

Pleading Guilty Online: Enhanced Vulnerability and Access to Justice

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Online courts have the potential to create or exacerbate pressures to plead guilty, particularly for vulnerable defendants. I explore these pressures in the context of the Covid-19 pandemic in which [increasing use of online justice](#) has coincided with a [significant increase in guilty pleas](#).

In a [2018 article](#) published in the *Modern Law Review*, Jill Peay and Elaine Player discussed the risks that incentivising guilty pleas can pose for defendants with vulnerabilities. They describe the potential differential impact of discounts awarded in accordance with the [Sentencing Council's Definitive Guideline on Reduction in Sentence for a Guilty Plea](#) on defendants with vulnerabilities including learning disabilities, mental illness, personality disorder, and autism spectrum disorders. In this short piece, I argue that vulnerable defendants are also likely to be particularly susceptible to increased pressures to plead created by the use of online justice procedures.

Existing research has linked online procedures (and in particular online appearances) to increased guilty plea rates, without identifying an underlying causal relationship. A [2010 Ministry of Justice paper](#) examined outcomes in virtual magistrates courts over a 12-month pilot in London. In virtual courts, defendants appeared via a video link, while remaining in the police station in which they were charged. The study found that guilty pleas were three percentage points higher in the virtual courts than in the non-virtual courts (75% compared to 72%). A [2000 study](#) examining the use of video link at Manchester Crown Court. In the 45 video link hearings which the study recorded, 24.4% of defendants pled guilty. The highest monthly plea rate in the same court during the five-month pilot period was 21.2%. The authors note that this comparison is even more striking since confirmed guilty pleas were removed from the video link list for the defendant to attend court in person.

There are important theoretical reasons to believe that the relationship between online justice proceedings and plea rates may be causal and specifically that the use of online justice procedures increases pressure for defendants to plead guilty (see, for example, Jane Donoghue's [2017 article in Modern Law Review](#)). Research and theory from law and psychology, discussed below, suggests that such pressures have the potential to further exacerbate what Peay and Player describe as the 'uneven burdens' placed on vulnerable defendants by guilty plea procedure.

Examining the potential for online justice to have a differential impact on vulnerable defendants plea decisions is important in the context of the Covid-19 pandemic in which [increasing use of online justice](#) has coincided with a significant increase in guilty pleas ([the guilty plea rate in the Crown Court increased by 20% from 68% in](#)

[Q2 of 2019 and 80% in Q2 of 2020](#)). The Ministry of Justice has noted that it is likely that this increase is due to the restricted ability of courts to progress jury trials. However, and particularly given the existing work showing plea rates may be higher in online courts, the relationship between online justice and guilty plea rates must surely also be explored as a potential contributor to this increase. While some difficulties for vulnerable defendants appearing remotely have previously been recognised by the government, for example in the equalities statement linked to the Prisons and Court Bill (as reported [here](#)), many current pressures risk being overlooked as the result of [large court backlogs](#) and the [dramatic and relatively sudden increase in online justice as a result of Covid-19](#).

1. Online Justice and Informed Decision-Making.

Guilty pleas constitute waivers of the right to a fair trial under Article 6 of the [European Convention on Human Rights \(ECHR\)](#). As a result, they are required to be made [“in full knowledge of the facts, that is to say on the basis of informed consent...”](#) Online procedures have the potential to compromise the knowledge, understanding, and appreciation of defendants, particularly where defendants have certain vulnerabilities.

Research has shown that utilising online justice procedures can impact both levels and quality of representation. Research from [pilot virtual courts](#) suggests that those using virtual courts are more likely to self-represent (and note that self-representation rates have [increased generally](#) since this pilot court data was published, probably as a result of legal-aid cuts). As [Donoghue notes](#), failing to receive legal advice has the potential to lead to increased guilty plea rates. First, few defendants are well-equipped to represent themselves even in circumstances where they have a good case to make. Second, defendants who do not receive adequate legal advice may not understand the strengths and weaknesses of their case and may not know that they have a legitimate defence. Both of these factors have the potential to lead defendants to plead guilty even in situations in which they may not have actually committed an offence. Both of these factors are likely to differentially impact vulnerable defendants, particularly in the case of vulnerabilities influencing the ability to understand and process legal information. These defendants include those with comprehension and communication difficulties. In online courts, it may be hard to pick up these difficulties as a result of hampered communication – [a 2017 survey](#) reported that 71.79% of 198 legal professionals surveyed felt that in their experience appearing by video link had a negative impact on a defendant’s ability to communicate with practitioners and judges.

Even where defendants are represented, research suggests that the quality of representation and the lawyer-client relationship is different where communications and court appearances take place online. In a [study conducted in 2012](#) examining the experiences of 31 prisoners appearing in court via video-link in New South Wales,

Australia, Caroline McKay described what she called a ‘nexus between space, participation, and comprehension’, and found that being in an isolating space such as a custody suite ruptures this relationship. Defendants in Mackay’s study reported things “sinking-in better” in a courtroom space, and described not understanding things and not having things explained to them sufficiently when appearing virtually. [Another study conducted in Australia](#) examined plea decisions made by defendants appearing remotely from a police station through interviews with judicial officers, court administrators, court staff, justice department officials, prosecutors, witnesses, and lawyers. This study found evidence of defendants who were appearing remotely in court receiving information and assistance from non-legally trained prison officers who were proximately close to them and easier to access than their lawyers. In the two virtual court pilots conducted in England and Wales, lawyers also noted difficulties communicating with clients via video-link, and a risk that these difficulties could hamper the provision of legal advice during a hearing (see [here](#) and [here](#)).

These communication difficulties have the potential to undermine the status of defendants as informed decision-makers. These pressures are likely to be most important for defendants with vulnerabilities that hamper their communication or comprehension for two reasons. First, defendants with communication or comprehension difficulties may find it particularly hard to communicate with their lawyers online. Such clients may not necessarily have the ability or insight to know where they lack comprehension or to ask for more information, and lawyers may struggle to pick up on non-verbal cues indicating reduced understanding in an online environment. As [Anne Poulin has noted](#), non-verbal cues are likely to be much harder to read where defendants appear remotely. Second, defendants with such vulnerabilities are likely to be the most reliant on their lawyers to assist with comprehension, communication, and legal decision-making. As a result, these defendants are more susceptible to misunderstanding and confusion, and entering guilty pleas as a result.

In addition, defendants with certain vulnerabilities may struggle to engage with the online process regardless of their representation. As a result, they may lack an understanding of their case and the implications of pleading guilty, both as a result of online communications with legal representatives and online appearances in court. One example of a group of defendants who are likely to struggle with this difficulty is defendants with Autism Spectrum Disorders (ASDs). In a [2017 report by Transform Justice](#), autism expert Dr. Marie Tidball reported that defendants with ASDs can struggle to associate a video link as being part of their case and thus to understand the significance of what happens in court and what is being said in court. The 2017 report describes the experience of one mother who was watching her autistic son on a video screen, and remarked: ‘Look at him, he’s not listening. I know he doesn’t know what’s going on.’

For these reasons, defendants with ASDs may struggle to engage with what is happening in court and to understand and appreciate information being given to them. As a result, they may not fully understand the case against them or appreciate the consequences of entering a guilty plea. These defendants cannot be said to have given informed consent to waive their right to a fair trial.

2. Online Justice, Autonomy, and Free Decision-Making

The autonomy and free decision-making of defendants has the potential to be compromised where they appear from custody (or to a lesser extent from the police station) rather than court.

First, where defendants who are incarcerated make plea decisions from custody, their autonomy has the potential to be undermined. This undermining occurs where a defendant feels sufficient distress as a result of the custodial environment that they cannot engage with the plea decision-making process. Where defendants feel depressed or distressed or lack motivation in decision-making, this has the potential to significantly impair their ability to make autonomous decisions in accordance with their underlying values and preferences. Without motivation to engage in a decision-making process, an agent can feel deprived of the sense that there is a point to the decision that they are making and as a result fail to engage in or to reflect on the decision appropriately (see [here](#) and [here](#), for example). This type of disengagement can lead to decisions that do not accord with underlying values, for example through pleading guilty when innocent just to ‘get the process over with.’ While a definition of autonomy that encompasses this type of vulnerability is likely to be beyond the scope of the current definition used by the ECtHR (see [Natsvlishvili v Georgia, paragraph 97](#)), the fact that vulnerable defendants may be disproportionately susceptible to autonomy depletion and subsequent guilty pleas that are detached from underlying values and preferences is important from an equality perspective.

The remand environment can be particularly distressing and difficult for vulnerable defendants who may struggle to cope in such an environment. They are therefore likely to be particularly susceptible to the influence of what has been termed the [“coercive environment” of incarceration](#) (although note that existing research focuses on those serving sentences in prison rather than those on remand). For example, [research investigating the experiences of inmates with ASDs](#) has shown that they are at an increased risk of bullying, confrontations, exploitation, anxiety, and social isolation in custody. Research with inmates with intellectual disabilities also suggests that such inmates may be disproportionately susceptible to the harm resulting from being detained in custody. For example, [one study](#) found higher levels of probable psychosis in inmates with intellectual disabilities when compared to controls. The authors of this study note that although this disproportionate rate of psychosis may pre-exist imprisonment, there may also be a disproportionate onset of psychosis during incarceration in those with intellectual disabilities as prisoners are ‘challenged

by the stressful and complex prison environment.’ In contrast, although not ideal, the courtroom provides an environment in which a defendant can be supported by physically-present family and friends and legal representatives, all of [which can foster a sense of support and motivation](#) (note that in online appearances, defendants may be unable to see family and friends even where family and friends are able to attend court in person due to the orientation of the camera, see [here and here](#)).

There is an additional reason to believe that appearing in court from custody might disproportionately cause vulnerable defendants to plead guilty, grounded in psychological theory. Appearances from custody may have a cognitively biasing impact on defendant decision-making through influencing the “framing” of guilty plea decisions. Framing refers to a bias [demonstrated in cognitive psychology](#), where decision-makers who are asked to pick between a sure option (such as a guilty plea, where there is a 100% chance of an outcome) and risky option (such as trial, where there is a chance of a worse outcome and a chance of a better outcome) have a tendency to pick the sure option when a decision is framed as a gain, and the risky option when the same decision is framed as a loss. For theoretical explanations of this effect see [here](#) and [here](#). [Research specifically examining framing in guilty plea decision-making](#) in the United States plea-bargaining context suggests that defendants can be susceptible to this effect when deciding whether to plead guilty.

Framing has the potential to be important when considering guilty pleas and online justice. For defendants remanded in custody, whether they are kept in custody for their court appearance or whether they are allowed out of custody to appear in court may influence their cognitive framing of decision options. Where defendants are able to attend court, they get to experience the outside world again (albeit on a limited basis). This experience of the outside world can emphasise the status of custody and a custodial sentence as a loss of freedom and thus make the imposition of any custodial sentence at trial or via plea (as would most often be imposed on a defendant who has been held on remand and is then convicted) appear as more of a loss. On the other hand, where defendants are not able to leave custody, they are more likely to view incarceration as a baseline and thus eventual freedom (following a plea or trial sentence) as a gain. Thus, defendants appearing from custody are likely to be in more of a gain frame, while defendants appearing in person are likely to be in more of a loss frame. As a result of the standard framing effect, we would therefore expect defendants appearing from custody to be more biased towards the sure option (plea) and defendants appearing in person to be more biased towards the risky option (trial). Although this effect has not been examined previously in the context of online justice, it has been discussed when considering how remand in custody might influence the framing of decision options (see [here](#)). Since the defendant’s decision-making in such scenarios is biased by a restrictive situation that they have been placed in by the state, this effect can be seen as an unintentional manipulation of free choice (particularly in a system where the defendant is innocent until proven guilty and thus the baseline position of the defendant should be freedom). This effect is particularly important in

the context of the Covid-19 pandemic in which the number of defendants held on remand awaiting trial has [been reported](#) to have increased by almost a third as a result of court delays.

Again, this effect is unlikely to rise to the level of restriction on free choice necessary to invalidate the waiver of fair trial rights under Article 6 of the ECHR, but it may have equality implications. These implications arise because the likelihood that the effect is present in decision-making will be related to the way that a defendant mentally frames their own situation which can be impacted by vulnerability. For example, a defendant who becomes depressed and unmotivated in custody will be more likely to start to feel helpless and view custody as their status quo, thus placing them in a gain frame (biasing them towards pleading guilty) when appearing from custody. These defendants may be particularly in need of moving from custody to the more [‘dignified’](#) courtroom environment. Therefore, where vulnerabilities cause particular difficulties with the remand environment, they may also have the potential to increase framing effects and thus guilty pleas in those appearing from custody. [Research in cognitive psychology](#) finds that those with one potential vulnerability, ASDs, tend to be less susceptible to framing effects. However, another vulnerability, low cognitive ability, [has been associated with greater susceptibility to framing effects](#).

CONCLUSIONS

There are important potential benefits of online justice, particularly in the context of current court backlogs. Dealing with cases online may also have the potential to reduce discrepancies in time and cost of a full trial compared to time and cost involved in pleading guilty, and thus may actually make trial more accessible for some defendants (for a discussion of the increased time and cost currently involved in trial when compared to pleading guilty, see [here](#)). However, [research from as far back as the 1980s](#) shows that defendant decisions have the potential to be influenced by the move towards online justice. Any influence on decision-making is problematic where it influences decisions in normatively undesirable ways (for example by undermining defendant understanding or autonomy) or where it differentially and adversely impacts vulnerable defendants. The research discussed here suggests that the move towards online justice has the potential to do both, particularly in the context of guilty pleas. Where a defendant is convicted on the basis of a guilty plea rather than at a full trial, they essentially decide to self-incriminate, and the prosecution is no longer required to prove the case against them. In this context, the legitimacy and fairness of convictions becomes dependent on the decision-making of defendants. It is therefore vital to ensure that this decision-making is free and informed, and that procedures surrounding decisions do not exacerbate inequality resulting from vulnerability. Such decisions should be closely monitored to protect the integrity of the criminal justice process and to ensure compliance with [Equality Act 2010](#) obligations. Empirical research on online procedures must specifically

address the relationships between vulnerability, guilty pleas, and online procedures for this reason. This research is particularly important as policy-makers begin to plan for the future of online justice, and seek to retain the potential benefits of online procedures, beyond the Covid-19 pandemic.