

Putting legal research on trial. A reflection of challenges investigating terrorism prosecutions in England and Wales.

In 2024, governments continue to grapple with legal and political ramifications posed by repatriating foreign terrorist fighters (FTFs). Criminal justice systems and governments taking different approaches to returning individuals suspected of committing acts of terrorism overseas has become an area of international contestation. Inconsistency in repatriating FTFs has highlighted differences between legal systems across Europe, Asia, and North America. In England and Wales, growing interest in the repatriation and prosecution of terrorists has outlined barriers to effective research of terrorism trials and legal decision-making processes. Dismantling barriers to researching the courtroom is central to promoting legal transparency and accountability, understanding how appropriate legal responses to terrorism are articulated and enforced, and drawing attention to the potential impact of implicit biases in the prosecution of terrorists in the criminal justice system. The study of terrorism trials and sentencing is an interdisciplinary endeavour which allows for the fields of Law, Terrorism Studies, and Criminology to investigate intersections between criminality, justice, and national security. However, relatively little work has explored these junctures. This article outlines methodological, practical, and conceptual barriers which hamper research of terrorism trials in England and Wales and looks to suggest new methods which can promote transparent interdisciplinary legal research.

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Interest in the use and applicability of counter-terrorism legislation has re-emerged as a pertinent issue since the fall of the ISIS ‘caliphate’ which lost its final territory of Baghouz in March 2019¹. An estimated 52,808 men, women, and children travelled from 80 countries across the world between 2013-2019 to support ISIS². In 2021, it was estimated that around 2,500 of the 5,300 European men, women, and children remain in North-East Syria and Iraq, though exact current figures are difficult to discern³. Although European countries are unified by the challenge of having large numbers of citizens remaining in these territories, there is no consensus on how FTFs overseas should be handled⁴. While counter-terrorism laws have been subject to ongoing research, the territorial defeat of ISIS confronted multiple states with comparable legal and security challenges, including tensions between national and international law and potential challenges with rehabilitation and reintegration⁵. Despite suggestions that failing to repatriate FTFs could continue to fuel future terrorist activity, state responses continue to vary widely, with some opting to repatriate and rehabilitate, return and prosecute, or revoke citizenship altogether⁶. These differing approaches across jurisdictions have prompted a renewed scholarly interest in legal responses towards terrorism suspects.

In seeking to gain greater understanding of the legal mechanisms used in responding to suspected terrorists, in-person observation of court trials has proven a useful research methodology in countries including Germany, the Netherlands, and France. With few exceptions, in-person legal research methods remain notably absent from the current research landscape of terrorism literature addressing England and Wales⁷. Data from the Global Repatriations Tracker demonstrate that Germany, the Netherlands, and France have repatriated significantly more women and children from camps, prisons, and other detention facilities in northeast Syria since the start of 2019 than the UK, which, perhaps, partly explains the increased use of courtroom observations in these countries⁸. However, 19 individuals were prosecuted for terrorism-related offences across Britain in the year ending March 2023, suggesting that a lack of data is not to blame for a failure to utilise observational research methods⁹.

In England and Wales, law and legal institutions are considered to play a key role in the operation of society. To ensure that the operation of the law is transparent and held to account, criminal justice is subjected to the Open Justice principle which stipulates:

‘It is a central principle of criminal justice that the court sits in public so that the proceedings can be observed by members of the public and reported on by the media. Transparency improves the quality of justice, enhances public understanding of the process, and bolsters public confidence in the justice system’¹⁰.

However, longstanding and multifaceted issues with the criminal justice system are creating court backlogs, delayed trials, and a lack of court reporters, posing issues which run parallel to the growing interest in legal processes surrounding suspected terrorists¹¹.

As well as building trust in the operation of the criminal justice system, a transparent and accessible legal system can help to facilitate in-person research methods, a key strand of which is ethnography. While the duration of time a researcher needs to be embedded in an environment to constitute an ethnographic study is debated, ethnographic research comprises several tools which have been frequently applied to the legal context. A legal ethnography is a method of research in which the researcher immerses themselves:

‘In a social field, setting, or arrangement in order to comprehend the actors’ social relations, their practices and their representations of themselves and the world. To do that, the ethnographer employs a variety of techniques: participant observation, interviewing, conducting surveys, engaging in naturally occurring conversations, and collecting documents as well as audio-visual materials’¹².

This methodological tool kit allows the researcher to use the most appropriate methods to immerse themselves in their research environment and adapt to various circumstances and barriers. Such approaches are valuable in terrorism research to provide insight into the way trials are conducted, shedding light on ‘the routines and practices, the symbolism and social identities, and the day-to-day interactions, happenings and occurrences taking place around us’¹³. The courtroom facilitates legal processes and practices which, unless observed in person, remain unseen and unanalysed. Therefore, terrorism research benefits from in-person observation of trials to capture insights which are difficult or impossible to generate from other methodologies.

With in-person attendance of court proceedings being a useful methodology, the core argument advanced in this article is that the legal system in England and Wales contains barriers which hamper valuable empirical socio-legal terrorism research. Building from global insights utilising ethnographic research methods in terrorism research, this paper questions the lack of observational data used in England and Wales, examines barriers to legal research of terrorism cases, outlines the implications of these obstacles for socio-legal terrorism research, and prescribes methods which can help overcome these barriers. This is achieved by situating the courtroom as an important environment in terrorism research, reflecting on personal fieldwork experiences and barriers to researching the courtroom environment, and discussing the implications these hurdles pose to quality interdisciplinary research and the administration of justice.

The following analysis is based on 6 weeks of fieldwork between November 2023 and March 2024 in which the author conducted a legal ethnography of two terrorism cases held in the Old Bailey, and one terrorism trial held in Westminster Magistrates Court. This fieldwork presented practical, linguistic, and conceptual obstacles which, it is argued, continue to hamper the feasibility of conducting legal ethnographies or observations of terrorism trials in England and Wales. The arguments presented are delivered from the perspective of a non-legal scholar, and this paper is, therefore, not a comment on the substance of legal doctrine but on the barriers to interdisciplinary legal research.

The courtroom

It is generally agreed that the courtroom is central to upholding and exercising the rule of law, but it is not a neutral arena¹⁴. Rather, the courtroom acts as a ‘theatre’ which stages the performances of several actors, including the defendant, their counsel, and prosecution parties¹⁵. In an adversarial system, the prosecution holds the ‘burden of presenting a persuasive and complete narrative’ but, building from the same set of facts, the defence party have a different story to tell, ‘with the goal to persuade the trier of facts (i.e. the judge or jury) that their side’s story is the only valid version’¹⁶. Consequently, criminal trials are ‘intertextually constructed communicative events’ whereby ‘stories’ are composed and exchanged, with the jury deciding which version of events is true based on the evidence provided¹⁷. If the courtroom is a theatre, performances are dependent on and regulated by a script. With the legislation- or scripts- surrounding terrorism frequently changing in response to changing threats and global events, courtroom performances are also continually changing¹⁸. Terrorism trials act as

‘concrete spaces where relatively new terrorism laws are given meaning’, signifying our understanding of processes unfurling in terrorism trials remains continually incomplete and requires sustained analysis¹⁹.

Importantly, the analysis of terrorism trials encourages the interrogation of broader legal and social developments around terrorism. Courts, and the trials which play out within them, are more than places of ‘truth-finding’; they also function by ‘moralizing guilt directly or indirectly for their audience’²⁰. Linguistic and Sociological perspectives have been useful in helping to illustrate the foundational role of language in constructing ‘facts’ in court proceedings, as well as the utility of strategic lexical and grammatical choices in framing courtroom narratives around agency and responsibility by foregrounding and backgrounding elements of the case which ‘play a decisive role in the outcome of the trial’²¹. Narratives, then, play an important role in decisions made in the courtroom and observing the practice of law is therefore ‘paramount to understand questions of how the law shapes, renders, undermines and uplifts justice within society’²². Therefore, criminal trials are sites in which interpretations of evidence are exchanged to persuade the jury of one version of events over the other and are not necessarily reflections of the truthful version of events.

Terrorism trials are one of the few environments whereby different actors, such as the defendant, investigating police, victims, family members, and the public come together and, therefore, form ‘a nexus between terrorist violence, law enforcement and public opinion’²³. The social world which is developed and operates within this environment is therefore significant to understand because of the potential impact it holds for the different parties in the room. For academics and researchers interested in understanding counter-terrorism legislation or legal decision-making processes around terrorism, trials are an opportunity to witness ‘justice in progress’ which could act to inform and enhance the operation of counter-terrorism measures²⁴. This also stands true for the power structures seen to operate within the courtroom, meaning that analysing terrorism trials ‘allow[s] the socio-legal constitution of terrorism to be studied with its inherent power structures at different scales’²⁵. A question, then, arises. What are the barriers researchers face in accessing the courtroom as a site of data collection in terrorism research?

Existing research

A rich body of global literature analyses terrorism trials and the role that they can play in community reparations, knowledge production around the law, and cross-jurisdictional trends in repatriation and prosecution²⁶. A subsection of this research has utilised in-person, ethnographic, or observational research to gain an in-depth and embodied understanding of the intricate processes involved in legal proceedings addressing suspected terrorists. Embodied research has helped to document the material used in court trials, situating the operation of the court system within broader debates surrounding the law as a counter-terrorism tool and/or a manifestation of state violence towards marginalised groups and communities²⁷. Literature emerging from European states, including Germany, France, Norway, The Netherlands, Sweden, and Denmark, has addressed legal responses to far-right terrorists and the repatriation of FTFs from Syria and Iraq, while research from Nigeria has analysed terrorism trials of Boko Haram²⁸. Usefully, existing ethnographic terrorism research helps to illustrate the utility of the approach in generating data which, unless obtained through embodied research, remains unseen, unheard, and unanalysed.

A prominent theme of research uses in-person attendance in the courtroom to dissect processes which construct and deconstruct temporalities in legal proceedings. Insights from The Netherlands show the methods in which prosecutors organise events to form a timeline which ‘arrive[s] at a narrative of anticipating catastrophic future violence’²⁹. It is observed that, with the prediction and prevention of future terrorism risk at the centre of counter-terrorism measures, legislative discourses are constructed, re-ordered, and mobilised to support conviction³⁰. Similarly, research in Nigeria questions this forward-orientated logic of prevention because members of Boko Haram were arrested for membership of a proscribed organisation four years before the group became formally proscribed, suggesting that notions of proscription are ‘imagined, contested, and made real in legal discourse’³¹. The processes by which time is constructed to hold increased/decreased significance during terrorism trials also links to evidential elements of the proceedings. For example, Anwar reflects on the growing importance of social media as a form of evidence in terrorism trials which is used to organise and shape time to ‘provide valuable information on events that occurred there-and-then, to prosecute in the here-and-now’³². This ‘making or sorting time’, it is argued, shows a temporal shrinking of legal subjects which fits evidence ‘into a clear, clean and linear story that can serve as a basis for conviction without the messiness of everyday lives’³³. Here, it is evident that terrorism trials do not simply reflect the series of events which lead to the criminal behaviour

in question. Rather, the actions and intentions of the defendant are portrayed and the sequence of events re-organised to serve defence or prosecutorial narratives.

With legislative frameworks responding to the changing landscape of terrorist threats and behaviours, terrorism trials are ever-changing³⁴. This is perhaps most evident when considering long-standing assumptions of women as passive victims of terrorism. The growing understanding that women can, and do, play a range of active roles in terrorism has shaped novel prosecution tactics to capture the full range of offending carried out by women, particularly in ISIS³⁵. In Europe, a range of national and international laws have been used to prosecute women for crimes including pillaging, outrages upon personal dignity, child recruitment into an armed group, and war crimes³⁶. The Counter Extremism Project has helped to give further insight into these processes by documenting the progress of numerous trials of terrorism suspects, detailing the material of trials, the evidence used, and the outcome of proceedings. In a prominent trial, evidence given in court demonstrated that the female defendant ‘not only took care of the household, but also translated propaganda, participated in two ideological trainings, and was instructed in the use of firearms’³⁷. These embodied insights contribute to understanding gender dynamics within ISIS by highlighting the numerous and varied identities held by women associated with the group. By reinforcing the lack of linearity of terrorism offending, this work helps to inform broader questions about gendered and racialised biases in counter-terrorism measures. In its broadest sense, analysing evidence used in terrorism trials outlines complexities of terrorism trials, situating development within the broader political and national security context.

Beyond providing insight and clarity around legal processes and developments, a key benefit of observational terrorism trial research is the ability to include the voice and perspective of suspected terrorists in research. In France, terrorism trials broadly perform two functions: fact-finding, and an investigation of personalities. In this latter category, Weill suggests that trials allow the defendant to account for their version of events, providing an opportunity -sometimes the only opportunity- for the accused to give a public account of their story, and families to gain insight into the actions of their loved one³⁸. This emotional element is an important factor frequently overlooked in media coverage of terrorism trials. However, emotions can also cause barriers to researchers attempting to conduct in-person terrorism trial research. For example, in Denmark, researchers attending terrorism trials whilst researching Salafi-Jihadist FTFs felt uncomfortable due to unexpected ethical considerations and emotional demands arising as part

of courtroom research, including navigating ethical nuances of being around family members of defendants in the courtroom³⁹.

Literature addressing the prosecution and sentencing of terrorists in England and Wales is growing, but despite the clear benefits of observational research, the methodology remains largely absent. Three significant studies have developed unique databases seeking to understand patterns of sentencing and investigate how race, gender, age, ideology, or contextual factors may impact trial outcomes for individuals charged with terrorist crimes⁴⁰. Key findings from these studies show that women tend to receive shorter sentences than men for terrorism-related offences; ideology-based discrepancies are found in the sentencing of minors associated with far-right and Islamist terrorism; and the proximity of sentencing to major terrorist incidents significantly affects sentencing outcomes⁴¹. Yet, these investigations into sentencing and prosecutions in England and Wales, surprisingly, have not yet turned to the use of in-person attendance at court hearings and trials. Rather, studies have typically used mixed-methods approaches which triangulate numerous data sources which include legal documents, court transcripts, interviews, media coverage, open-source government data, and legal databases such as the LawPages, Lexis Nexis, and Westlaw UK⁴².

Observing trials is not impossible in England and Wales, with ethnographic studies outside of terrorism analysing differences in jury practice between America and England and Wales, the substance of legal proceedings, and issues which arise in immigration tribunals⁴³. However, the methodology is not commonly used in terrorism research. Aside from journalistic reporting or analysis from legal terrorism experts, one study uses an ethnographic approach to analyse the Stansted-15 protesters trial, situating the criminal justice response as a form of repressive and disciplinary state power leveraged over activists. In doing so, Hayes et al. illustrate the courtroom performances and prosecutorial methods utilised to ‘displace the political’⁴⁴. Despite the terrorism-related element of the protest charges, the study firmly focuses on social movements and activism rather than political violence, meaning that similar research approaches are yet to be fully utilised in Terrorism Studies.

Overall, existing global literature outlines rich academic inquiry into terrorism trials and the prosecution process, providing insights into the effectiveness of counter-terrorism legislation, theorisations of the courtroom, and where potential biases may be visible within this environment. Research outside of England and Wales provides vision into the exercise of

justice which otherwise remains unseen. While ethnographic terrorism research remains fragmented and focuses ‘mostly on partial processes within the courtroom—narratives, argumentation, or interactions’, growing research forms a basis of comparative analysis which looks to find similarities and differences between the operation of legal systems⁴⁵. Integrating England and Wales into the development of this field requires the erosion of research barriers set out below.

Methodology

This article forms part of a wider project investigating the prosecution of female terrorists in England and Wales. Between November 2023 and March 2024, the author attended three terrorism-related trials to analyse potential gendered narratives present in courtroom proceedings. Two of these cases were held at the Old Bailey (Case 1 and Case 2), and one at Westminster Magistrates Court (Case 3)⁴⁶. Due to the low numbers of suspected female terrorists prosecuted in England and Wales, and complications arising from the COVID-19 pandemic, Cases 1 and 3 were the first publicly known cases of women prosecuted for terrorism-related offences since 2021⁴⁷. Case 2, the prosecution of a male defendant, arose during the deliberation period of Case 1 and provided the opportunity to compare potential gendered narratives present in terrorism prosecutions held in England and Wales.

The author attended these trials and employed observational research throughout. Attendance of these three trials forms the basis of the following discussion which outlines barriers to legal research and theorises issues that this holds for terrorism research and legal transparency. The courtroom is a publicly accessible environment meaning that permission is not generally required to observe open court proceedings, and taking notes is permissible. Wider regulations and laws prohibit observers in the public gallery from using recording devices, taking photos, or talking during court proceedings⁴⁸. These regulations were followed throughout. During the trials, broader reflections of the courtroom environment were documented by hand. Holding conversations with members of staff or other individuals in the public gallery was not part of the research methodology used, however, over 6 weeks of courtroom attendance, naturally occurring conversations were had and overheard. In these instances, any thoughts or reflections on these discussions were anonymised, and personal circumstances were not recorded. Ethical approval was sought to attend terrorism trials as part of the wider doctoral research project and was granted by the University of St Andrews in 2023.

The United Kingdom is formed of three distinct legal jurisdictions- Scotland, Northern Ireland, and England and Wales. This article discusses processes which unfold during courtroom proceedings in England and Wales and should not be extrapolated to reflect potential research barriers in other UK jurisdictions. Similarly, though the Old Bailey and Westminster Magistrates Courts are locations where many terrorism-related crimes are prosecuted, similar crimes are prosecuted nationwide. While comparable research barriers may hamper research more broadly, these are not captured by this study.

Findings

Practical barriers

Members of the public attend the public gallery for several reasons ranging from being interested in pursuing a legal career to being tourists come to view the most famous court in England and Wales. Attending the court is not an issue, but locating, accessing, and keeping up with the relevant case is a challenge for friends, family, and the public alike. These ways that these practical barrier manifest are explored below:

1) Identifying a relevant case

With court cases being held throughout the week, individuals with a generalised interest in the court can arrive on the day able to watch some kind of legal proceedings. However, members of the public wishing to attend a particular type of case- such as murder, fraud, or terrorism- face several complexities because little information about cases being held in the court is communicated to the public.

Court lists are published daily by each court, providing the details of cases taking place the following working day. A major issue is that court listings only contain the initials (or sometimes the name) of the defendant, the time and courtroom in which the hearing is due, and their court case reference number. Therefore, without existing insight into the case, it is difficult to establish if a relevant case is being held on the day. A helpful resource, Insight Old Bailey, provides details of some interesting cases that are being held in court the following day, but a similar resource is not provided at Westminster Magistrates or other courts in England and Wales.

Not only are court lists relatively unhelpful in identifying a case, but they also give little prior notice about forthcoming proceedings. This complicates matters for research and assumes the

researcher can cancel any commitments for the foreseeable future to attend, that they live in the local area, or have the time/money/connections to reside nearby temporarily or commute daily. While attending a trial is simple enough, identifying a case relevant to the researcher is a challenge.

2) Access barriers

While court proceedings are open to the public, accessing the courtroom itself can be challenging- even after overcoming barriers to finding a relevant trial. Upon arrival at the court, admission for friends and family members of defendants is rightfully prioritised, leaving members of the public to fill any seats remaining in the courtroom. However, this means that individuals attending the public gallery for research purposes frequently miss elements of the proceedings and, on some occasions, it took so long to enter the court that proceedings had already ended. During breaks of legal proceedings, the public are required to vacate the public gallery and wait in the hallway or waiting area of the court. Re-admittance to the courtroom is dependent on the court clerk alerting security to the imminent beginning of proceedings. Frequently, the clerk forgot to call through, meaning that even when inside the building, sections of proceedings were often missed.

Understanding proceedings was also frequently impaired by the inability to hear individual(s) speaking in the courtroom. Due to the physical distance between courtroom actors and the public gallery- which, in the Old Bailey, is a balcony above the courtroom, and at Westminster Magistrates Court a glass box at the back of the courtroom- microphones are often required to enable the public to hear courtroom discussion. Often, courtroom microphones did not work making it difficult to hear the legal proceedings as they unfolded. Not only does not make it difficult to hear, but it is also difficult to take notes for later reflection. In this sense, whilst proceedings are physically attended, they are not understood.

A further issue experienced by many at the Old Bailey is the long list of restricted items, and the lack of storage facilities. For both courts, individuals must pass through airport-style security when entering the building. However, permitted and restricted items differ at each court, with the public being able take electronics (phones, laptops, etc) and drinks into Westminster Magistrates Court, but not into the Old Bailey. This meant that many individuals were turned away from entering the Old Bailey after a long period of queuing because of carrying an unknowingly prohibited item. Due to a lack of on-site storage facilities, individuals

who have prohibited items must pay to use nearby locker facilities before returning to the courtroom. Though a list of prohibited items is available online, it is not exhaustive, but can be disruptive to the public attempting to observe the administration of justice⁴⁹.

3) Changing dates and times

Legal proceedings are unpredictable and subject to change at any time. Often, a trial does not begin when it is scheduled to, pre-trial and preparatory hearings cannot go ahead, or jurors are late or unwell meaning that the court is unable to sit that day. All these factors can contribute to a trial taking longer (or shorter) than the expected timeframe and can cause frustration for all parties involved in or observing the trial. Whilst some of these issues are thought to relate to broader issues in the criminal justice system - such as a lack of judges, or overcrowding at prisons creating issues in transporting defendants from prison to court on the day- unpredictable legal proceedings are disruptive for the public and, often, the media⁵⁰.

At the Old Bailey, friends and family frequently expressed their frustrations about the lack of communication and clarity around the development of the case and were frequently turned away from the court as they had not been made aware of cancellations or delays. Conversations with members of court staff highlighted that family members and friends of defendants often became irritated with staff as a result of changing circumstances and false assumptions that security staff have insight into legal proceedings.

For researchers, a central issue is time. It is rare to be able to dedicate time to a trial with an unclear start date or duration, or when there may be delays in the proceedings. This is a costly task which, without funding or financial stability, cannot be carried out. Barriers to legal research, therefore, not only make it challenging to garner valuable insights from the courtroom environment but also arguably continue to perpetuate privilege in the academy.

Linguistic departures

Roscoe Pound's 1910 differentiation between 'law in the books' and 'law-in-action' continues to apply in today's context⁵¹. That is, academic inquiry into terrorism is distinct from legal practices of terrorism. These distinctions are extrapolated into the language and concepts used to discuss 'terrorism' in its various applicable environments, creating two central barriers to research: a lack of shared language, and the inaccessibility of legal language and terminology- or 'legalese'. A lack of shared terminology between Law and other disciplines is particularly

pertinent with concerning concepts such as agency and culpability. For some, agency is ‘central to offender decision making and desistance from crime’, meaning that the concept has been useful for the disciplines of Terrorism Studies and Criminology⁵². In Law, the notion of culpability is central to ‘determine how much the offender should be held accountable for his act’⁵³. Though, the subject of inquiry at hand is similar for both concepts- the intention of the individual- these two distinct approaches are underpinned by different methodologies, logic, terminology, ideas, and practices, complicating the interdisciplinary study of Law. This is compounded by the inaccessibility of legal language and terminology, which complicates courtroom research for non-legal scholars and the public. These barriers are examined further below.

1) Agency and culpability

A concept which is contested and ambiguous, agency is frequently invoked to discuss actors within Criminology and Terrorism Studies. Despite a lack of definitional agreement, a prominent perspective considers agency to be linked to action and understanding the consequences of such actions. For the purposes of this paper, agency is understood as ‘behaviours in which a person chooses to engage in order to shape his or her experiences within social structures in sight of his or her understanding of the social structures that surround and constrain his or her options’⁵⁴.

Agency is a particularly prominent concept in analyses of female terrorist actors due to prevailing assumptions that women are generally ‘compassionate, mothers and caregivers not having the capacity to instil violence and terror’⁵⁵. These perceptions are problematic because ‘the interlinked assumption is that [women] are also more moderate’- and assumption which is at odds with an established knowledge base outlining the diverse range of women’s support for and involvement in terrorism and violent extremism⁵⁶. Increasingly, it is argued that agency is not a binary notion in which an individual is simply in control of their actions or not⁵⁷. Rather, agency is complex, shifting between time, cultures, and structures- this is particularly salient regarding FTFs who, in travelling to ISIS, traversed cultural and contextual norms. Failing to understand the full range of agency for women linked to terrorism limits Countering Violence Extremism (CVE) meaning that the conceptualisation of agency can have broad implications for national security⁵⁸.

The concept of agency does not play a prominent role in legal proceedings. Rather, sentencing in England and Wales is underpinned by three different concepts: culpability, capacity, and harm. In practice, this means that a person cannot be found guilty of an offence unless it can be proven that a criminal act has been carried out (*actus reus*), and that the suspect had a 'guilty mind' at the time the offence was committed (*mens rea*)⁵⁹.

Culpability is assessed 'with reference to the offender's role, level of intention and/or premeditation and the extent and sophistication of planning'⁶⁰. In England and Wales, most crimes are accompanied by factors which demonstrate culpability, ranked on three levels of severity. For example, for an indictment of 'encouragement of terrorism', culpability can be demonstrated by 'the intention to provide assistance' or 'encourage others to engage in terrorist activity'⁶¹. The higher the degree of culpability demonstrated, the higher the sentence which can be imposed by the judge. However, demonstrating culpability does not automatically demonstrate capacity. The notion of capacity seeks to understand the mental state of the individual at the time at which they committed a crime and plays a pivotal role in the sentencing process. We lack capacity if, at the time of the offence, an impairment or disturbance in the functioning of the mind or brain means that:

'We are unable to understand information relevant to the specific decision; unable to retain that information for as long as is required to make the decision; or to use or weigh that information as part of the decision-making process; and, finally, if we cannot communicate our decision'⁶².

Lacking capacity has an impact on the degree of culpability that can be demonstrated and, therefore, the sentence which the judge can pass down.

A third key element is harm. The degree of harm caused by the offence is also linked to the sentence given and, like culpability, is pre-defined and ranked. For an indictment of 'encouragement of terrorism', levels of harm can be demonstrated by 'evidence that others have acted on or been assisted by the encouragement to carry out activities endangering life, or a 'statement or publication provides instruction for specific terrorist activity endangering life'⁶³.

Together, culpability, harm, and capacity form a praxis for sentencing, but the lack of shared language between Terrorism Studies and Law poses a problem for research and practice by

hindering the transference of ideas from academia into practice, and fragmenting ideas of accountability in terrorism. For example, claims that women involved with terrorism ‘tend to receive more lenient treatment in the criminal justice system, based on (often false) gendered assumptions about their limited agency’ cannot be fully investigated without the establishment of a common language between ‘agency’ and ‘culpability’⁶⁴.

Agency and culpability are nuanced notions which, it is argued, share a belief that committing an act, criminal or otherwise, does not necessarily prove an intention to do so. For example, an individual with a mental illness can carry out an act of terrorism but can lack the capacity to fully understand their actions at the time. This does not mean the act has not been carried out, but that there are nuances to be considered about the intention to carry out such an act. Some existing courtroom research looks to understand how agency is constructed in legal proceedings, yet this term is not fully reconcilable with legal terminology⁶⁵. Bridging these terms could help researchers more effectively draw from different bodies of literature and conceptual frameworks, as well as help build an accessible interdisciplinary socio-legal perspective of terrorism that does not necessitate a legal background.

2) ‘Legalese’

Even if a member of the public or researcher identifies a case relevant to their interest or study and gains access to the courtroom, there is no guarantee that the individual will be able to understand the trial unfolding before them. ‘Legalese’ can make understanding legal proceedings particularly difficult, even when in the room⁶⁶. It is widely remarked that the legal profession ‘uses language that contains a substantial amount of technical vocabulary and a number of distinct (often archaic) features and may be difficult for the lay public to understand’⁶⁷. Frequently, the discussion of legal matters involved such jargon that understanding the direction of the dialogue was difficult- unhelpfully partnered with a lack of working microphones.

However, the language used during the trial becomes noticeably more accessible when the jury is in the courtroom, because they are responsible for deciding if the defendant(s) is guilty, and therefore, it is of central importance for the jury to understand the case fully⁶⁸. This meant that understanding proceedings- when they could be heard- was often easier when the jury was in the court. However, many types of hearings can occur before a jury joins a trial and, at a Magistrates Court, a jury is not used at all⁶⁹. The Contempt of Court Act 1981 forbids the

public to speak in the gallery, meaning that there is little to no infrastructure to help the public fully understand the proceedings that they are observing, and asking for clarification is, if not impossible, certainly unwise⁷⁰.

To the researcher, all hearings can provide data and insight into the operation of the legal system- not only those in which a jury takes part in - raising important questions about the transparency of proceedings held without a jury and measures in place to help non-legal actors understand legal hearings. Justifiably, legal actors conducting a criminal trial are likely less concerned with the public understanding the proceedings than successfully conducting their role in the administration of them. However, the Open Justice principle stipulates that ‘the public has the right to know what takes place in the criminal courts’⁷¹.

Whilst legal terminology serves a clear purpose in the courtroom, the very way that law is discussed can be, in and of itself, a barrier to understanding the processes taking place in the courtroom because ‘it is often couched in [obscurity]’ and ‘involves stuffy rituals and forms of address that only those “in the know” seem to truly understand’⁷². With the Open Justice principle allowing ‘the public to scrutinise and understand the workings of the law’, legal jargon does not pose a barrier to *hearing* legal proceedings, but a tangible obstacle to *understanding* legal proceedings⁷³. As such, overcoming the many barriers already discussed does not guarantee the ability to access legal proceedings fully.

Implications

This paper has outlined conceptual, practical, and linguistic barriers to conducting observational research of terrorism trials in England and Wales. These barriers have far-reaching implications for research and the administration of justice by enabling a lack of accountability of the legal system, creating an overreliance on media coverage of courtroom proceedings, and reinforcing data fragmentation. The implications of these barriers are discussed further below:

Lack of accountability

Public attendance of court proceedings can hold the criminal justice system to account by putting pressure on witnesses to tell the truth and uncovering any personal biases of judges, lawyers, and juries⁷⁴. Given the importance of transparency in Open Justice, it is a surprise that so many barriers hamper in-person criminal justice research, particularly considering research

in England and Wales finds inconsistencies in terrorism sentencing depending on gender, age and ideology, and proximity to an attack⁷⁵. A 2022 inquiry which set out to understand how the ongoing digitisation of the courtroom impacts Open Justice finds that members of affiliated media and the public face problems accessing relevant court cases⁷⁶. The review cited court lists as being a key issue to accessing proceedings, as well as acknowledging that information on future cases or the outcomes of closed cases are difficult for the public to locate.

The Open Justice Principle emphasises the role of the media in the sharing of information and holding the judicial process to account. It also stresses the importance of the public being able to attend the court to build confidence in legal processes. In creating this distinction and failing to consider the importance of researchers, the operation of the court system creates a media/public divide, overlooking the role which research and researchers play in the scrutiny and accountability of the criminal justice system. In this context, ‘public’ also refers to ‘researchers’, meaning that foregrounding the role of the media in Open Justice indirectly backgrounds the importance of research⁷⁷. Without being fully transparent to the public- and by extension, researchers- full accountability of the criminal justice system cannot be achieved. CourtWatch London explains that ‘what happens in the courts can have a huge impact on the lives of individuals and communities’, yet large portions of decision-making happen behind closed doors ‘where injustice can go unnoticed and unrecorded’⁷⁸. To help combat this, CourtWatch volunteers attended Magistrates’ hearings across London to hold the law to account where possible but, again, faced barriers in doing so- including issues with court lists and not being able to hear proceedings consistently⁷⁹. Attending court hearings to promote accountability conforms to the argument put forward by Faria et al. which suggests that demonstrating ‘tenacity’ by attending terrorism trials can be viewed as a form of activism which ‘push[es] against normative and violent courtroom moves and even influence outcomes’⁸⁰. However, barriers to courtroom attendance stifle the opportunity to gather data on terrorism trials, understand how and where biases may manifest and are perpetuated, and routinely hold the system to account.

Overreliance on media coverage

Barriers to the public accessing and understanding legal proceedings inadvertently creates an overreliance on media coverage to explain and account for trials and legal proceedings. While it would be inaccurate to suggest that media have unrestricted access to the courtroom environment, accredited journalists face fewer barriers to accessing courtroom proceedings.

At the Old Bailey, accredited journalists are provided with a separate entrance and seating arrangement in the courtroom itself, can enter the courtroom with electrical items and, in some cases, view the evidence provided to the jury. Additionally, Technologies, such as Cloud Video Platform (CVP) links, may be made available if the reporter is unable to make the case in person to enable remote access to the hearing⁸¹. However, these are not equally available to the public, and when requesting a CVP link during the period of the fieldwork, this was not followed up by the court. The use of online technologies does not always operate perfectly, but the additional insights they can offer are generally prioritised for journalists to support their ability to report on legal proceedings.

Whilst the Open Justice principle emphasises the role of the media in promoting legal transparency, court reporting is rapidly declining⁸². A recent interview with CourtNews UK journalists highlights that the ongoing digitisation of the courtroom is having an impact on court reporters and the information made available to them- ‘so much of legal proceedings are effectively concealed from reporters’, even with an office inside the Old Bailey⁸³. While new reforms can allow for those directly involved in the case and accredited journalists to have access to a CVP link, court documents are now sometimes shared ‘privately online between barristers and the judge without ever being heard in court’⁸⁴. These barriers, in many ways, are similar to those faced by the public and researchers. With declining numbers of court reporters contributing to a ‘democratic deficit’, it has been noted that ‘the vast majority of the court and judicial activity taking place at any one moment of time will not be subject to media scrutiny’⁸⁵. Placing media at the centre of legal transparency means that justice is predicated on editorial decisions as to what is newsworthy and fails to account for media bias, or the fact that media outlets cannot report on all court hearings⁸⁶. Whilst media coverage is important to hold the justice system to account, relying on this as the primary way that legal decision-making is communicated to the public is insufficient and unsustainable. Barriers to public attendance and, consequently, academic research must be eroded to supplement media coverage. If transparency is a key tenet of democracy, the need to examine the failures of open justice to provide consistent insight into the operation of the courts is urgent.

Data fragmentation

Barriers to in-person research methods could discourage researchers from attempting to conduct courtroom fieldwork. With increased academic attention being paid to the role of law and legal processes in terrorism, scholarship focusing on the England and Wales contexts

frequently leans on transcription services or media coverage of trials. Though these sources offer the next-best access to the courtroom, both offer incomplete images of courtroom proceedings.

Whilst transcripts are a useful data source, their insights are limited. In-person attendance of the courtroom exposes subtleties in language, tone, and delivery of comments, infusing observational research with a depth which is not possible to attain from court transcripts alone. For example, in-person research gives witness to the demeanour of lawyers, ‘constructing displays of style and competence that command the attention of their audience and imbue their arguments with persuasive force’⁸⁷. Cross-examination tactics often utilise prolonged pauses or ironic tones to convey additional meanings to the judge and jury of the case⁸⁸. In this sense, subtleties of meaning and the construction of a version of events are frequently communicated non-verbally and, therefore, not captured in court transcripts despite their important role.

Aside from often costly and often difficult to attain, reliance on transcripts and other statistical data drastically reduces the insights which can be generated. Large areas of the court system cannot be accounted for by transcripts since proceedings from Magistrates courts are not recorded and, therefore, not transcribed meaning that it is almost impossible to understand how Magistrates proceedings unfold without being present in the courtroom⁸⁹. This is significant with first hearings and some trials of terrorism-related crimes being carried out at a Magistrates Court⁹⁰.

Secondly, in terrorism trials- like any other trial- the defendant may choose to give evidence to the court. This provides an invaluable primary resource, hearing first-hand their account of events, which can help to enrich and inform evidence-based research of terrorism trials. However, these insights are diluted by transcripts and media coverage. Being in close proximity to terrorism suspects, hearing their voices, and observing their body language humanises defendants in such a way which cannot be achieved by reading transcripts or news coverage⁹¹. With the courtroom being one of the few environments in which ‘the word of the accused is heard publicly’⁹², embodied research can be an emotionally demanding endeavour. The emotions felt by the researcher in these circumstances are unique and can serve as a ‘basis for weaving more accurate and situated narratives’⁹³. Presently, terrorism research does not tend to include the voices, perspectives, and opinions of terrorism suspects themselves, and this resource is underutilised.

Thirdly, though ‘culpability’ and ‘agency’ have different functions, the two concepts are fundamentally concerned with ascertaining the intent of the individual in question. The separation of these terms reinforces academic and legal conceptual silos, failing to realise the value of interdisciplinary perspectives. Terrorism has been well-established as a legal concept holding relevance across different disciplines, including Criminology, Sociology, Psychology, and Law⁹⁴. Researchers with an interest in deepening their understanding of legal proceedings may not have a legal background and find it difficult to fully understand legal matters as they unfold. Complex legal language poses a barrier to non-legal scholars who recognise the importance of socio-legal insights to support interdisciplinary research but have not spent years specialising in criminal law. Therefore, the ability to research terrorism trials has a wide potential cross-disciplinary impact which is hampered by legal jargon and a lack of shared language between disciplines.

Conclusions

A lack of primary data has been described as the ‘Achilles Heel’ of Terrorism Studies⁹⁵. Not only does Terrorism Studies continually recycle existing secondary data, but it also struggles to utilise new methodologies to gather data. In the case of observational methods, it appears that practical and linguistic research barriers outlined in this article are more acutely felt in England and Wales compared to other jurisdictions.

To mitigate these barriers, five key recommendations are put forward. Firstly, the creation of court research accreditations. These accreditations should permit researchers enhanced access to the courtroom which mirrors that of media access and allow for the creation of independent and empirical evidence-based research, aiding multi-disciplinary analysis and enhanced understanding of legal proceedings more generally. Research accreditations must be available in a prompt manner which reflects the fast-paced changes to legal proceedings. Secondly, court lists must be improved for the public and researchers to attend cases that they are interested in to enhance public and academic scrutiny. In line with wider recommendations from Transform Justice and the Open Justice inquiry, court lists should include a basic summary of the indictment and be released promptly- ideally providing more advanced notice than the prior working day⁹⁶. This could be supplemented by online resources helping the public to decode legal jargon and gain a fuller understanding of the proceedings they observe, whether a jury is in attendance or not. Thirdly, court reporters and initiatives such as CourtWatch London are

important to promote legal transparency and illustrate issues with existing Open Justice provisions. There is a need for further investment in these initiatives, and others like it, to encourage accountability of the criminal justice system and improve knowledge of and access to legal proceedings nationwide. Fourth, a common framework is needed between Law and other disciplines to bridge together thematically similar terminology, such as that of ‘agency’ and ‘culpability’. Simplifying and bridging these complex but similar ideas may prove insightful for Terrorism Studies, Criminology, Law, and other disciplines. Further work is needed to fully understand how this might be achieved, but a useful starting point is to recognise the multidisciplinary significance of legal proceedings and foreground the role that intention plays in ‘agency’ and ‘culpability’. Considering the barriers outlined in this article and the dwindling numbers of court reporters in England and Wales, attending a court hearing is stymied by many factors, meaning that -finally- court transcripts must be made easier and cheaper (or free) to acquire. Court transcripts are the only way of obtaining insight into the direction of court proceedings without being in the courtroom in person. Additional barriers to then accessing court transcripts mean that large sections of criminal justice can go unseen and unscrutinised, failing to promote the transparency of justice.

Attending terrorism trials holds potential insights for various disciplines, as well as producing relevant data for agencies dealing with terrorism offenders post-conviction. Importantly, being present in court proceedings offers valuable insights beyond those obtainable by court transcripts- though in some instances, transcripts may remain our only option. Gathering data which remains uncaptured in other research methodologies, attending terrorism trials provides the opportunity to witness the constructions of narratives within legal proceedings and observe defendants giving evidence. Eroding barriers to the in-person analysis of terrorism trials are key to accessing the benefits of ethnographic legal research and could introduce new methodological possibilities to the field of Terrorism Studies.

While the barriers outlined in this article are based on the personal experiences of the author and cannot be assumed to be universal experiences of researchers in this environment, it remains true that these barriers hamper legal research within England and Wales and raise methodological issues with comparative studies between other jurisdictions. Enhancing Open Justice will help facilitate in-depth interdisciplinary research, bring insights from England and Wales in line with the existing global research landscape, enable cross-country comparative

research which is currently lacking, and increase the examination of justice for media, public, and researchers alike.

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⁴⁴ Graeme Hayes, Seven Cammiss, Brian Doherty, Disciplinary Power and Impression Management in the Trials of the Stansted 15. *Sociology*, 55(3), 561-581, 2020, page 577. Available at: <https://doi.org/10.1177/0038038520954318>

⁴⁵ Nicole Bögelein et al., "Courtroom Ethnography in the Context of Terrorism: A Multi-Level Approach," *International Journal of Qualitative Methods* 21, 2022, page 2. Available at: <https://doi.org/10.1177/16094069221090059>

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⁴⁹ The City of London, *The Old Bailey*. Retrieved 1st June 2024. Available at: <https://www.cityoflondon.gov.uk/about-us/law-historic-governance/central-criminal-court>

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⁵⁶ Elizabeth Pearson, Emily Winterbotham, and Katherine E. Brown, *Countering Violent Extremism, Making Gender Matter*, Palgrave Macmillan Cham, 2020, page 53. Available at: <https://doi.org/10.1007/978-3-030-21962-8>

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⁵⁹ John Sprack and Michael Engelhardt–Sprack, *A Practical Approach to Criminal Procedure*, Oxford: Oxford University Press, 2019. Available at: <https://doi.org/10.1093/oso/9780198843566.001.0001>; Rita Augestad Knudsen, "Why Terrorism Researchers Should Care about Criminal Responsibility," *Perspectives On Terrorism* 17, no. 1, 2023, page 52. Available at: <https://www.doi.org/10.19165/XGLY9572>

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