Handmaidens, partners or go-betweens: Reflections on the push and pull of the judicial and justice policy audience

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Abstract

Debate about the ways in which the credibility of socio-legal empirical work can be compromised by close engagement with policy audiences has long dogged discussions about the possibility of progressive socio-legal agenda. This paper re-examines these critiques by reference to a case study in which the authors worked closely with UK judges and the court service. It argues that many existing accounts of the relationship between the policy audience and researchers frequently rely on overly simplistic conceptualisations of elite state actors and the ways in which empirical researchers engage with the powerful. We suggest that a range of different types of research relationships are possible which we characterise as handmaidens, partners or go-betweens. While acknowledging the importance of interrogating how policy audiences can compromise the independence of academic researchers, we argue that debate has tended to rest on uni-dimensional understandings of the dynamics of interactions with powerful state actors.

Key words

Policy makers; judges; research impact; partiality; stakeholders

Resumen

El debate sobre las formas en que la credibilidad del trabajo empírico socio-jurídico puede verse comprometida por un estrecho compromiso con el público político ha perseguido durante mucho tiempo las discusiones sobre la posibilidad de una agenda socio-jurídica progresista. Este artículo reexamina estas críticas haciendo referencia a un estudio de caso en el que los autores trabajaron estrechamente con jueces y el servicio judicial del Reino Unido. Sostiene que muchos de los relatos existentes sobre la relación entre el público político y los investigadores se basan con frecuencia en conceptualizaciones demasiado simplistas de los actores estatales de élite y de las formas en que los investigadores empíricos se relacionan con los poderosos. Sugerimos que son posibles distintos tipos de relaciones de investigación, que caracterizamos como de sirvientes, socios o intermediarios. Aunque reconocemos la importancia de cuestionar el modo en que las audiencias políticas pueden comprometer la independencia de los investigadores académicos, sostenemos que el debate ha tendido a basarse en interpretaciones unidimensionales de la dinámica de las interacciones con los poderosos actores estatales.

Palabras clave

Responsables políticos; jueces; impacto de la investigación; parcialidad; partes interesadas

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> The policy audience fosters an uncritical acceptance of the status quo and thus diminishes the critical potential of scholarship. And when the policymaker's problems become the scholar's problems, scholarship becomes a means to an end rather than a pursuit for its own sake.
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> (Leo 1996, p. 866)

1. Introduction

In this paper we reflect on the issues that have been so succinctly summarised by Leo (1996) in this quotation. More specifically, we consider what it means to work closely with judges and civil servants when conducting socio-legal empirical research and how such partnerships threaten to compromise academic independence. We respond to arguments that the pull of the policy audience causes research to lose its independent and critical edge when researchers work too closely with or for powerful elites. Critics have long warned socio-legal researchers against the dangers of limiting their research agendas to problems defined by those with power or focusing on the pragmatic at the expense of the theoretical (Campbell and Wiles 1976, Sarat and Silbey 1988, Albiston and Sandefur 2013). Literature in this vein raises issues of great importance about the impact that working with these groups has in shaping the domain of law and society scholarship. This debate can be traced back to broader discussion in the social sciences about the relative value of a purely theoretical or empirical approach to social phenomena, which, in the context of European socio-legal scholarship, has played itself out in discussions about the relationship between the sociology of law and socio-legal studies (Campbell and Wiles 1976, Freeman 1994, Banakar and Travers 2005). There has been a tendency for critics of socio-legal empirical work to assert that to be genuinely critical as a scholar, research must be directed at discrediting the assumptions underlying the existing legal order rather than merely engaging in observing them (Whitford 1989).

Arguments about the pull of the policy audience have particular relevance to contemporary UK academia where there are mounting pressures for academic research to have "impact". However, it is argued that existing debate is sometimes confused about the exact nature of the ills it identifies and would benefit form more nuance. Some of those who have identified the dangers of working with the policy audience are well known and reflexive empirical researchers who have used this debate to reflect on their own dilemmas. Despite this, many critics tend to characterise the relationship between policy makers and socio-legal researchers as a static rather than a dynamic one and fail to draw attention to the day-to-day negotiations and resistance which take place when undertaking work for state agencies. Moreover critiques are in danger of ignoring the potential for internal critique within elites and the possibility of progressives within the policy audience.

In the sections which follow we draw on a project conducted by the authors which involved working closely with judges and the court service. We reflect on the process of carrying out this research in order to construct a typology of relationships between socio-legal researchers and policy-makers which are much more fluid than has been suggested in debate to date. We begin by reviewing debates about the pull of the policy audience in more depth before going on to provide some context about the Supporting Online Justice Project. The article then discusses how existing debate would benefit from a more

in-depth account of the different ways in which socio-legal researchers engage with the policy audience.

2. The pull of the policy audience and the institutional push towards it in the UK

Debate about socio-legal researchers' engagement with policymakers has tended to be negative and based on the assumption that the association is one which taints the purity of the scholarship produced. For some authors, undertaking any empirical study of law is problematic. Nelken (1998) argues that when law is looked at through a sociological lens there is inevitably a danger that its internal epistemological logic is ignored and that sociology's aspirations to scientism transform law into a policy science or hybrid monstrosity that is neither law nor social science. For him, it is sociology's claim to find more objective and realistic ways of understanding law that makes socio-legal studies valuable to policy audiences seeking the legitimacy of evidence-based policies. This link between socio-legal work and objectivity can be traced back to the American Legal Realists (Sarat and Silbey 1988, Trubek and Esser 1989) who frequently placed a premium on the exposure and critique of judicial subjectivity. This has led Trubek and Esser (1989) to claim that "…at the core of Realists' effort to reintegrate academic legal discourse were the very themes which have become troubling in the autumnal period of the law and society movement" (p. 10). Two particular assumptions are seen as emerging from this stance. Firstly, that social science can render law more transparent or efficient by adopting the mantel of a science of law. Secondly, that the creation of policy can be separated from politics (Sarat and Silbey 1988).

A key implication of these arguments is that socio-legal empirical research is frequently treated by its critics as distinct from progressive politics and critical theory. This is because the State and Law are viewed as something to be suspicious as a result of their complicity in the production of the sort of inequality and injustice which they then commission socio-legal researchers to examine. Critical legal scholars have been particularly suspicious of the methods employed by socio-legal empiricists and dubious about their results, viewing their work as reductionist, deterministic and politically conservative (Trubek 1984). By way of example, Lacey (1996) has raised concerns about the technocratic instrumentalism of policy orientated studies which are not explicit about the political or ethical values which underpin them. Viewed in this way critical theorists have a tendency to posit themselves as virgins or intellectual purists. In this narrative, socio-legal empiricists are understood as mere handmaidens of policy audiences who are in danger of enjoying the allure of being in the proximity of the powerful (Sarat and Silbey 1988). Reflecting on the state of the US law and society movement in 1988, Sarat and Silbey saw the undesirable alliance between policy elites of the liberal state and socio-legal scholars as creating an irresistible pull towards the agenda of the policy audience. This possibility of "policy capture" is exacerbated when the State funds the research being conducted or acts as a gatekeeper to research subjects. Mungham and Thomas (1981) remind us that powerful institutions and groups frequently expect something back from the research they enable in this way and in doing so reduce scholarly endeavours from a sociology *of* law to a sociology *for* law. These compelling arguments continue to dog debate about the nature and legitimacy of socio-

legal empirical projects over forty years after they were first raised (see for instance Hunter 2007, Albiston and Sandefur 2013).

These claims are particularly resonant in the contemporary world of socio-legal studies in the UK, where scholars are being incentivised to work with policy audiences. Since 2014, a significant portion of research funding for the Higher Education sector has been distributed through the Research Excellence Framework (REF) which has assessed the quality of research and its "impact" outside of academia.[1] Impact is defined as "an effect on, change or benefit to the economy, society, culture, public policy or services, health, the environment or quality of life, beyond academia" (UK Research and Innovation – UKRI – 2022). Government funded research councils, such as the Economic and Social Research Council, which distribute additional funding to academics through competitive bidding are also paying increasing attention to the impact agenda and encourage evidence of an intention to engage with actors outside of the academy in bids to them (Fransman 2018, p. 185). While the impact agenda is seen positively by some, others have been highly critical of these changes, linking developments to market pressures on the broader university environment (Holmwood 2014, Giroux 2014) or highlighting how they may lead to an underrepresentation of women (Davies *et al.* 2020). Studies of the emotional effects of these changes suggest that there is "a sense of fear and resistance to the perceived deleterious effects of an impact agenda" within the academy (Chubb *et al.* 2017, p. 565). Regardless of how one might value these changes, they produce incentives that make the general gravitational pull towards policy audiences even more compelling.

Arguments about the pull of the policy audience are both persuasive and important but they also deserve to be challenged. Trubek (1984) has argued that critical legal scholars often link empiricism to a range of other things they find undesirable such as positivism, determinism, and pragmatism but that they tend to do so in confused ways. Suggestions that empirical studies of law are inevitably concerned with objectivity and reality or are bound to positivistic approaches constitute a gross simplification and outmoded understanding of contemporary methodologies adopted by social scientists (Trubek and Esser 1989, Fischer 1998). Silbey and Sarat's (1988) call for a reconceptualization of the relationship between law, science, and political order is well made, but the critique of scientism they embark on has also come from within the social sciences. Theories around social constructivism, phenomenology, grounded theory, feminism, post colonialism, critical race theory, positionality, and participatory research have all fundamentally altered the way that qualitative researchers frame the approaches adopted by empiricists, the voices they privilege, and the claims they make on behalf of their data. Indeed, it has been claimed that interpretivist approaches to the study of law, in which the role of meaning in maintaining legal order is examined and a clean break with positivistic approaches is made, actually serves to unite critical and socio-legal scholars (Trubek 1984, Trubek and Esser 1989).

Critics have also tended to be vague about what they mean by the policy audience and equated the term with a conservative elite who are only capable of legitimating hierarchy and domination. One definition is that the policy audience consists of those who make

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[1] This is a process run every 6 or so years in the UK to evaluate research achievements and allocate block grant funding.

or administer policy (Sarat and Silbey 1988) but this characterisation raises as many questions as it answers. As Sanderson (2011) has argued:

> [T]here is considerable complexity around what we define as 'policy' – it is not just specific instruments, measures or legislation, but covers a wide gamut of activities and processes from background ideas, through problem definition, development of strategies, identification of what has been effective elsewhere, implementation and review. (Sanderson 2011, p. 70)

Policy debate, policy making, and policy implementation also involve a spectrum of different institutional and organisational settings (Tate 2020). "Policy makers," "policy elites" or "the policy audience" are not necessarily easily identifiable groups with coherent approaches or consistent sets of attitudes towards a single issue. Is it credible or meaningful to group such a diverse body of actors together or to assume that they make or administer policy without debate or resistance? Does it matter that socio-legal empirical research might be inadvertently policy relevant without being policy led? Is the progressive intellectual approach espoused by critics less biased in its claim to evoke rigorous but balanced intellectual argument than the neoliberal orientation of the empirical work they chart? While social scientists tend to be pessimistic in their dealings with the powerful is it possible for policy makers to pursue progressive research agendas? Are socio-legal empiricists absolved of their collaboration with policy makers if their findings prove unpopular with them?

The discussion in subsequent sections attempts to answer these questions through the lens of an empirical case study which bears many of the hallmarks of approaches that have been subject to critique. The Supporting Online Justice case study described above involved working with judges, civil servants in Her Majesty's Courts and Tribunal Service (HMCTS) who oversee and operate the court service on a day-to-day basis and lay users of the justice system. The judges and civil servants we worked with fall neatly into loose definitions of the policy audience as those who make or administer policy (Sarat and Silbey 1988). We begin by describing the case study and go on to tease out what it reveals about the many ways in which qualitative social scientists might work with judicial "policy makers" and other groups while retaining their intellectual integrity.

3. The Supporting Online Justice Project

The Supporting Online Justice Project was funded by the "Ideas to Address COVID-19" initiative which was a UK Research Council programme specifically designed to support the government in the delivery of essential services during the pandemic (UKRI 2020). The programme sought to fund new research or innovation with a clear "impact" pathway that had the potential to deliver a significant contribution to the understanding of, and response to, the public health crisis (UKRI 2020). The project the authors were funded to undertake ran for 18 months and explored how the effective participation of litigants in online hearings, which became ubiquitous during the pandemic, could be better facilitated.[2] It was designed in a way that put research-informed impact front and centre, addressing a clearly articulated need identified by the research team and

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[2] The Supporting Online Justice Project was funded by the Economic and Social Research Council [Grant Number ES/V01580X/1], under a scheme that was looking for ideas to address COVID 19.

government that litigants needed more support when engaging with the court service. Indeed, Her Majesty's Courts and Tribunals Service (HMCTS 2022) were formally identified as a project partner in the bid. In the course of the research project the authors engaged with a diverse range of people who made or administered policy on a day-to-day basis but had varying degrees of influence. This included clerks, IT support staff, ushers, more senior civil servants responsible for customer support and innovation strategies in HMCTS, civil society actors working in the field, members of the judiciary, members of the public, and interpreters, lawyers and social workers employed by local authorities.

The project involved researching, designing, and testing five films which aimed to help lay users prepare for online hearings.[3] The research process included regular consultation with our HMCTS partners and judges regarding the jurisdictions about which we were making films: the Special Educational Needs and Disability Tribunal, the Social Security and Child Support Tribunal, the Employment Tribunal and the Family Court (private law). It also involved two national surveys with court staff, lawyers and other professional users (n≈600), and an extensive series of focus groups including eight focus groups with professional stakeholders and fourteen focus groups with lay users (including those in food banks and community gardens). The films were developed using a cyclical design and development process, in which a constant loop of research, consultation and development occurred until the films were deemed ready for release to the general public. In short, the Supporting Online Justice Project fitted squarely in the category of research criticised by those concerned about the proximity of socio-legal empirical work to the policy agenda. The research was made possible through government funding, relied on judicial and civil servant gatekeepers, and involved working closely with policy makers and front-line workers, with all the dangers of insider capture that flowed from these conditions.

This choice of case study is not without its problems. It was conducted during a global pandemic which produced unusual incentives for policymakers to draw on experts and to work with them in producing solutions to pandemic specific issues. As such it provides an example of how periods of crisis can mean that it is deemed more acceptable for borders separating policy, media and academic spheres to be disrupted (Andersson 2018, p. 223). The relatively short-term nature of the global crisis generated a sense of urgency and momentum it would not otherwise have had. Reflecting on the research process, the research team have discussed the possibility that, while some of the judges and civil servants we engaged with would have been interested in the research we did under normal conditions, others probably only participated through a sense of public duty in difficult times. This is particularly true of members of the judiciary who had considerable discretion over decisions about participation in the project. It is certainly the case that a host of socio-legal researchers have characterised the judiciary, Ministry of Justice and HMCTS as suspicious or hostile to intellectuals (Paterson 1983, 2013, Harlow 1986, Cowan and Hitchings 2007, Feenan 2008, Hunter *et al.* 2008. See also

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[3] One of the films gave generic advice about how to prepare for an online hearing and the four others were customised to reflect the practices in Social Security and Child Support Tribunals (SSCS), Employment Tribunals, Special Educational Needs and Disability Tribunals (SEND) and private law matters in the Family Court

Judicial Office 2020).[4] However, we argue in the remainder of this article that the case study still has much to offer in discussions about the ways in which working with policy makers might compromise intellectual independence and integrity. In the sections below we consider the many constraints it appeared to impose on our critical and intellectual facilities before going on to explore the possibility of a progressive agenda, intellectual agency, and resistance to conservative norms. While doing so we reflect on a number of the difficult moments in the research projects when a loss of independence was a possibility.

4. Towards a typology of socio-legal empiricism: Handmaidens, Partners, Go-betweens or irritants?

Critics of socio-legal empiricism tend to conceptualise the goals and aims of empirical work as static, rarely reflecting on the everyday dynamics of conducting research or the many ways in which relationships in the field are constantly being re-configured and negotiated. The complexity of obtaining access to research sites and people, gaining credibility and developing working relationships can mean that the relationship between researchers and the policy audience can be fluid, as well as highly context and time specific. Relationships can also change unexpectedly over the course of the research project (Mungham and Thomas 1981). Drawing on the Supporting Online Justice case study we argue that relationships with policy makers fall into one of a number of points on a spectrum from handmaiden to go-between or even irritant and that researchers can move from one category to others within the course of a research project.

4.1. Handmaidens of Policy makers?

As discussed above, critics have warned that a deep rooted and consistent problem with empirical socio-legal work is that it is silent about its politics or denies that empirical research has a politics (Sarat and Silbey 1988, Lacey 1996). This view of the empirical researcher sees them as being akin to a handmaiden of the state. As Figure One suggests this involves them being fed information by policy makers and somewhat subservient to them.[5] Relationships of this kind seem particularly likely when social scientists work within government departments, establish long term relationships with civil servants and the judiciary, and where government departments pay for research framed by academics or commission it.

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[4] There are of course notable exceptions to this. Penny Darbyshire and Alan Paterson have reported that the judiciary have been very supportive of their work.

[5] Having written a first draft of this article we realized that this is also a term that was employed by Hutter and Lloyd-Bostock (1997).
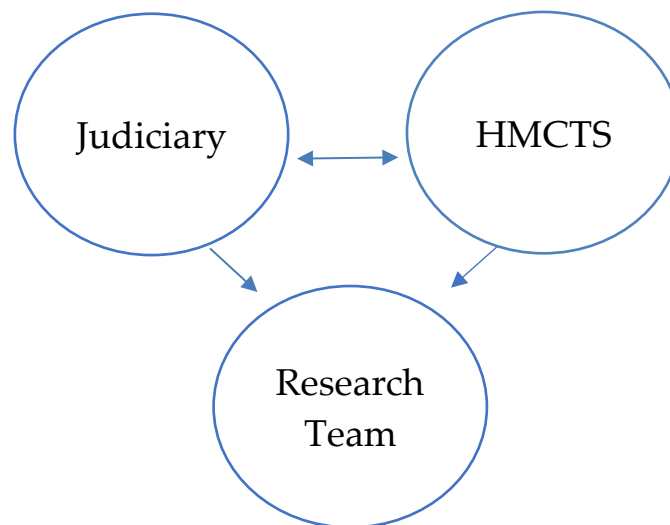
FIGURE 1

Figure 1. Visualisation of the dynamics of being a policy handmaiden.

In her reflections on the setting up of a research secretariat within the Lord Chancellor's Department in England and Wales in the 1990s, Mavis Maclean (2015) had questioned the inevitability of this way of conceptualising close working relationships with policy makers responsible for the justice system. She has described how researchers benefited from having their research funded by the Department in terms of the access they were given and the ways in which it allowed the socio-legal community to lobby the Department to think about how it could benefit from research. Far from being a badge of shame, Maclean's essay extols researchers not to avoid the policy world but to exercise influence from within it. Her work reflects a pragmatic approach to the construction of policy; drawing attention to the ways in which progressive thinkers in the socio-legal community were able to improve the policy making process, and challenge extreme policies by reference to the data they produced. Elsewhere Whitford (1989) has argued that policy-related research can play a politically palatable role, even to progressives, in structuring reform so that it is more acceptable in a modest way.

Engagements with the policy agenda in the course of the Supporting Online Justice Project were not as comfortable as those described by Maclean. Access to the judiciary was severely limited in the early stages of the project and had to be carefully and diplomatically managed by our HMCTS partners, who had no authority to require the judges to engage with us. It was indicated to us early on by the Judicial Office that the judges were so busy because of the issues that came to the fore during the pandemic they had no time to engage in research which seemed rather trivial by comparison. The project also involved a number of difficult compromises we have come to describe as "ouch" moments, in which our progressive politics and independence were muted in the interests of maintaining trust and gaining access to judges. At a practical level, the research team was dependent on HMCTS partners who acted as gatekeepers to court staff and other divisions in the civil service. As an executive branch of the Ministry of Justice, HMCTS had a much closer relationship to the judiciary than we could ever hope to achieve, meaning that we were forced to rely on them in negotiating the successful inclusion of judges in the project.

Our research also undoubtedly played a role in legitimatising policy. While many academics, including the authors, remain sceptical of the shift towards the dematerialisation of the courthouse (Mulcahy 2009, 2021), the production of our five films undoubtedly played a part in normalising a shift to online hearings which, at worst, can be seen as an attempt to reduce the cost of hearings or putting up barriers to accessing the courts. The films we produced can also be interpreted as promoting the idea of litigant self-help strategies when we personally believed that litigants would be much better supported if free legal advice had not been taken away by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Additional "ouch" moments occurred in the course of the research. When the Family Court judges indicated that they did not have the necessary support to field telephone inquiries about online hearings, the research team took a reference to "phoning court staff for help" out of the film script even though many litigants clearly needed this sort of support. When technical support staff told us that they did not have the resources to "meet and greet" litigants online before the hearing we took out reference to the fact that litigants would have time to acclimatise themselves to the online setting. Acceptance of the limited resources being devoted to supporting litigants was not just limited to the project outputs. By handing over the "research based" portfolio of resources, including scripts and images, to HMCTS at the end of the project we have provided them with the ability to make more films which will continue to include these messages long after the pandemic is over (Tsalapatanis *et al.* 2022), leaving decisions about the integrity of the product to others. Much has also been made by the project team of the claim that the resources we have produced are "evidence based" or "research led" in an attempt to establish our credibility by reference to the positivist ideal which critics have rendered problematic (Mulcahy *et al.* 2022, Tsalapatanis *et al.* 2022). These were conscious decisions fuelled by a pragmatic desire to do something for litigants who might otherwise go unsupported during a global crisis, but it also explains our particular discomfort at the occasional references by HMCTS to "our" Oxford team. In these various ways, we at best accepted the status quo and at worst became apologists for the state's inadequate support of litigants. This is a damaging self-critique for which we take responsibility; a possible example of the ways in which evidence-based policy can easily transform into policy-based evidence (Strassheim and Kettunen 2014). But is this the only way our research project can be understood? Were we really such unthinking dupes of the policy audience?

4.2. Co-production, partnership and mutual exchange?

Discussions of the dangers of working with a policy audience are based on a number of assumptions that call for more in-depth analysis. Firstly, they frequently assume that researchers are lured into viewing the world in the same way as elite actors; a suggestion that appears to deny researcher agency and intelligence. Secondly, it is often taken as a given that the judiciary and civil servants are inherently and unquestionably conservative. Thirdly, it is worthwhile looking at alternative case studies to those that prevail in order to explore the dynamics of projects where the judiciary and HMCTS are not suspicious or hostile to intellectuals. Another way of conceiving of our relationships with HMCTS, the judiciary, and lay users of the justice system is to think of it as a form of partnership between groups who all had some commitment to responding to the

needs of the disadvantaged. This allows us to move away from the rather uncomfortable understanding of our work as subordination towards invocation of ideas of temporary co-operation, balance, coalition, or alliance reflected in Figure Two.

The concept of co-production has been of increasing importance to social scientists in recent years and is attractive to those of us interested in researching the narratives and perspectives of marginalised groups. The idea was first introduced by Elinor Ostrom and others in the late 1970s (Ostrom *et al.* 1978) and can be broadly defined as the involvement of users and professionals in research design and delivery. Significantly, this renders the participatory approach to empirical research "critical" in the sense that it attempts to view social phenomena from the perspective of the marginalised (Whitford 1989). This alternative way of thinking about the dynamics of the research relationship is visualised and applied to the Supporting Online Justice Project in Figure Two.

Co-production is not without its problems, including a tendency on the part of its proponents to claim that it provides voice to the disempowered. Current usage of the term also encompasses a wide range of practices and the idea can be difficult to define with any degree of accuracy (Nabatchi *et al.* 2017). It is often associated with other equally broad terms such as co-planning, co-design, co-delivery, co-monitoring, and co-evaluation. It has been argued that the concept has been under-theorised (Jo and Nabatchi 2016), with much work in the field involving single case studies (but see Eisenstadt and McLellan 2020). While engagement with diverse perspectives and recognition of different ways of knowing commonly lies at the core of work in the field, the actual level of engagement can vary considerably (Brandsen and Honingh 2016).

In the context of the Supporting Online Justice Project, the short turn-around time for the project raised concerns about whether meaningful co-production could be achieved. In addition, we were mindful that the literature on co-production stresses the importance of "foregrounding" the process at the earliest stages of a research project, including its design (Eisenstadt and McLellan 2020). Another issue with the co-production literature is that it generally assumes that researchers are "engaging down" with groups who have less social and cultural capital than the researchers. While this is an accurate description of the interactions we had with food bank users, and potentially clerks and ushers, the same was not true of HMCTS partners or the judges on which the successful operationalisation of the project depended. It is for these reasons that we preferred to work with the concept of "partnership" in the project; a term which reflects a relationship involving mutual exchange rather than condescension or empowerment.

It became clear in the early stages of the project that, contrary to the claim that judges are suspicious of working with academics, several judges were keen to be actively involved with the research team in the hope of engendering positive change for litigants.[6] Indeed, a number of judges and civil servants readily agreed with the basic proposition of our research that the needs of disadvantaged lay users were not being met in either online hearings *or* face-to-face interactions. The eight judges invited to work on the project with us were consulted on every stage of the research process from the

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[6] Having selected the four jurisdictions best able to engage with the research, approval from the Judicial Office for eight judges from four jurisdictions to work with us in producing the films, was approved in six weeks. This was subject to the provision that judges would not be involved in the national surveys as they were already involved in an HMCTS survey about online hearings.

review of the wording of film scripts to appraisal of the images produced and the extent to which the messages conveyed reflected practice in a particular jurisdiction. Judges and civil servants were often proactive partners. By way of example, initial advice that we would have access to no more than two meetings of less than one hour with judges was soon abandoned as they became fully engaged with the project and actively suggested more meetings. In addition to giving up their own time, the judges we worked with also committed additional resources to the research by regularly asking their senior administrators to join our meetings and provide us with information.

It is significant that in our discussions with judges and civil servants, our own perspectives changed in line with the concept of close association which is assumed by the concept of partnership. This is not necessarily a negative in the way that critics have suggested. Seasoned empirical researchers might ask what is the point of doing field work if the possibility of changing one's perspective is to be resisted? In his sophisticated exploration of the ways in which critical and socio-legal scholars tend to misunderstand each other, Trubek (1984) argues that, in common with critical legal scholars, the best empirical work not only looks at law from the outside but also examines and makes problematic what is taken for granted by the elites they study. Rather than seeing the critical/theoretical and empirical as opposites, we found that some abstract and arguably progressive insights only occurred because of our discussion with project partners. Viewed in this way, empirical research is not a technical process designed to test theory but a reflexive process in which empirical insights help build new insights (Hutter and Lloyd-Bostock 1997).
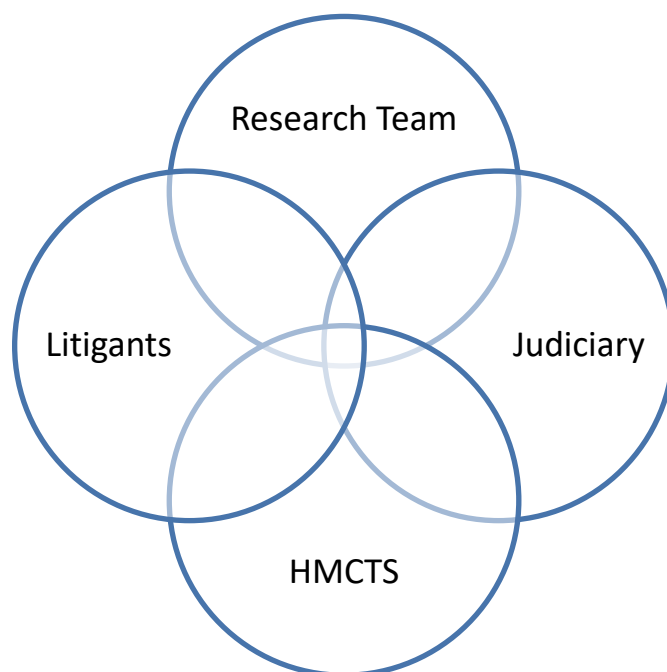
FIGURE 2

Figure 2. The mutual exchange model.

This raises important issues about the extent to which the judiciary are a homogenous group or shares values and perspectives with other groups that make up the state or policy making community. There is no doubt that judges are frequently viewed as being drawn from a narrow segment of "the establishment", who share a preference for the

status quo and are sometimes seen as being stuck in a time warp (Griffith 1977, Darbyshire 2011). While such characterisations continue to be of relevance when looking at the background of those at the apex of the legal system, our research brought to the fore the heterogeneity in the lower parts of the legal system which has been less frequently talked about. The tribunal sector with which we were predominantly working are much more socially diverse than the rest of the judiciary and arguably much more sensitive to the impact of law on the marginalised. The most recent statistics available on the profile of judges (Ministry of Justice 2020) show that 32 per cent of court judges and 47 per cent of tribunal judges were women, and that eight per cent of court judges but 12 per cent of tribunal judges identified as BAME in 2020. The professional background of tribunal judges also differs. Overall, 32 per cent of court judges compared to 63 per cent of tribunal judges. Most tribunal judges had been solicitors compared with only three per cent of judges in the High court.

These figures, and our experience, suggest a genuine possibility of an internal critique from within representatives of groups that have traditionally been marginalised in the legal system. The six tribunal judges, and two family court judges with whom we worked demonstrated considerable experience of, and empathy with, the needs of the digitally disadvantaged and the limitations of current practices relating to online hearings (Mulcahy and Tsalapatanis 2022). In line with national statistics, the majority had qualified as solicitors rather than barristers and had worked in small regional practices rather than "magic circle" firms in the City of London. Only one of the judges had a commercial law background, with the remainder specialising in family or welfare law. One of the judges had followed an unconventional route through practice and had worked as a lawyer in a law centre and at a progressive set of barristers' chambers. Most had devoted much of their career to working with the disadvantaged, for instance by becoming specialists in special educational needs. Whilst recognising the compelling arguments made by critics of socio-legal empirical work and our own occasional complicity as apologists for policies we did not agree with, these reflections suggest that monolithic concepts of the state or elites can be overly simplistic and misleading. They also question the somewhat arrogant assumptions that the University sector is uniquely positioned to produce progressives while those who work in the government sector are routinely drawn to conservatism.

This scepticism was born out in the process of running the Supporting Online Justice Project. Contrary to our expectation that it would be the research team educating practitioners about how the disadvantaged experienced the legal system, it was often the case that it was the judges who encouraged us to re-think the way a message was conveyed. It became clear during our extensive discussions with the judges that they were extremely sensitive to the needs of disadvantaged clients. This was most apparent in discussions with Social Security Tribunal judges who were concerned about the low percentage of appellants who turned up at both face to face and online hearings, despite the fact that they have a much higher chance of winning their appeal if they are present. In an effort to encourage the participation of vulnerable appellants they asked us to remove *any* advice that could discourage them from turning up to their hearing. In this context we were urged to take out any reference to what they should wear to the hearing or re-organising their backdrop during online discussions. At other times judges in the Special Educational Needs and Disability Tribunal (SEND) urged us to simplify our

accounts of the different people who might speak, for fear that this would induce or compound stress on the part of litigants. By way of "exchange" the research team felt comfortable producing and defending scripts, objecting to requests to include more information about the naming of evidence bundles in a Scottish version of the employment film, and bringing to the attention of the judiciary the problems in producing a Makaton version of the SEND film which they had requested.[7]

These data have prompted us to revisit the concept of "the State", or "policy elite", which is so often employed in critiques of socio-legal empirical work. These monolithic and unitary concepts bear little relationship to the complexities of large organisations. Assumptions about the coherence of "the State" rehearsed in the opening section of this article, are, in fact, a denial of everything that social scientists know about the complex character of social groups. Rather than being seen as homogenous entities guided by a single ideology, elites are often made up of a complex coalition of interests. In the Supporting Online Justice Project, the judges and civil servants we engaged with oversaw hearings in just four jurisdictions in a legal system which encompasses 25 different categories of court and 24 categories of tribunal. Even in the small sample of jurisdictions we engaged with it became very obvious that each of the jurisdictions we worked with had its own set of informal rules, conventions, and cultures. The constitutional expectation that the judiciary remain independent from the Executive, represented in our study by HMCTS, is also relevant in this context. The English judiciary are expected to remain impartial and independent of all external pressures and of each other so that those who appear before them and the wider public can have confidence that their cases will be decided fairly and at times this can prompt tensions in the relationship between the judiciary and civil service. In the Supporting Online Justice Project this sometimes manifested itself in judicial frustration at the extent to which vulnerable litigants in person were being supported and the poor quality of some of the support that was offered. These tensions render it inaccurate to view policymakers as a monolithic whole. Indeed, in their exploration of professional clusters within the legal profession, Mungham and Thomas (1981) have argued that it is the very cleavages within groups which can provide researchers with important openings to explore the alternative views of disgruntled stakeholders or innovators.

4.3. Go-betweens? The possibilities offered by selective facilitation

Is there a possibility that researchers can exercise even more autonomy in their dealings with "the elite" than has been suggested so far? Hutter and Lloyd-Bostock (1997) have contended that no academic approaches their empirical work in a theoretical or political vacuum waiting to be moulded by those they come into contact with. In their words:

> Those conducting research in social sciences and the law cannot simply dissociate themselves from policy concerns, and disclaim responsibility for any practical impact (intended or unintended) their work may have by insisting they are not in the business of evaluation, reform or promoting justice. The crucial point is that theory, research, and the subjects of research interplay and are interrelated. Just as theory feeds into

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[7] Makaton is a language programme that uses symbols, signs and speech to enable people to communicate. It supports the development of skills such as attention and listening, comprehension, memory, recall and organisation of language and expression. See further: https://makaton.org/TMC/About_Makaton/What_is_Makaton.aspx

empirical research, so empirical research feeds into theory: and in turn both *may* reflect back into the 'real world' and thus alter or influence the subjects of research. (Hutter and Lloyd-Bostock 1997, p. 31)

The authors came to the Supporting Online Justice Project with a track record of research which was sympathetic to the importance of revealing the ways in which the disempowered experience the legal system and state bureaucracies. We also had very clear ideas about the contribution this project could make to the critical appraisals of online justice (Mulcahy 2009, Mulcahy and Tsalapatanis 2022). More specifically we were concerned about the value of films produced by HMCTS for the public which often gave limited and generic advice, paid insufficient attention to the ways in which due process rights could be realised during the proceedings, had the potential to exacerbate stress, and were not sufficiently attuned to the needs of diverse users.[8] In short, we aimed to engage in an approach to data collection which Silbey has called critical empiricism (Trubek and Esser 1989). This is an approach which recognises the importance of researchers being self-consciously aware of the value laden nature of discourse produced by state actors or elite groups. Rosemary Hunter makes the case for critical empirical approaches by drawing attention to the ways in which empirical research undertaken by feminists inevitably adopts a theoretical and critical approach to empirical studies of socio-legal phenomena. These accounts of interactions are very far from characterisations of empiricists as unthinking handmaidens. Is it possible, as Whitford (1989) has argued, for the researcher to be the co-opter as well as the co-opted? Social scientists are very good at reflecting on the powerful position empiricists are placed in by reason of their role as interpreters of data and managers of the research process. Does this continue to be the case when those being researched are also elite actors? Our answer, reflected in Figure Three, is an equivocal yes.

In the Supporting Online Justice Project it is significant that we were the only actors in the research process who had access to all the views about scripts and images expressed by the groups shown in Figure Three. While contact with the judiciary and stakeholder groups such as clerks, users and technical support staff were negotiated for us by our HMCTS liaison officer, engagement with each of these groups frequently occurred in the absence of the officer or members of the judiciary and the data we gleaned from these discussions remained confidential. It was never our intention to manipulate or misrepresent what each of these groups wanted, but the fact that we interacted with each group separately and were the go-between provided us with important opportunities to use information provided by one group to question the assumptions or demands of another.[9] This allowed us to engage with what Greatbatch and Dingwall (1988) have called "selective facilitation" in the context of their work on mediation. This is a process which allows mediators to subtly steer conversation in particular ways that favour certain outcomes over others. In contrast to accounts of working with policy audiences discussed above, this gave considerable scope to assert agency in the research process. Indeed, in many instances it allowed us to foreground and reinforce the needs of the marginalised lay users of the justice system with whom we were also working.

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[8] Particular courts or jurisdictions including SEND had already responded to the need for more user-friendly public information to be disseminated, through a series of films completed some ten years ago.

[9] The notion of selective facilitation was developed by Greatbatch and Dingwall (1989).
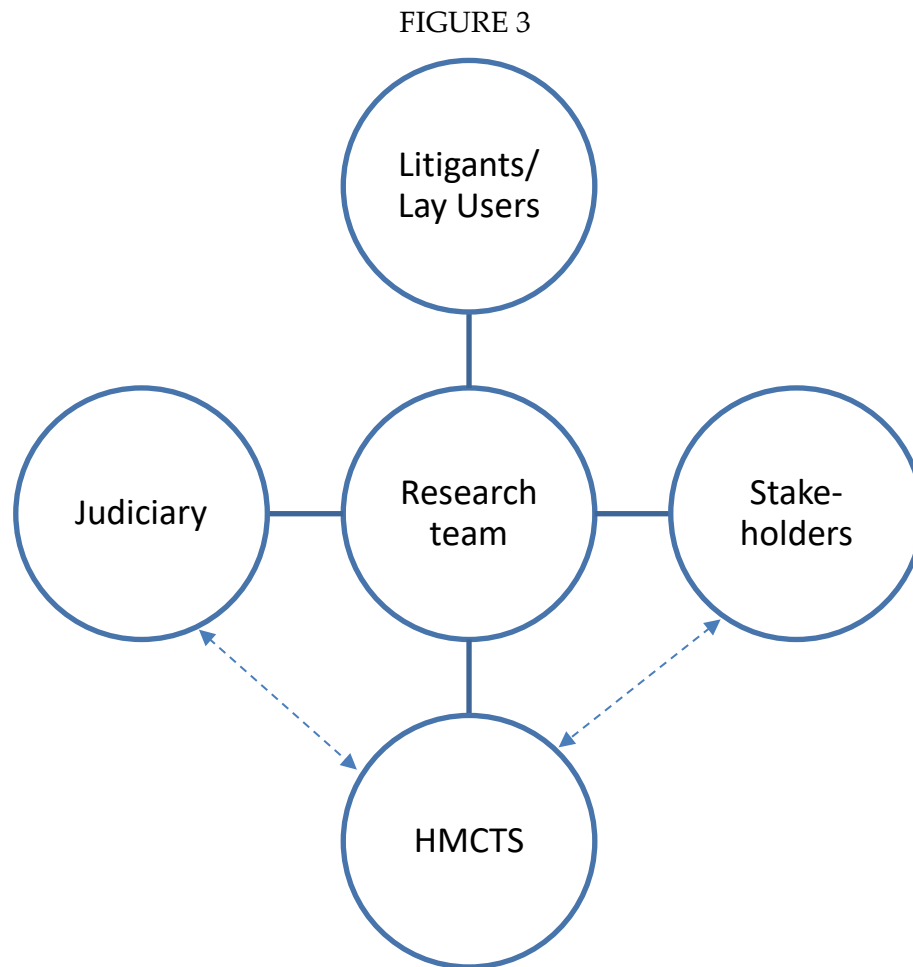
FIGURE 3

Figure 3. The relationship between the groups through selective facilitation.

The variety of perspectives offered by lay users, court officials, technical staff, those responsible for policy implementation and the judiciary frequently led to a creative tension between the various stakeholders we engaged with and presented the opportunity to decide how to resolve the tension. Two particular examples demonstrate the possibility of steering the course of conversation in ways which involved a careful selection and promotion of counter arguments which favoured disadvantaged litigants. Firstly, when judges amended the scripts offered to them for comment and introduced technical language, we were able to justify simplifying or excluding their edits by reference to data collected in focus groups in food banks. Predictably, research with food bank users demonstrated extremely poor understandings of the language of law, what happened in hearings, what was expected of those who attended and who would be there (see further Mulcahy and Tsalapatanis 2021). In these instances, we used social science data to deny the demands of the policy audience rather than to support it. Secondly, when the Communications Division of HMCTS were reluctant to make our films publicly searchable on their YouTube Channel, we invoked the support of the judiciary, who proved useful allies in the dissemination of information about the films in ways rarely discussed in the existing literature. In addition to their support for the promotion of the films on YouTube, the judiciary have pressed for more extensive dissemination than that anticipated by HMCTS, reinforcing judicial independence and our suggestion that a number of tribunal judges saw themselves as important agents of social change.

In contrast to visions of socio-legal scholars as dupes of the system, the possibility of seeing socio-legal empiricists as irritants or muckrakers that challenge established legal orders is also possible (Leo 1996). By way of example, Baldwin and McConville's work on plea bargaining is said to have led to abuse, slurs and vituperation (Mungham and Thomas 1981). Hunter (2007) has argued that socio-legal empirical work has frequently been rejected by the policy audience as too radical. In their discussion of the potential for empirical work to be considered threatening or subversive by elites, Mungham and Thomas (1981) have also argued that the capacity of research to offend is extremely difficult to manage to everyone's satisfaction, making tension inevitable. In the context of the Supporting Online Justice Project, we experienced extensive support from many sections of HMCTS but it would be misleading to suggest that our research was without its critics in the service. The partnership we had developed with other units within HMCTS allowed us, on this occasion, to garner their support in producing robust responses to these challenges but it was clear that the project was viewed by some as an irritant.

5. Conclusion

> The ivory tower lies shattered, if indeed it ever existed; our defences are down. In the world of impact mantras and mandalas, we are inexorably pulled into the borderlands of outreach, policymaking and 'engagement' whether we like it or not. (Andersson 2018, p. 229)

Many of the issues raised in this paper have dogged sociology since Weber (Trubek 1984) and continue to do so (see for instance Apple 2010, Borgerson 2011). Characterisations of researchers as "captured" by the policy audience remain convincing and the espousal of neopositivist methodologies and scientism ever present (Fischer 1998). There are also ongoing examples of socio-legal research where capture clearly occurs (see for example Leo 1996). The incentives to produce work that engages with policy audiences also remain compelling as ever. These include access to funding which is conditional on impact pathways being framed in advance; the increasing recognition that "impact" is well received by those who fund the University sector; and issues around gatekeeping which frequently mean that access to a field site can only be secured on conditions set by policy makers. The latter is a particular problem for those working with judges in the UK in which access for the purposes of research is more closely guarded than is the norm in the other countries discussed in this collection. There is no doubt that vigilance is required if we are not to get lost in the demands and perspective of those responsible for the designing and running the very systems we seek to critique.

It could be argued that this paper is in danger of presenting too rosy a picture of working with judges which will not necessarily be experienced by all who embark on similar projects. There is much in what we have achieved that reflects good luck or timing and we recognise that the post pandemic world may reduce the willingness of the judiciary to engage in the sort of research we have undertaken. However, we hope that however unusual the circumstances in which we undertook the research, that there continues to be some credence in the view that working with policy makers does not always involve the adoption of a positivist approach or undermine the agency or independence of the researcher. In some instances, it may even generate new insights or offer opportunities to challenge dominant discourses within government or policy circles. We argue that

critics of empirical socio-legal work have tended to gloss over the extent to which independence is ever attainable and the complicated and nuanced ways in which socio-legal researchers work with, and react to, the pull of a heterogenous policy audience.

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