

Abstract

This article discusses empirical approaches to criminal procedure, focusing on three broad and recurring themes that reflect the complex nature of the criminal justice system as a social institution: legal culture, discretion, and policy. It first considers criminal justice in the context of its sociopolitical culture, taking into account the place of legal and occupational cultures and the ways that they influence criminal justice law and practice. It also looks at culture as rhetoric before reviewing studies that explore some routine criminal justice practices, particularly how criminal justice institutions, such as the police and the prosecution, exercise discretion, and factors that affect a jury's decision-making. Finally, it examines the relationship between law and policy, and more specifically how public policies (such as austerity) impact criminal justice practices, and how empirical research on law has contributed to evidence-based policy.

Keywords

criminal procedure, criminal justice, legal culture, discretion, policy, sociopolitical culture, rhetoric, police, prosecution, jury

Empirical Approaches to Criminal Procedure

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I. Introduction

It is difficult to think of any area of law where empirical research can be more valuable in understanding its core than that of criminal justice, or more precisely, criminal procedure. As Meares suggests, empiricism's relevance to criminal procedure is almost banal.¹ In operationalizing the norms of criminal law and justice, criminal procedure defines the limits of state power in bringing offenders to justice, and it sets the conditions under which individual freedoms can be restricted or removed. In this way criminal justice is an important manifestation of state power and sovereignty and the values upheld by the state, or at least the government of the day. Understanding the nature and exercise of this power beyond the rhetorical claims of government has the potential to tell us something about the fundamental relationship between the state and the individual.

Empirical research is well placed to contribute to this understanding. Statistical information can provide crucial baseline data, demonstrating the dominant forms of case disposal, attrition rates within certain offense types, or the different case pathways and outcomes experienced by young offenders or those of color, for example. Qualitative studies are able to go beyond this and unpack legal actors' motivations as well as the institutional, economic, sociopolitical, and professional drivers and constraints they experience in carrying

¹ Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—And Three Answers*, 517 U. Ill. L. Rev. 851, 852 (2002).

out their role. Observational methods in particular show us the “fine-grained institutional details” and the ways that processes and organizations function in practice—not only in the binary sense of what is within or outside what is permitted by the law, but also in the vast expanse that lies between these two points, in the exercise of discretion.²

In addition to deepening our understanding of the practices of criminal justice, we might also consider why we need empirical evidence to understand criminal procedure at all. Why do we not assume that criminal justice practice conforms to the rhetoric of the law and simply trust state officials to do a good job in keeping us safe and punishing only those guilty individuals? By asking this question, we are suggesting that empirical researchers are inherently skeptical. This skepticism is important in a democratic society, given that criminal justice deals with the exercise of the coercive power of the state. Independent empirical accounts of practice can reveal unknown and unforeseen ways in which law operates, offering the perspectives of those operationalizing the criminal process as well as those who are its subjects. It provides a broader understanding of legal, occupational and political cultures, the ideologies of legal actors, and the impact of these features on the daily experiences of suspects, defendants, victims, witnesses, and those working within the criminal justice process. It interrogates external factors such as compliance with human rights standards and pan-European legislative measures; domestic policies such as managerialism and austerity that demand faster, cheaper justice; and more overtly political drivers that govern and shape criminal justice in sometimes unarticulated ways. And perhaps most important, in mapping the exercise of state power, it can provide a form of accountability and a measure of legitimacy.

² Robert M. Lawless, *What Empirical Legal Scholars Do Best*, 87 *Temple L. Rev.* 711, 715 (2015).

A chapter of this nature is necessarily selective. It would be impossible to do justice to the huge variety of empirical studies on criminal justice across different topics and jurisdictions. Instead, we have chosen three broad and recurring themes that capture something of the criminal justice system as a complex social institution—legal culture, discretion, and policy. In the first section, we explore criminal justice from a sociopolitical perspective, examining the place of legal and occupational cultures and their influence on criminal justice law and practice. The second section focuses on the studies that shed light on some routine criminal justice practices, particularly how criminal justice institutions, such as the police and the prosecution, exercise discretion, and factors that influence juries' decision-making. Finally, the last section investigates the relationship between law and policy, that is, how public policies (such as austerity) impact criminal justice practices, as well as how empirical research on law has facilitated evidence-based policy.

II. Legal Culture, Rhetoric, and Reality

By referring to criminal justice as a system, we do not mean to suggest that it is a well-orchestrated unit, comprised of interdependent official agencies working toward a clear and common goal. This conjured harmonious image is a long way from the realities of criminal justice, where multiple and sometimes competing aims are pursued by different participants, who may be in ignorance of one another, or in competition over the allocation of responsibility or funding. These contrasting aims influence the way in which those working in criminal justice agencies perceive their own role, and the development of professional cultures and ideologies in response to the challenges and constraints of practice.³ Added to

³ Malcolm Davies et al., *Criminal Justice* 11 (2010).

this, the decisions of federal-level and supreme courts, or the supranational layers of European Union (EU) criminal justice and the fair trial requirements of the European Convention on Human Rights (ECHR), place demands on national systems that are sometimes hard to incorporate.⁴ Thus, decision-making, albeit undertaken by the individuals within criminal justice institutions, should be seen as part of a wider collectively defined enterprise.

This holistic perspective, as Hawkins has argued, is the key to the comprehension of decision-making in the criminal process.⁵ Hawkins suggests that the social context, which shapes the decision-making process, can be understood in three dimensional layers, namely *surround*, *field*, and *frame*. The *surround* is concerned with the social, political, and economic environment that influences all forms of individual and organizational decisions within the criminal justice system. This includes: public concerns over terrorist threats, potential riots, or other forms of antisocial behavior; financial constraints and a diminishing budget of public spending on criminal justice sectors; and the publication of crime statistics and their political implications. The idea of the *field* describes a more proximate legal decision-making context defined by political conceptions of the ends that are served by the law, by legal regulations that are designed to secure those ends, and by political perceptions

⁴ Jacqueline Hodgson, *EU Criminal Justice: Crime Control and Due Process within a Framework of Mutual Recognition*, 37 N.C.J. Int'l L. & Com. Reg. 307 (2011); Jacqueline Hodgson, *Safeguarding Suspects' Rights in EU Criminal Justice: A Comparative Perspective*, 14 New Crim. L. Rev. 611 (2011); see also Donald Dripps, *On Reach and Grasp in Criminal Procedure: Crawford in California*, 37 N.C.J. Int'l L. & Com. Reg. 349 (2011).

⁵ Keith Hawkins, *Order, Rationality and Silence: Some Reflections on Criminal Justice Decision-Making*, in *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* 187 (Loraine Gelsthorpe & Nicola Padfield eds., 2003).

of how those provisions ought to be used in order to further this objective. The term *frame* is concerned with a number of variables that form the subjective aspects of decision-making. It can refer to cognitive matters of the individual or illicit considerations such as the social class, ethnicity, or agenda of the accused.

A. Sociopolitical Culture

As we focus on *surround* for a moment, we see that a number of empirical studies suggest that the criminal process cannot be meaningfully understood apart from its sociopolitical culture. Here criminal procedure is not merely a branch of law; it is an integral part of a superstructure, which appreciates the “meaningful nature of the social world and the phenomena studied.”⁶ To understand how criminal justice functions, one must therefore consider a variety of social, economic, and political factors that serve as constraints and drivers of criminal justice in a particular context, studying how the wider social environment shapes the criminal process and its daily practices, and the impact that criminal justice has on society.

This broader sociopolitical context is often more apparent when looking comparatively at another legal system. A good example of this contextual approach is Mike McConville et al.’s empirical inquiry into criminal justice in China.⁷ After immersion within that system for a significant period of time, the authors emphasize that Chinese criminal justice cannot simply be approached by relying on the “usual analytical grids,” such as its promulgated laws, official documents, the roles of legal actors, or even public hearings, all of which have reached their limits in this particular instance. The authors conclude that the system can only

⁶ David Matza, *Becoming Deviant* 85 (1969).

⁷ Mike McConville et al., *Criminal Justice in China: An Empirical Inquiry* (2011).

be understood through knowing the specific sociopolitical context within which the criminal justice apparatus operates that “gives it its character, infuses it with particular values, determinants and performance indicators—which are necessarily largely systemic and non-individuated—and directs the conduct of those who run it on a daily basis.”⁸

If we stay with China for a moment, we note that this finding is also reflected in Mou’s research of the Chinese prosecution service, conducted through extensive observations, case file analysis, and semi-structured interviews.⁹ She suggests that the unique supervisory function of the Chinese prosecution service and its relationship with other criminal justice institutions (such as the police and the courts) should be set against China’s specific political backdrop, which was influenced by the Soviet legal system. The behavior of prosecutors cannot be understood with reference only to the law. Institutional and political mandates inform all aspects of the prosecution function and better explain the nature and motivation of prosecutorial decision-making.

The significance of the social and political background to a criminal justice system can also be found in other comparative empirical studies. For instance, Cape and Namoradze indicate that some Eastern European institutions are also influenced by the country’s Soviet legacy, which in many ways hinders the effectiveness of criminal justice reforms and remains a continuing dominant force.¹⁰ Field’s observation of the *cour d’assises* suggests that French criminal courts’ preoccupation with the defendant’s character can be traced back to the

⁸ *Id.* at 450.

⁹ Yu Mou, *Overseeing Criminal Justice: The Supervisory Role of the Public Prosecution Service in China*, 44 *J.L. & Soc.* 620 (2017).

¹⁰ Ed Cape & Zaza Namoradze, *Effective Criminal Defense in Eastern Europe* 445–68 (2012).

French Revolution, which embedded the value of social cohesion.¹¹ Also in France, Hodgson's ethnography of investigation and prosecution explored the nature of judicial supervision as it operated in practice and as understood by legal actors themselves.¹² She found that most of the supervision is carried out by the public prosecutor, who, although accountable to the Minister of Justice and working closely with the police, is understood as an independent judicial officer. Key to this understanding of the prosecutor's role is the strength and pervasiveness of the French Republican tradition, which sees prosecution accountability to the executive, and so to the people, not as an impediment, but a guarantee of independence.¹³ Comparative studies in particular demonstrate that this broader politico-legal context is important in understanding the construction of the prosecution function within different processes of criminal justice.¹⁴

B. Occupational Culture

In addition to the wider political culture within which criminal justice operates and by which it is shaped, the working culture of legal actors often exerts a more immediate influence on

¹¹ Stewart Field, *State, Citizen and Character in French Criminal Process*, 33 J.L. & Soc. 522 (2006).

¹² Jacqueline Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (2005).

¹³ The recent jurisprudence of the European Court of Human Rights (ECtHR) has, however, found the French public prosecutor not to be a judicial officer for the purpose of Article 5 ECHR. See Jacqueline Hodgson, *The French Prosecutor in Question*, 67 Wash. & Lee L. Rev. 1361 (2010).

¹⁴ Jacqueline Hodgson, *The Democratic Accountability of Prosecutors in England and Wales and France: Independence, Discretion and Managerialism*, in *Prosecutors and Democracy: A Cross-National Study* (Máximo Langer & David Sklansky eds., 2017).

how work is carried out. This can be expressed as ideas, values, or attitudes shared by the group; or a process by which “patterns learned and created in the mind” are embodied in communication and other interpersonal relationships; or in more concrete form as “artifacts” produced out of institutional creativity that is distinctive to the group.¹⁵

In this sense, culture constitutes the concept of the *field* that influences decisions relating to the criminal process, of which a dominant example is that of police subculture. Reiner, for example, defines police culture as “complex ensembles of values, attitudes, symbols, rules, recipes, and practices.”¹⁶ The study of police culture was derived from early ethnographic studies inside the police, where researchers found that the way officers enforce the law is rarely guided by legal precepts, but rather some “informal occupational norms and values operating under the apparently rigid hierarchical structure of police organizations.”¹⁷

Since then, police occupational culture has been researched extensively to understand the exercise of police discretion and the negative “working personality” that potentially subverts or obstructs external reforms affecting officers.¹⁸ For example, Fielding approached police

¹⁵ Ben Bowling & Coretta Phillips, *Racism, Crime and Criminal Justice* 81 (2001).

¹⁶ Robert Reiner, *The Politics of the Police* 118 (2010).

¹⁷ Janet Chan, *Changing Police Culture*, 36 *Brit. J. Criminology* 109, 110 (1996). For early ethnographic studies see Michael Banton, *The Policeman in the Community* (1964); Jerome Skolnick, *Justice without Trial* (1966); Maureen Cain, *Society and the Policeman's Role* (1973); William Westley, *Violence and the Police* (1970); Peter Manning, *Police Work: The Second Organization of Policing* (1977); Peter Manning, *The Encyclopedia of Police Science* (William Bailey ed., 1989); Simon Holdaway, *Inside British Police: A Force at Work* (1983).

¹⁸ Andrew Goldsmith, *Taking Police Culture Seriously: Police Discretion and the Limits of Law*, 1 *Policing & Society: Int'l J.* 91 (1990); Janet Chan, *Changing Police Culture*, 36 *Brit. J. Criminology* 109 (1996); Janet Chan, *Changing Police Culture: Policing in a Multicultural Society*

culture from a gendered perspective and argued that the aggressive, competitive, macho values perpetuated by so-called “canteen culture” contribute to miscarriages of justice and could lead to a crisis of police legitimacy.¹⁹ Holdaway’s study of race within the police force suggests that the racialized rank-and-file occupational culture of officers is an outcome of a social process that constructs and sustains “race” in relation to the demands of the work they undertake.²⁰ In recent research on the recorded stop and search/account reform in the wake of the death of Stephen Lawrence,²¹ Michael Shiner probed into the psychological defense mechanisms (such as denial, projection, splitting, and fantasies) employed by the police to ward off threats to their institutional ego. In examining the way that the police react to “the trauma of institutional racism,” Shiner argues that police culture should be perceived as the

(1997); Peter Waddington, *Police (Canteen) Sub-culture: An Appreciation*, 39 *Brit. J. Criminology* 287 (1999); Jan Terpstra & Dorian Schapp, *Police Culture, Stress Conditions and Working Styles*, 10 *Eur. J. Criminology* 57 (2013).

¹⁹ Nigel Fielding, *Cop Canteen Culture*, in *Just Boys Doing Business* 46, 62–64 (Tim Newburn & Elizabeth A Stanko eds., 1994).

²⁰ Simon Holdaway, *Constructing and Sustaining “Race” within the Police Workforce*, 48 *Brit. J. Sociology* 18 (1997).

²¹ The changed stop and search/account practice requires police officers to make a record of all stops and to provide a copy to the person who has been stopped. This is one of the seventy reform recommendations made by the judicial inquiry (Macpherson report) that looked into matters arising from the death of a black British teenager who was murdered in an unprovoked, racially motivated attack in London in 1993. The Macpherson report examined the flawed investigation conducted by the police and declared that the failure was caused by “a combination of professional incompetence, institutional racism and a failure of leadership by senior officers” Cluney MacPherson, *The Stephen Lawrence Inquiry: Report of an Inquiry* 46.1 (1999).

collective minds of those involved, which are able to respond defensively to resist external forces, thereby blunting policing reform.²² Presenting an alternative account, Waddington reminds us that what the police discuss in the “remote recessive” canteen may not automatically be translated into their actions on the street.²³ The concept of “canteen culture” is in many ways merely a rhetoric that “gives meaning to experience and sustains occupational self-esteem”;²⁴ hence it should not be seen simply as a taken-for-granted explanation accounting for all negative values, beliefs, and attitudes (such as macho, racist, and sexist) of the police.

C. Culture as Rhetoric

In addition to identifying factors that shape decision-making, socio-legal researchers also explore the significance of the gap between law’s rhetoric and law’s practice. Findings of malpractice or rule breaking are themselves problematic, but when situated within the wider framework of legal procedural protections and guarantees, they become more so. For example, poor quality custodial legal advice also has implications for the treatment of the accused later in the criminal process.²⁵ In contrast to unrepresented suspects who are

²² Michael Shiner, *Post-Lawrence Policing in England and Wales*, 50 *Brit. J. Criminology* 935, 949 (2010).

²³ Peter Waddington, *Police (Canteen) Sub-culture: An Appreciation*, 39 *Brit. J. Criminology* 287, 297 (1999).

²⁴ *Id.* at 295.

²⁵ Andrew Sanders et al., *Advice and Assistance at Police Stations and the 24-Hour Duty Solicitor Scheme* (1989); Mike McConville & Jacqueline Hodgson, *Custodial Legal Advice and the Right to Silence* (1993).

understood to have been denied the advice and protection provided by a lawyer, appeal courts in the 1990s were unwilling to allow appellants who, on the face of it, received custodial legal advice, to challenge interrogation evidence. In fact, many of these suspects had not received anything that could meaningfully be termed “legal assistance,” meaning that appellants were credited with a benefit that they had never received.²⁶

This “culture as rhetoric” approach emphasizes the extent to which reality on the ground differs from the idealized legal culture inscribed within the text and the rhetoric of the law. Within French criminal justice, features central to inquisitorial systems, such as the ideology of judicial supervision, are generally considered to define its structures and procedures, providing different procedural guarantees to those found in more party-based adversarial procedure. Within this legal tradition, the judiciary is entrusted as the guardian of the public interest to safeguard the rights of the accused, requiring the defense to play a much smaller part than in the adversarial model. In contrast to the confirmation bias that has been observed in police investigations and miscarriages of justice in a variety of jurisdictions, the single, neutral judicial enquiry offers a model of non-partisan enquiry in which evidence exculpating, as well as incriminating, the suspect is investigated. However, Hodgson found that in practice, in most cases judicial supervision is understood to be provided by the public prosecutor (the *procureur*), rather than the more independent *juge d’instruction*. Furthermore, prosecutorial “supervision” is largely bureaucratic and retrospective, offering little more than a file-based review.

Sanders et al. have observed in relation to England and Wales that there is a gap between the rhetoric of the overall system (which claims to be due process), the legal rules (which

²⁶ Jacqueline Hodgson, *Tipping the Scales of Justice: The Suspect’s Right to Legal Advice*, 1992

reflect mixed values), and the reality (which is largely crime control).²⁷ For example, the law requires reasonable suspicion in the exercise of police powers, but McBarnet has observed that many police practices that might popularly be understood as deviant are in fact permitted within the text of the law, which allows for broad discretion. Furthermore, even where procedures are clearly established in statute, working rules and practices are used to circumvent these requirements.²⁸ For example, Dixon et al. found that officers got around the statutory requirement of reasonable suspicion as a base for a stop and search by asking the person if the officer could search them.²⁹ If he or she agreed, the police considered this a “consent” search rather than a search carried out under the Police and Criminal Evidence Act 1984 (PACE) and so statutory safeguards were considered not to apply. The net result of legal rules regulating behavior or criminal procedure, therefore, can be to legitimate the reverse.

In China, McConville et al. observe that law reform resulted only in a change in the way that state officials *account for* their behaviors that, otherwise, remain largely unaffected.³⁰ Mou too found that despite the introduction of new due process safeguards in the Criminal Procedure Law in 2012, criminal justice continues to be dominated by the working rules of the legal apparatus, structured by the political mandate, the value of hierarchical structures

²⁷ Andrew Sanders et al., *Criminal Justice* 741 (2010).

²⁸ Doreen McBarnet, *Conviction: Law, the State and Construction of Justice* 4–5 (1981).

²⁹ David Dixon et al., *Safeguarding the Rights of Suspects in Police Custody*, 1 *Policing & Soc’y: Int’l J.* 115 (1990).

³⁰ McConville et al., *supra* note 7, at 425–74.

and deference to authority, and a strong emphasis on retribution.³¹ State officials who work under the new legal regime have made no changes in their routine practices and ideology. In this respect, it is not surprising that there exists an entrenched culture within the Chinese system, which ignores or violates the formal due process rules that are in many ways alien to it. This systemic transgression undermines the authority of the law, yet the law retains its power: it legitimates state practice and prevents the expression of critical judgment.

As with the various accounts of police culture, empirical researchers purporting to observe the same phenomena—the work and practices of criminal defense lawyers—do not always agree. McConville et al.’s wide-ranging study of the organization and practices of defense lawyers in forty-eight firms across England and Wales was criticized by Travers for presenting “a partial and one-sided account of the day-to-day activities of . . . criminal defense lawyers” built up by “a great deal of selection and omission” that “shows lawyers and clerks in a bad light.”³² In attacking McConville et al.’s analysis and research strategy, Travers used his own four-month ethnographic research in one law firm as an example, citing the importance of thick description of the context. In his research of “the work and talk” in the law firm, Travers proffered a glowing account of defense lawyers unreservedly devoted to their clients and satisfied clients who appreciated the standard of care they received.³³ However, in addition to the limited sample of a single firm, Bridges et al. warn that by

³¹ Yu Mou, *Written Evidence and the Absence of Witnesses: The Inevitability of Conviction in Chinese Criminal Justice* 249–79, PhD thesis, University of Warwick 2015.

³² Max Travers, *The Reality of Law: Work and Talk in a Firm of Criminal Lawyers* 370 (1997).

³³ Max Travers, *Preaching to the Converted? Improving the Persuasiveness of Criminal Justice Research*, 37 *Brit. J. Criminology* 359 (1997).

treating lawyers' perspectives unquestioningly, Travers's approach could easily "end up accepting at face value practitioners' own rationalizations for their (mal)practices."³⁴

In the face of the oppositional images portrayed by the two studies, Newman's empirical enquiry was tasked to judge "which finding held good" by adopting an integrated methodology.³⁵ Although (a little like Travers) Newman's initial motivation was to support "the noble cause" that legal aid lawyers pursue, what he observed in the law firms had strong resonance with McConville et al.'s conclusion.³⁶ In this updated study of the lawyer-client relationship, the professional standards of defense lawyers have not improved: they were observed to have treated their clients with disrespect, pushed them to plead guilty, and utilized their professional knowledge to control their clients. Newman illustrates the sharp discrepancy between how lawyers presented themselves when interviewed and the way they acted when observed. On the one hand, lawyers in interviews described themselves as dedicated professionals who fostered healthy relations with other legal actors for the benefit of the client; on the other, the participant observation revealed a rather different and depressing reality, "damning for this branch of the legal profession and tragic for the clients who depend on them."³⁷

In this regard, the professional claims made by the lawyers in Newman's study can also be understood as rhetoric. Joan Leach suggests that rhetoric, as a conviction in the power of

³⁴ Lee Bridges et al., *Can Critical Research Influence Policy? A Response to Max Travers*, 37 *Brit. J. Criminology* 378, 379 (1997).

³⁵ Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* 27–30 (2013).

³⁶ *Id.* at 143–68.

³⁷ *Id.* at 147–52 & abstract.

language, can shape the perception of the world and structure our way of thinking.³⁸ It is a pervasive way of communicating and interacting with people, which is constructed to justify a position as well as to attack any counterarguments. Thus, there are two functions of rhetoric: building up an idealized account (the “reification”) and undermining of the reality discovered by others (the “ironizing”).³⁹ Whereas empirical researchers should be wary of rhetoric that seeks to deflect from the truth, it is not meaningless and therefore does not warrant being dismissed. Rhetoric can express the law’s claims and aspirations, and the ways that legal actors such as defense lawyers and public prosecutors believe themselves to be acting—protecting their client’s interests or overseeing the police investigation to discover the truth. At the end of his book, Newman suggests that rhetoric somehow embodies the values that did and could exist and reflects the optimistic belief held by criminal defense lawyers.

III. Justice on the Ground and Discretionary Power

In outlining the broad setting of a cultural *surround* or organizational *field* that criminal justice activities take place, we have noted that one of the main achievements of empirical research has been to provide detailed accounts of how certain factors and considerations have influenced the way legal actors respond to legal and organizational mandates—the *frame* that decision-makers employ in deciding. This section highlights some of the empirical research

³⁸ Joan Leach, *Rhetorical Analysis*, in *Qualitative Researching with Text, Image and Sound: A Practical Handbook* 207 (Martin Bauer & George Gaskell eds., 2000).

³⁹ Jonathan Potter, *Representing Reality: Discourse, Rhetoric and Social Construction* 106–08 (1996); Newman, *supra* note 35, at 151.

on decision-making processes within the criminal justice system in England and Wales. We focus in particular on the exercise of discretion, a cornerstone of criminal justice that infuses all areas of practice and reveals something of the limits of the law as well as the broader exercise of power.

A. Police Discretion: Stop, Search, Charge

As already discussed, the disconnect between the official description of the way a certain process ought to work and how that process operates in practice is well recognized in empirical research. Institutions as large as the police and the Crown Prosecution Service (CPS), for instance, are inevitably subject to gaps between perception and reality, with their practices varying within units and at different organizational levels. It is also impossible to prescribe every action of police officers or prosecutors—the law necessarily allows them a broad degree of discretion in determining how to respond to each situation or case. One of the missions of empirical research is to make people aware of what exists in the gaps between theory and practice and in many instances, this will focus on how and why discretion is exercised in particular ways.⁴⁰ For example, in McConville et al.'s study of the construction of prosecution cases in England and Wales, the authors argue that the police, who dominate the evidence-gathering process, are accorded a high degree of autonomy to disregard competing accounts and construct the file of evidence toward conviction.⁴¹ In mapping the way that prosecution cases develop from vague suspicions to carefully constructed edifices, their research demonstrates the ways in which rules and laws governing detention and

⁴⁰ Anthony Edwards, *The Value of Empirical Research in Criminal Justice*, 8 *Crim. L. Rev.* 533 (1997).

⁴¹ Mike McConville et al., *The Case for the Prosecution*, ch. 5 (1991).

interrogation can assist the police to create a suspect population. This understanding of case construction challenges Packer's Due Process/Crime Control dichotomy and undercuts the due process principles championed by PACE.⁴² As McBarnet has argued in relation to the permissive nature of the legal text, their findings suggest that the rules that provide safeguards for the suspect can also serve crime control purposes: the enabling law is employed by the police to rationalize behavior undertaken for other reasons, and is rarely a consideration to regulate their behaviors.

In line with this pessimistic view of enabling law, the open-textured nature of the law and the latitude it offers are also exemplified in literature around the police power to stop and search. Empirical studies have suggested that ethnic minorities are selectively targeted by the police for discriminatory reasons.⁴³ Following the inquiry into the murder of the black teenager Stephen Lawrence, the Macpherson report found that the police enjoyed only low levels of trust within ethnic minority communities, and stops and searches were clearly the "core conclusion of racist stereotyping."⁴⁴ The use of racial stereotyping, and poor

⁴² Herbert Packer, *The Limits of the Criminal Sanction*, Part II (1968).

⁴³ These empirical studies include David Smith, *Police and People in London: A Survey of Londoners* (1983); David Dixon et al., *Reality and Rules in the Construction and Regulation of Police Suspicion*, 17 Int'l J. Sociology L. 185 (1989); Clive Norris et al., *Black and Blue: An Analysis of the Influence of Race on Being Stopped by the Police*, 43 Brit. J. Sociology 207 (1992); Monica A Walker & Tony Jefferson, *Ethnic Minorities in the Criminal Justice System*, 1992 Crim. L. Rev. 83; Wesley Skogan, *The Police and the Public in England and Wales: A British Crime Survey Report* (1990); Wesley Skogan, *Contacts Between Police and Public: Findings from the 1992 British Crime Survey* (1994); Ben Bowling & Coretta Phillips, *Racism, Crime and Criminal Justice* (2001); Laurence Lustgarten, *The Future of Stop and Search*, 8 Crim. L. Rev. 603 (2002).

⁴⁴ MacPherson, *supra* note 21.

relationships between the police and the black community in particular, is not new,⁴⁵ and recent studies point to continuing concerns in the use of stop-and-search powers, though researchers disagree as to how this should be measured: with reference to the residential population or those present in the area — the “availability” approach.⁴⁶

The use of stereotyping in police stop and search is not limited to skin color. As Quinton et al. suggest, even clothing and vehicle type can influence the exercise of police discretion.⁴⁷ In his ethnographic study, Choongh reports that the police have an entrenched prejudice against working class people, who are often seen as criminal-minded and dangerous. Parallel with McConville et al.’s research, he also argues that the law enables, rather than controls or constrains police discretion. In his account of police station procedures, police activities cannot be understood simply by reference to their responsibility to control and prevent crime—more importantly, they embody order and authority; suspects, who normally come from less privileged social backgrounds and ethnic origins, represent a threat to the orderly middle-class fabric and are in need of discipline by coercive power.⁴⁸

⁴⁵ See Leslie Scarman, *The Scarman Report: Report of an Inquiry* (1982).

⁴⁶ Marian FitzGerald & Rae Sibbitt, *Ethnic Monitoring in Police Forces* 64 (1997); HM Inspectorate of Constabulary, *Winning the Race: Embracing Diversity* 73(2000); MVA & Joel Miller, *Profiling Populations Available for Stops and Searches* 13–31 (2000); Joel Miller et al., *Measuring Stops and Searches: Lessons from U.K Home Office Research*, 4 *Just. Res. & Pol’y* 143 (2002); Philip Waddington et al., *In Proportion: Race, and Police Stop and Search*, 44 *Brit. J. Criminology* 889 (2004).

⁴⁷ Paul Quinton et al., *Police Stops, Decision-Making and Practice* vi (2000).

⁴⁸ Satnam Choongh, *Policing as Social Discipline* 44–106 (1997).

Aside from illicit social considerations, police discretion is also influenced by other variables, especially the context in which the investigation takes place.⁴⁹ For example, Kemp found that the “offences brought to justice” (OBTJ) performance indicator plays a significant role in the police’s decision-making process. The police performance indicator is part and parcel of a “command and control” style of managerial framework designed to ensure a commitment from the top down of the hierarchical organization. To meet the target, the majority of cases (including borderline criminal activities) are channeled to formal actions once they are reported to the police. In order to fulfill the required detection rate, the police target “easy hits” and minor offenses, failing to record crimes honestly, misusing cautions etc. to manipulate the figures. In attempting to reduce the number of cases dropped with no further action, the logic of response rate measures is to widen the net of criminalization to target easy wins, often at the expense of investigating more serious offenses.⁵⁰

It is interesting to see how empirical research has identified the same trends across quite different jurisdictions, with the same consequences. In France, this same process has occurred, as so-called “third way” alternatives to prosecution and trial are used to ensure that fewer cases are discontinued. The result in many areas is that prosecutors are focusing on minor offenses and devoting insufficient time and resources to more serious crime. This in turn has caused deterioration in prosecutor-police relations.⁵¹ Officers resent the close

⁴⁹ Loraine Gelsthorpe & Nicola Padfield, *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* ch. 1 (2003).

⁵⁰ Vicky Kemp, *PACE, Performance Targets and Legal Protections*, 4 *Crim. L. Rev.* 278 (2014).

⁵¹ Hodgson, *supra* note 14; Jacqueline Hodgson & Laurène Soubise, *The Public Prosecutor in France*, in *Oxford Handbooks Online: Criminology and Criminal Justice* (2016).

scrutiny of their actions concerning relatively minor offenses, preferring the more light touch oversight that they enjoy in their relationship with the *juge d'instruction*.⁵² Similarly in China, the police are found to have diverted a significant amount of resources into dealing with minor drug dealing and dangerous driving offenses in order to fulfill performance indicators, paying little attention to more serious and complex fraud offenses.⁵³

B. Police Discretion: Enabling Suspects' Rights

Discretion is not confined to whether certain rules and procedures are conformed with; it is also about *how* the requirements are met in fulfilling the aims and purposes of criminal justice. It can be embodied in the police's attitude, for instance, which has an impact on the rights of the defense. When suspects are confused or uncertain whether to seek advice from legal counsel in police stations, the suggestion of the police (and especially of the custody officer, understood as the gatekeeper to the suspect's rights) might tip the balance.

Empirical research over the last three decades has identified that the police in a number of procedurally very different jurisdictions have resisted the introduction of a statutory right to custodial legal assistance in similar ways. Typically they may discourage the suspect from requesting a solicitor by telling him that he does not need one, by failing to mention that

⁵² Hodgson, *supra* note 12, at 154–61, 185–89, 202–03.

⁵³ Yu Mou, *The Constructed Truth: The Making of Police Dossiers in China*, 26 Soc. & Leg. Stud. 69 (2017).

advice is free at the point of delivery,⁵⁴ or by persuading suspects who have sought legal advice to change their mind.⁵⁵

The techniques used by the police to undermine suspects' access to legal rights can be imperceptible. For instance, defense lawyers could be barred from entering the police custody suite, creating an impression for suspects that requesting a lawyer would be time-consuming. This in turn might lead the suspect to give up the request, or to switch to less effective legal services, such as telephone contact. Similarly, whereas delays can be caused by a host of factors (such as the police investigation or charging process), police have constantly utilized the risk of delays to discourage suspects from having legal advice.⁵⁶ Here, it is not the wider legal culture that has been seen to determine police behavior (the *surround* or the *field*), but the more immediate threat (as the defense lawyer is understood to be) to the police mandate to investigate and gather evidence for the prosecution. In particular, the presence of the defense lawyer on police territory challenges the *frame* of police culture: the questioning of the suspect in order to obtain an admission. It is only when the defense lawyer's presence is seen to be compatible with the police task of interrogation (for example, when represented

⁵⁴ Sanders et al., *supra* note 25; Dixon et al., *supra* note 29; Choongh, *supra* note 48; Hodgson, *supra* note 12; Ed Cape & Jacqueline Hodgson, *The Right of Access to a Lawyer at Police Stations: Making the European Union Directive Work in Practice*, New J. Eur. Crim. L. 450 (2014).

⁵⁵ These techniques have been observed in England and Wales, France, and the Netherlands. See Jodie Blackstock et al., *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* 274–75 (2014); Vicky Kemp, *Bridewell Legal Advice Study: Adopting a Whole-System Approach to Police Station Legal Advice* 18 (2013).

⁵⁶ Sanders et al., *supra* note 25, at 23; Hodgson, *supra* note 12, at 192–93; Kemp, *supra* note 55, at 3.

suspects regularly refrain from exercising their right to silence) that her role comes to be accepted.

In addition to managing suspects' access to defense lawyers, the police have substantial control over the disclosure of evidence. They have the option to decide the amount of evidence that they are willing to disclose to the suspect or the suspect's lawyer, either before or during the interview. This has resulted in varied legal practices, with some officers being more forthcoming with evidence and others tending to hold back information from the defense.⁵⁷ Sukumar et al.'s observations of police station disclosure reveal that while police have generally satisfied the minimal requirement, evidence disclosure tactics (such as withholding information prior to the interview, exaggerating the strength of the evidence, use of evidence as an ambush) have frequently been used to pressure the suspect into making an admission of guilt.⁵⁸

C. Prosecutorial Discretion

Criminal justice as a system is organized to allow decisions to be made serially. When a police case is handed on from the police to the prosecution, until (and even at) the point of

⁵⁷ Vicky Kemp, "No Time for a Solicitor": Implications for Delays on the Take-Up of Legal Advice, 3 *Crim. L. Rev.* 184 (2013); Divya Sukumar et al., *Behind Closed Doors: Live Observations of Current Police Station Disclosure Practices and Lawyer-Client Consultations*, 12 *Crim. L. Rev.* 901 (2016); Divya Sukumar et al., *How the Timing of Police Evidence Disclosure Impacts Custodial Legal Advice*, 20 *Int'l. J. Evid. & Proc.* 200 (2016); Divya Sukumar et al., *Strategic Disclosure of Evidence: Perspectives from Psychology and Law*, 22 *Psych. Pub. Pol'y & L.* 306 (2016).

⁵⁸ Sukumar et al., *supra* note 57.

case disposition, discretionary power is dispersed across criminal justice institutions and individuals.⁵⁹ Prosecutorial discretion, for instance, enables the prosecutor to “respond sensitively to the great diversity of factual situations and policy issues.”⁶⁰ Although prosecutorial discretion is traditionally associated with the opportunity principle, which grants prosecutors a broad flexibility to take into account factors other than evidence in making their decisions, it is also compatible with the principle of legality, provided that the decision is not arbitrary.

In England and Wales where the opportunity principle prevails, the decision to prosecute was historically part of the police function. This historical legacy has meant that the relatively recently created public prosecution service, the Crown Prosecution Service (CPS), remains subordinate to the power of the police in many respects. This relationship was presaged in Moody and Tombs’s empirical study of the Scottish procurator fiscal, which suggested that the prosecution service, even if it has a sphere of responsibility that is independent, is still largely dependent on the police who provide the information and determine the way in which it is presented.⁶¹ This concern was further raised in Mansfield and Peay’s research, which concluded that independence for the prosecutor may not be created simply by demarcating

⁵⁹ Keith Hawkins, *Order, Rationality and Silence: Some Reflections on Criminal Justice Decision-Making, in Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* 8–9 (Loraine Gelsthorpe & Nicola Padfield eds., 2003).

⁶⁰ Andrew Ashworth, *The “Public Interest” Element in Prosecutions*, 9 *Crim. L. Rev.* 595 (1987).

⁶¹ See Susan Moody & Jacqueline Tombs, *Prosecution in the Public Interest*, 129–30 (1982).

the role of investigators of crime and reallocating responsibility for the decision to prosecute.⁶²

Issues concerning how the Crown Prosecutor exercises discretion are explored in the Home Office research conducted by Crisp and Moxon. They found that although a good proportion of cases have effectively been filtered out of the system following the establishment of the CPS, some of the cases were dropped unnecessarily, because the police did not always respond to Crown Prosecutors' requests for further investigations.⁶³ With friction between the CPS and the police continuing to cause problems, the government proposed placing Crown Prosecutors in police stations in order to be on hand to provide pre-charge advice and to improve working relationships by fostering closer cooperation with the police. A pilot was conducted in twelve sites, but Hunt and Baldwin's study of the scheme concluded that it was ineffective. Crown Prosecutors have no authority to direct the police to take their advice, and so making prosecutors available for pre-charge advice and consultation will "cater only for those officers perceptive enough to recognize a legal problem when they see one. This means that those officers in greatest need of advice are the ones least likely to benefit from what is on offer."⁶⁴

The subsequent statutory charging scheme saw prosecutors located in police stations in England and Wales to advise on charges. It was hoped that this might improve relations and

⁶² Graham Mansfield & Jill Peay, *The Director of Public Prosecutions: Principles and Practices for the Crown Prosecutor* 46–50 (1987).

⁶³ Debbie Crisp & David Moxon, *Case Screening by the Crown Prosecution Service: How and Why Cases Are Terminated* 28–29 (1994).

⁶⁴ Adrian Hunt & John Baldwin, *Prosecutors Advising in Police Stations*, 8 Crim. L. Rev. 521, 536 (1998).

provide a more unified approach, but it was discontinued in favor of a centralized telephone system. Soubise's research suggests that co-location at the police station did not improve police-prosecutor relations. Crown Prosecutors told her in interviews that officers sometimes sought to pressure them into charging suspects: "The disadvantage [of being based at the police station] is basically the police can exercise pressure on you. You might have two or three officers . . . and they're sort of asking you questions and challenging your decisions there and then, which can be quite, I suppose, intimidating."⁶⁵

Crown Prosecutors exercise considerable discretion when deciding whether a prosecution is justified on evidential grounds and in the public interest. The prosecution in England and Wales has long been criticized for not being robust enough to terminate those cases that do not have enough evidence to reach the threshold to stand jury trial. In the Crown Court study conducted by Zander and Henderson, judges and barristers suggested that weak prosecution cases account for 20 percent of all contested cases, and a number of them (4–8 percent) ended in conviction.⁶⁶ In exploring the reasons that led the CPS to continue these weak cases, Baldwin pointed out that the CPS decision is overly dependent on police views (following the findings of McConville et al.), and the failure of these prosecution cases lies primarily in its reliance on a single, often vulnerable, witness, where there are unpredictable contingencies that cause collapse of prosecutions.⁶⁷ Strikingly, he found that many difficult cases where weaknesses were identified and consciously itemized still proceeded to trial.

⁶⁵ Laurène Soubise, *Prosecutorial Discretion and Accountability: A Comparative Study of France and England and Wales*, PhD thesis, University of Warwick 202 (2016).

⁶⁶ Michael Zander & Paul Henderson, *Crown Court Study* 184–85 (1993).

⁶⁷ John Baldwin, *Understanding Judge Ordered and Directed Acquittals in the Crown Court*, 8 *Crim. L. Rev.* 536 (1997).

CPS lawyers relied on “instinct,” “feeling,” and “intuition,” rather than required legal techniques, in conducting case reviews. When applying the evidential sufficiency test, Crown Prosecutors were unduly influenced by the gravity of the offense, thereby “clouding their judgments, pervading their thinking and approach, and inhibiting them in taking decisions to discontinue prosecutions.”⁶⁸

D. Discretion in the Jury Room

In contrast to the professional and legally regulated role played by police, prosecutors, and defense lawyers, the jury exists to provide a lay perspective. The judge provides legal direction, but ultimately, the jury determines the facts that in turn determine the guilt of the accused. With few rules on how jurors should evaluate evidence and determine the truth of witnesses, how do they arrive at their decision? As the least regulated and least visible form of decision-making in the criminal process (jurors provide no reasons for their verdict), juror behavior has long fascinated researchers. What happens when cases are tried by jury? Is this a fair and democratic process that ensures justice by injecting the experiences of ordinary citizens into adjudication on criminal guilt? Or is it an unregulated and unaccountable process that permits prejudice and discrimination into the justice process, without the possibility of challenge? Does lay decision-making temper the extremes of repeat player adversarial lawyers, or are jurors unable to resist the persuasive tactics of courtroom advocacy?

Despite legislation constraining empirical research conducted by using real jurors, there has been a large body of literature in common law countries (especially England and Wales, the United States, New Zealand, Canada, and Australia) devoted to different aspects of the

⁶⁸ *Id.* at 551.

jury undertaken by legal scholars, social scientists, and experimental psychologists,⁶⁹ many of them well captured in Darbyshire et al.'s comprehensive literature summary.⁷⁰

Early in the 1970s, McCabe and Purves conducted arguably the best shadow jury experiment to date. The experiment was a replica of a real jury working process: the subjects were selected from the electoral register, watched court trials, deliberated and delivered verdicts just like actual juries.⁷¹ A number of studies have also been dedicated to exploring the views of participants involved in the trial,⁷² observing “simulated” or “mock” juries,⁷³ comparing jury verdicts with professional opinions,⁷⁴ and conducting questionnaires with actual jurors after the trial.⁷⁵

⁶⁹ Penny Darbyshire, *What Can We Learn from Published Jury Research? Findings for the Criminal Court Review*, 2001 Crim. L. Rev. 970.

⁷⁰ Penny Darbyshire et al., *What Can the England Legal System Learn from Jury Research Published up to 2001?* (2002).

⁷¹ Sarah McCabe & Robert Purves, *The Shadow Jury at Work* 1–15 (1974).

⁷² Mike McConville & John Baldwin, *Jury Trial* (1979).

⁷³ Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies and Jury Bias*, 14 L. & Hum. Behav. 409 (1990); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 L. & Hum. Behav. 29 (1994); Amy L. Otto et al., *The Bias Impact of Pre-trial Publicity on Juror Judgements*, 18 L. & Hum. Behav. 453 (1994); David Rosenhan et al., *Notetaking Can Aid Juror Recall*, 18 L. & Hum. Behav. 53 (1994).

⁷⁴ Harry Kalven & Hans Zeisel, *The American Jury* (1966); Dennis J. Devine et al., *Strength of Evidence, Extraevidentiary Influence, and the Liberation Hypothesis: Data from the Field*, 33 L. & Hum. Behav. 136 (2009).

⁷⁵ Zander & Henderson, *supra* note 66.

More recent mock jury studies have diverged in their findings. Cheryl Thomas has explored the fairness of jury decision-making, using a “multi-method” approach, which encompasses a controlled simulation study, a large-scale analysis of all jury verdicts in Crown Courts in England and Wales between October 2006 and March 2008, and a post-trial survey of 668 jurors in sixty-two cases.⁷⁶ It examined some of the most critical factors that potentially influence the fairness of jury decision-making, including racial discrimination, consistency of jury verdicts, and jurors’ comprehension of directions on the law. This research has dispelled some myths of jury trial, such that juries in certain areas do not convict and juries tend to acquit for certain offenses. The analysis suggests that jury trials are in fact very efficient, with less than 1 percent of juries being discharged and hung juries only occurring in 0.6 percent of the cases. Perhaps one of the more surprising findings of this study is that there are more convictions than acquittals in rape cases, which are even higher than other serious offenses, including attempted murder, manslaughter, and causing grievous bodily harm.⁷⁷

Finch and Munro, and Ellison and Munro’s research has focused on jury verdicts in rape trials and presents a less positive picture of juror behavior and motivation. The authors conducted a series of focus groups, trial reconstructions, and trial simulations to explore jurors’ understanding and discussion of the critical issues in trials of rape cases, such as consent, complainant’s intoxication status, public expectations regarding socio-sexual conduct, and the complainant’s credibility in relation to her conduct during and post-

⁷⁶ Cheryl Thomas, *Are Juries Fair?* (2010).

⁷⁷ Focusing on conviction rates takes no account, however, of the very high attrition rate in rape cases, from low reporting to failure to charge or prosecute.

assault.⁷⁸ In Ellison and Munro's recent study, 160 members of the public observed mini rape trial re-enactments, before then deliberating in jury groups. The authors found that juries, whether provided with written or oral directions, tended to fall back on their own personal views and experiences, rather than taking seriously the evidential burden to prove guilt beyond reasonable doubt. They also sought to understand how jurors might be affected by different modes of presenting evidence—live video links, screens, and prerecorded evidence.⁷⁹ Research suggests that victim witnesses find these measures helpful,⁸⁰ but the impact on jury decision-making had not been explored—in particular, the impact of

⁷⁸ Emily Finch & Vanessa Munro, *Breaking Boundaries? Sexual Consent in the Jury Room*, 26 Leg. Stud. 303 (2006); Emily Finch & Vanessa Munro, *Lifting the Veil: The Use of Focus Groups and Trials Simulations in Legal Research*, 35 J.L. & Soc. 30 (2008); Louise Ellison & Vanessa Munro, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, 49 Brit. J. Criminology 202 (2009); Louise Ellison & Vanessa Munro, *Of "Normal Sex" and "Real Rape": Exploring the Use of Socio-sexual Scripts in (Mock) Jury Deliberation*, 18 Soc. & L. Stud. 291 (2009); Louise Ellison & Vanessa Munro, *Getting into (Not) Guilty: Examining Jurors' Deliberative Process in, and Beyond, the Context of a Mock Rape Trial*, 30 Leg. Stud. 74 (2010); Louise Ellison & Vanessa Munro, *A "Special" Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials*, 23 Soc. & Leg. Stud. 3 (2014) [hereinafter *A "Special" Delivery?*].

⁷⁹ Louise Ellison & Vanessa Munro, *"Telling Tales": Exploring Narratives of Life and Law Within the (Mock) Jury Room*, 35 Leg. Stud. 201 (2015).

⁸⁰ Becky Hamlyn et al., *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Development and Statistics Directorate 2004); Mandy Burton et al., *Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales*, 11 Int'l. J. Evid. & Proc. 1(2007).

disrupting the sequential narrative that jurors often find helpful in making sense of evidence. The research found that there was no clear and consistent response to different modes of evidence presentation in cases of adult female rape complainants. They were as likely to result in adverse prejudice to the victim as to the accused, leading the authors to conclude that their overall impact was not detrimental to the fairness of the trial.⁸¹

IV. Policy and Criminal Justice Reforms

Gessner and Thomas suggest that sociolegal research can be roughly categorized into two types: one evaluates the way law functions in a particular organizational, social, or political context; the other concerns policies, especially the intended or unintended consequences of law enforcement.⁸² When it comes to criminal justice research, however, this distinction is very much blurred. Policy implementation has been an integrated part of the operation of the law enforcement agencies, and empirical researchers often cannot avoid considering the influence of policy when making sense of the way legal institutions function. Policy itself is a broad term and might be understood as a course of action proposed by the governing body of the state (public policy), which impacts on various aspects of the domain of criminal justice; but in less normative terms, it can also represent a system of more or less formalized principles adopted by criminal justice institutions (criminal justice policy) to guide decisions and pursue specified outcomes. Depending on the specific meaning that is implied, it can be a

⁸¹ Ellison & Munro, A “*Special*” *Delivery?*, *supra* note 78.

⁸² Volkmar Gessner & John Thomas, *Socio-legal Research and Policy Studies: A Review of the Issues*, 10 L. & Pol’y 85 (1988).

component part of the social *surround, field, and frame* that shapes criminal justice decision-making.

A. Austerity and Criminal Defense and Prosecution Practices in England and Wales

The consequences of government public sector austerity for the delivery of legal services and all aspects of the criminal justice process from policing through to prisons are examples of how public policies can direct criminal justice. Although an integral component of the right to a fair trial (Article 6 ECHR) and a necessary part of the proper functioning of adversarial procedure, the funding and provision of criminal defense services has been hard hit by government austerity. By 2014, the cost-cutting of public spending on criminal legal aid in England had accumulated to over £120 million, which, inevitably, has had a detrimental effect on defense rights of the accused.⁸³ For instance, Skinns indicates that since the fee paid to visit the police station has been capped to include all costs incurred, duty lawyers are less willing physically to attend police interviews. As such, some suspects have to rely on telephone legal advice.⁸⁴ Alongside concerns around confidentiality, the absence of face-to-face contact undermines the lawyer's ability to establish the trust necessary for an effective

⁸³ Asher Flynn & Jacqueline Hodgson, *Access to Justice and Legal Aid Cuts: A Mismatch of Concepts in the Contemporary Australian and British Legal Landscapes*, in *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need 1–2* (Asher Flynn & Jacqueline Hodgson eds., 2017).

⁸⁴ Layla Skinns, "I'm a Detainee; Get Me Out of Here"—Predictors of Access to Custodial Legal Advice in Public and Private Police Custody Areas in England and Wales, 49 *Brit. J. Criminology* 399 (2009).

lawyer-client relationship and so to assess and advise the suspect and begin to develop a defense strategy.⁸⁵ As already discussed, evidence disclosure by the police is also contingent on personal relationships, so it is unlikely that the lawyer will learn as much about the case without attending the police station in person. For these kinds of reasons, earlier research suggests that telephone advice can jeopardize the already vulnerable situation of the suspect by giving inappropriate advice.⁸⁶ It should be noted that telephone advice is not always the result of a lack of resources. Only one-eighth of suspects receiving custodial legal advice in Scotland between 2011 and 2013 were personally attended by a lawyer; the majority were provided with telephone advice. Lawyers in Scotland have argued that within an evidential framework that requires corroboration, silence is always the best advice, and this could be done as effectively by telephone as in person.⁸⁷ Some, however, recognize that silence is a difficult position to maintain, and the lawyer's presence can assist suspects to resist persistent police questioning, especially if they have not been questioned by the police before.⁸⁸

Furthermore, empirical studies have demonstrated the poor quality of criminal defense work that existed in the 1980s and 1990s, with unqualified and untrained clerks carrying out the bulk of case preparation, including attending clients in the office and at the police station.⁸⁹ Motivated by the greater profit that could be made from such wide-scale delegation,

⁸⁵ Blackstock et al., *supra* note 55.

⁸⁶ Mike McConville et al., *Standing Accused: The Organization and Practices of Criminal Defense Lawyers in Britain* 8–83 (1994).

⁸⁷ Blackstock et al., *supra* note 55, at 287–90.

⁸⁸ *Id.* at 289.

⁸⁹ Sanders et al., *supra* note 25; McConville & Hodgson, *supra* note 25, at 21; McConville et al., *supra* note 86, at 83–86.

criminal defense solicitors failed to act in their client's interests. Since then, significant improvements have been made to professional training, practice, and regulation to address these deficiencies, and these reforms have been reinforced by a legal aid framework that tied public funding to the quality of defense services.

However, despite the improvements made in defense lawyer standards⁹⁰ and the often onerous nature of professional regulation, the sustained period of disinvestment in legal aid has made the reversion to poor practices almost inevitable. Within this chastened financial environment, lawyers have been found to adapt the service they are able to provide to "make ends meet," with discontinuous representation and diminished time devoted to individual cases.⁹¹ The response in practice appears to be in accordance with Gwyn Bevan's supplier-induced demand thesis, which suggests that lawyers who simultaneously determine the cost of their work and secure a targeted income will inevitably abuse their position and conduct superfluous work in order to achieve monetary gains.⁹² Just as Fenn et al. observed in their research, lawyers sensitively adjusted their inputs according to the remuneration they received. The authors identified that when fixed standard fees were introduced that no longer cover the actual costs of defense work, defense lawyers switched to cost-control strategies, such as case-splitting and reduced time investment in case preparation and advocacy, to react to the constrained income.⁹³ In contrast, Bridges et al. found solicitors working in the non-

⁹⁰ Lee Bridge & Satnam Choongh, *Improving Police Station Legal Advice* 139–48 (1998).

⁹¹ Newman, *supra* note 35, at 17–18.

⁹² Gwyn Bevan, *Has There Been Supplier-Induced Demand for Legal Aid?*, 15 Civ. Just. Q. 98 (1996).

⁹³ Paul Fenn et al., *Standard Fees for Legal Aid: An Empirical Analysis of Incentives and Contracts*, 59 Oxf. Econ. Papers 662 (2007).

profit Public Defender Service, where salaries were fixed independently of case numbers or work carried out, perform generally better than private practice lawyers: public defenders were able to provide a more “holistic, client-centered service, and to adopt a more rigorous approach when representing their clients.”⁹⁴

The adoption of practices that seek to maximize efficiency, including the delegation of large portions of work, can also be seen in the working arrangements of the CPS, following the Optimum Business Model, introduced in 2008. Soubise describes how much of the case preparation is conducted by non-solicitors in a centralized and segmented system that sees files passed from one team to another, depending on the stage of the process the case has reached. Oversight by Crown Prosecutors is distant and no single lawyer retains case ownership, making difficult any discussion with defense counsel on disclosure or plea. Court work and trial preparation is also delegated to Associate Prosecutors—paralegals who have experience working in the CPS but who have received just two weeks of legal training. This work should be carried out under the supervision of Crown Prosecutors who alone are authorized to determine the charges to be brought. In practice, Soubise found that the pressure of the magistrates’ court docket required Associate Prosecutors to take decisions independently (sometimes directly contradicting the Crown Prosecutor’s written instructions), and only seek authorization retrospectively. This practice was tacitly acknowledged and the conclusion is that “[c]oncerns over flexibility and speed appear to overcome the need for accountability.” More fundamentally, “[c]uts to legal aid and the increase in the number of unrepresented defendants mean that many magistrates’ court hearings take place without qualified solicitors or barristers representing either party. This

⁹⁴ Lee Bridge, *Evaluation of the Public Defender Service in England and Wales* 255 (2007).

gives credibility to fears of ‘de-lawyerization’ of the magistrates’ court and concerns for the quality of justice in summary proceedings.”⁹⁵

B. Promoting Best Defense Practices in the EU

Internationally, empirical research is also a source of inspiration for constructive and effective programs and policies. In addition to empirical work that seeks to evaluate the success of criminal justice reforms, some studies take a forward-looking approach, providing accounts of practice to inform planned reform. A number of projects funded by the European Commission, for example, have been designed to bring together evidence of best practices as well as an understanding of what works and why. For empirical comparativists, this is a fascinating lens through which to study criminal justice—examining the practices of different criminal processes and the extent to which they are grounded in jurisdiction-specific cultures, and then identifying common strengths and weaknesses in their practical operation in order to shape and ensure the effectiveness of pan-European measures.

A variety of empirical research projects have been connected to specific EU Directives and to EU reform more broadly. Some are primarily desk-based accounts of law and practice, supplemented by interviews,⁹⁶ and others have new empirical data at the heart of the project.

⁹⁵ Soubise, *supra* note 65; Laurène Soubise, *Prosecuting in the Magistrates’ Courts in a Time of Austerity*, *Crim. L. Rev.* (forthcoming 2018).

⁹⁶ Cape et al. conducted a study of effective criminal defense in Europe (Belgium, England and Wales, Finland, France, Germany, Hungary, Italy, Poland, and Turkey) and Cape and Namorradze of Eastern Europe (Bulgaria, Georgia, Lithuania, Moldova and Ukraine). Ed Cape et al., *Effective Criminal Defense in Europe* (2010); Cape & Namorradze, *supra* note 10.

Spronken's study examined the information provided in writing to suspects in EU states, concerning their rights while in police custody immediately following arrest. Using questionnaires and interviews, the researchers gathered accounts of what information was provided and how this was done. Although required by law to provide basic information to suspects, the researchers found that this was done in a variety of ways, many of them wholly inappropriate and ineffective. A number of countries provided information in writing and several adopted the format of a Letter of Rights, but the language and format differed widely. Based on examples of best practices, they recommended the use of a clear and detailed template that ensured compliance with international norms such as the ECHR. The subsequent EU Directive on the right to information in criminal proceedings drew on these findings and included such an indicative Letter of Rights.⁹⁷

Vanderhallen et al.'s study of safeguards for young suspects during police interrogation also adopted a comparative European approach and focused specifically on best practices that might inform the proposed EU Directive.⁹⁸ Using focus group interviews of police, lawyers, and appropriate adults, as well as young suspects themselves, together with audio and video recordings of a sample of interrogations with juveniles, the study found that, despite common obligations under the ECHR, there were significant differences in the ways that young suspects were treated during the criminal investigation and in particular, in the safeguards provided during police interrogation. England and Wales and the Netherlands, for example, treat young suspects in the same way as adults, with the provision of some additional

⁹⁷ Taru Spronken, *EU-Wide Letter of Rights in Criminal Proceedings: Towards Best Practice* (2010).

⁹⁸ The study examined the laws and practices in five EU states: Belgium, England and Wales, Italy, the Netherlands, and Poland. *Interrogation Young Suspects II: Procedural Safeguards from a Legal Perspective* (Miet Vanderhallen et al. eds., 2016).

safeguards, such as the appropriate adult (a parent or other adult whose role is to facilitate communication and ensure that the young person understands the process). Poland and Belgium, on the other hand, adopt a more paternalistic approach, dealing with matters through the family courts. Although apparently less punitive, this approach was found to deny agency to those under investigation; under it, young suspects enjoy fewer rights, yet ultimately, can still have their liberty taken away. This and other findings from the research informed a set of guidelines designed “to contribute to shaping, defining and improving the well-being of juveniles who come into contact with juvenile punitive justice.”⁹⁹

Perhaps the most empirically rich of these recent comparative studies is that conducted across four jurisdictions by Blackstock et al. Researchers observed the detention and interrogation of suspects over a period of seventy-eight weeks, accompanying lawyers and being based in the police station for a number of weeks or months, thereby gaining both a police and defense perspective on the experience of custody.¹⁰⁰ The observation periods were followed by ninety-four semi-structured interviews with police and lawyers in all jurisdictions. Researchers were able to see firsthand how suspects were informed of their rights; were assessed and provided with an interpreter; how they were able to access legal advice and the quality of that advice; and how the police questioned suspects. While some practices reflected different frameworks of legal regulation—such as French lawyers being restricted to a thirty-minute client consultation and playing a passive role during the suspect’s interrogation—other phenomena could be explained within a broader context of reform experience that was less about the specifics of the procedural roots of the jurisdiction and

⁹⁹ *Id.* at 385.

¹⁰⁰ Blackstock et al., *supra* note 55.

more about understanding the degree to which due process reforms had become embedded in a particular criminal process.

This offers valuable lessons for reformers. For example, Dutch police officers were resistant to the idea of lawyers advising suspects and being present in the interrogation room. They felt this new reform would undermine the effectiveness of the investigation and so took steps to discourage suspects from exercising their right to custodial legal advice. Hodgson found that French police responded in the same way in the 1990s when lawyers were first permitted to consult with suspects for thirty minutes prior to the police interrogation, but over time, came to accept this role and even found it to be useful in providing reassurance to detainees.¹⁰¹ The same pattern was also observed in England and Wales in the 1980s following the statutory right to custodial legal advice provided by Section 58 of the Police and Criminal Evidence Act 1984 (PACE).¹⁰²

These reforms occurred in different jurisdictions and in different decades, but the response of the police was the same. As discussed briefly above, believing that lawyers would interfere with and undermine the investigation, encourage the exercise of silence, provide false alibis to ensure suspects did not incriminate themselves, and generally behave in unhelpful or improper ways, officers across all jurisdictions engaged in strategies of rights avoidance designed to ensure that suspects were either unaware of the extent of their rights, or were disincentivized from exercising them. As a result, PACE Codes of Practice were altered to prohibit the police from discouraging suspects to exercise their rights, and EU legislation has also preempted some of these strategies.

¹⁰¹ Hodgson, *supra* note 12, 135–39; Blackstock et al., *supra* note 55, at 298–300.

¹⁰² Sanders et al., *supra* note 25.

V. Concluding Remarks

This brief overview has focused on a selection of empirical research that assists us in understanding criminal justice practices and the way decisions are made in a complex environment. Hence, it is far from a comprehensive account of the empirical studies, and many important works, regrettably, are not included due to limited space. It is well recognized that studying the legal rules alone can offer only limited insights into the way state power is exercised, and legal rules cannot effectively illustrate obscure concepts such as discretion. Therefore, empirical research is a useful tool in exploring these critical aspects of criminal justice.

Edwards argues that the public should not just be aware of what is supposed to happen, but is also entitled to know what actually happens.¹⁰³ Hence, conducting empirical research can be seen as a way of exercising the “right to know”—an engagement of the public and dissemination of knowledge by making specific criminal justice inquiries. When embarking on empirical investigation, researchers face a range of challenges and a journey that is filled with uncertainties, risks, pitfalls, joys, and surprises. This choice, as Burton commented, is an “uncomfortable necessity in that it involves practice and ethical choices which represent real challenges for the researcher.”¹⁰⁴ Although we do not have the room to discuss the methodological issues that exist in collecting and analyzing the data, it is necessary to appreciate the obstacles that empirical researchers often confront—funding, resources, time, training, access to the field and research subjects, experience, cultural and language barriers,

¹⁰³ Edwards, *supra* note 40.

¹⁰⁴ Mandy Burton, *Doing Empirical Research: Exploring the Decision-Making of Magistrates and Juries*, in *Research Methods in Law* 81 (Dawn Watkins & Burton Mandy eds., 2013).

and often uncomfortable relationships—that constrain the success of the research.¹⁰⁵ Despite these challenges, the harvest outweighs the costs. There are also memorable stories behind every project, as many researchers have experienced and recalled.¹⁰⁶ In this regard, empirical research is not merely a productive process of acquiring knowledge, it is also a valuable experience that enriches our life.

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