimacy, Trust, and Compliance: An Empirical Test of Procedural Justice Theory Using the European Social Survey’ in J. Tankebe and A. Liebling (eds), *Legitimacy and Criminal Justice: An International Exploration* (OUP 2013) 327–349; A.Z. Huq, J. Jackson and R. Trinkner, ‘Legitimizing Practices: Revisiting the Predicates of Police Legitimacy’ (2017) 57 Br. J. Criminol. 1101–1122.

<sup>68</sup> Id.

Procedural justice is widely associated with the work of Tom Tyler and concerns the ways in which citizens are treated by those in authority. Though the exact relationship between procedural justice and legitimacy is subject to debate,<sup>69</sup> it is argued that if lay participants feel they have been treated fairly and respectfully by those in authority, they will be more willing to accept judicial outcomes, even when those outcomes are unfavourable to them.<sup>70</sup> Tyler specified four features of procedural justice in the courts.

1. Voice: Lay participants should be given the chance to 'tell their side of the story in their own words' (p. 30) and to feel that their views are considered before decisions are taken.
2. Neutrality: Decision makers are neutral and apply agreed rules consistently and transparently.
3. Respect: All those holding authority within the courts should provide lay participants with necessary information and ensure that they are treated respectfully, courteously and politely.
4. Trust: This recognises that perceptions of the character of the decision maker influence lay participants' overall interpretations of legal authorities. Lay participants should thus feel that they are treated sincerely, considerately and without prejudice.<sup>71</sup>

Participation is thus an 'intrinsic part of' procedural justice<sup>72</sup> and, we would argue, vice versa. Procedurally just treatment can enhance participation by supporting understanding and expression and promoting alignment with the court process. This is evident in lay participants' accounts of feeling treated with consideration and respect by court practitioners, feeling listened to and included in proceedings, and being provided with the necessary information. Encouragingly, research has found that professionals and practitioners working within the courts acknowledge the importance of meaningful participation of, and interactions with, lay individuals, and recognise it as legitimising.<sup>73</sup> However, while procedural justice allows us to examine 'micro' interactions between lay participants and court authorities, it is also important to look at how macro- and meso-level issues intersect with procedural justice and shape perceptions legitimacy.<sup>74</sup> Macro-issues may include wider issues of societal structure, such as racial, social and gendered (in)justice and the overall structural confines of the adversarial court system, while meso-issues include the ways in which policies and decision-making outside the immediate courtroom environment have an impact on how participation plays out in the courtroom.<sup>75</sup> Forms of procedurally just treatment that operate within the confines of the overall court structure do not equate to limitless participation that disregard established legal conventions but instead focus on promoting a procedurally just culture within the courtroom. This may include measures such as ensuring that all lay participants are acknowledged, provided with the necessary information, have the opportunity to have their questions answered and are able to provide the necessary information to the court, and

<sup>69</sup> Bottoms and Tankebe, *op. cit.*, n.57; D.S. Nagin and C.W. Telep, 'Procedural Justice and Legal Compliance: A Revisionist Perspective' (2020) 19(3) CPP 761–778.

<sup>70</sup> T. R. Tyler, 'Procedural Justice and the Courts' (2007) 44 CR 26–31.

<sup>71</sup> *Id.*

<sup>72</sup> McKeever, *op. cit.*, n.24.

<sup>73</sup> A. Kirby, 'Conceptualising Participation: Practitioner Accounts' in J. Jacobson and P. Cooper (eds), *Participation in Courts and Tribunals: Concepts, Realities and Aspirations* (Bristol University Press 2020).

<sup>74</sup> Loader and Sparks, *op. cit.*, n.55; R. Martin and B. Bradford, 'The Anatomy of Police Legitimacy: Dialogue, Power and Procedural Justice' (2021) 25(4) *Theor. Criminol.* 559–577; Kirby, *op. cit.*, n.62.

<sup>75</sup> Kirby, *op. cit.*, n.62.

the avoidance of belittling forms of cross-examination or displays of banter between professionals which can be perceived as exclusionary.<sup>76</sup>

## 4 | FUTURE TRAJECTORIES

If we are to improve our field of understanding and debate around participation in criminal justice, we need to consider areas that require development and how the JLS can contribute to these emerging narratives. McKeever et al. identified the importance of an individual's attitudinal dimension in relation to access to justice,<sup>77</sup> through which Byrom recognises that changes to policies and procedures must consider the likely impact on people's behaviour in the real world.<sup>78</sup> For many practical and ethical reasons, it has often been difficult to include lived and lay experience of the criminal process in socio-legal studies of participation in criminal justice. Despite these difficulties, there is an increasing focus on 'lived experience' and co-production via research *with* (rather than *on*) marginalised groups. This means including those with lived experience (such as defendants, victims, witnesses) within research design, fieldwork and dissemination.<sup>79</sup> Socio-legal studies of criminal justice have increasingly incorporated the views and perceptions of lay members of the public, such as Newman and Dehaghani<sup>80</sup> and Jacobson et al.<sup>81</sup> Moreover, Leader's work demonstrates the value of allowing people to explain their experiences of the justice system in their own words.<sup>82</sup> As with many studies seeking to examine meanings and perceptions among those with lay or lived experience of the courts, there are limits to representativeness and generalisability. However, studies of this nature provide in-depth and narrative accounts that allow the nuance and complexity of criminal justice interactions to be examined and can be situated within relevant social contexts. Again, the JLS has enhanced scholars' ability to take these steps through publication of the various case studies that exist about the current state of the criminal justice system, meaning that data can be compared, contrasted and areas for development identified.

Taking steps to increase understanding of the lived experience of participation in criminal justice may also help to move us away from some of the binaries traditionally associated with debates around access to justice and move us further towards viewing the criminal justice system, participation and access to justice as wider social processes. Tata's work on reshaping views of sentencing in their social contexts is an excellent example of how we can reconsider the understanding of the justice system,<sup>83</sup> and we could see that approach broadened into other areas of the criminal justice system through the lens of lived experience.

<sup>76</sup> Kirby, op. cit., n.41.

<sup>77</sup> McKeever et al., op. cit., n.23.

<sup>78</sup> Byrom, op. cit., n.36.

<sup>79</sup> See, for example G. Buck, P. Tomczak and K. Quinn, 'This Is How It Feels: Activating Lived Experience in the Penal Voluntary Sector' (2022) 62 Br. J. Criminol. 822–839.

<sup>80</sup> D. Newman and R. Dehaghani, *Experiences of Criminal Justice: Perspectives from Wales on a System in Crisis* (Bristol University Press 2023).

<sup>81</sup> J. Jacobson, G. Hunter and A. Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (Bristol University Press 2015).

<sup>82</sup> Leader, op. cit., n.26.

<sup>83</sup> C. Tata, *Sentencing: A Social Process* (Palgrave Pivot 2020).

We are both currently involved in research about lived experience of criminal justice. One such project is 'Lived Experiences of the Law'.<sup>84</sup> This project adopts a narrative interviewing approach to examine how lay perceptions and expectations of legal rights are shaped by formal and informal encounters with the law over time and across jurisdictions (criminal and family). This project is led by Gillian Hunter, conducted in partnership with Revolving Doors charity, and the research team includes peer researchers with lived experience of the law who are involved in conducting interviews, co-analysing data and participating in policy workshops. The co-production element of this study also includes seeking feedback on emerging findings from research participants. A recent pilot policy workshop provided a space for people with lived experience of the family courts, members of the judiciary, voluntary sector services and other relevant stakeholders to come together and co-produce reform recommendations, which were informed by findings from the study pilot.<sup>85</sup>

The second project examines the experiences of people who have sought to have their conviction or sentence rectified by the Court of Appeal and/or the CCRC.<sup>86</sup> This involves interviews with people who have such experience but also engagement with their families, feedback on the project by an advisory board that includes a person with lived experience and engagement with support and campaign organisations experienced in this topic.

In addition to the data that are produced by work involving lived experience, these studies offer a rich source of methodological information around issues of access, sampling, ethics and positionality, and have related implications for dissemination and knowledge exchange. Lived experience and co-production research facilitates communication in different formats, forums and media, including and beyond traditional academic outputs. Both projects aim to present data in a range of ways according to their audience, including through policy briefings, blogs, film and media dissemination. It would be excellent to see discussion and debate about such methodological issues being further promoted and highlighted via the JLS.

## 5 | CONCLUSION

We have set out to chart some of the trends that have developed in socio-legal studies of criminal justice in the last 50 years. We can see that socio-legal studies have come to play a vital role in developing knowledge across disciplines, allowing the disciplines to learn from each other and developing new narratives rather than operating in silos. We can also see the development of narratives designed to include voices which have historically been marginalised from analysis of the criminal justice system, moving into recent trends which encourage greater inclusion of those with lived experience.

This does, of course, lead to further considerations around the various shapes that lay people's rights, participation and access to justice could and should take. This includes interlinking the issues discussed here with those of legal scholars and practitioners. Debates may range from: varying perceptions of the meanings of participation and how these are compared with the day-to-day realities within the courtroom; how participation intersects with discussions around professional

<sup>84</sup> <<https://www.nuffieldfoundation.org/project/lived-experience-of-the-law-a-research-and-policy-project>>

<sup>85</sup> G. Hunter, M. Thomas and N. Campbell, *Experiences of Public Law Care Proceedings: A Briefing on Interviews with Parents and Special Guardians*. (Revolving Doors 2024).

<sup>86</sup> L. Welsh and A. Clarke, *Applicants' Experience of the Criminal Cases Review Commission (CCRC)* University of Sussex <<https://hdl.handle.net/10779/uos.29155226.v1>>

and lay dynamics; and the limits of participation. As with any process, the aims may fail to match the lived realities, something which is exemplified by the research we have discussed here.

The JLS can play an important role in contributing to and extending some of these important considerations. In its 50 years of production, the JLS has become the leading British periodical for socio-legal studies, and has proved itself adaptable to developing trends in a range of socio-legal methodologies and jurisdictions. There is no doubt it will continue this tradition and enhance the ability of scholars to produce and disseminate innovative and influential work in decades to come.

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