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in the 'Remote' Courtroom

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Online Courts: Re-Assessing Inequality in the 'Remote' Courtroom

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Abstract

This paper explores the repercussions of the virtual hearings within the context of socioeconomic inequality in the justice system. Following the imposition of 'lockdown' conditions in the UK in March 2020, the Courts and Tribunal Service (HMCTS) rapidly introduced an online court system resulting in thousands of hearings being swiftly transferred onto audio or video-calling platforms. This study is based on interviews with six barristers and solicitors practising in the criminal and family courts, focusing on what the online court experience can reveal about the disparity in socioeconomic status between those judging and those being judged. Conducting a thematic analysis of the interview data, I argue that the disruption to the courtroom dynamics caused by online hearings highlights tacit functions of the lawyer's role in supporting their clients to navigate the daunting court experience and comply with courtroom customs. I ultimately conclude that concerns regarding the loss of solemnity of proceedings reveal assumptions of both the traditional and virtual court environment and suggest that further research is needed before committing to permanent technology reforms.

On 23 March 2020, the UK government imposed 'lockdown' conditions throughout the country, requiring large swathes of UK industries to adapt to remote working conditions; the Court system was no exception. The introduction of an online court process by the Courts and Tribunals Service

(HMCTS) resulted in thousands of hearings being swiftly transferred to audio and video-calling platforms. This study focuses on socioeconomic inequality in the justice system and its revelations from this unprecedented move to fully ‘remote’ or ‘virtual’ hearings. It is based on interviews conducted in July 2020 with six barristers and solicitors practising in the criminal and family courts. These jurisdictions were chosen due to the notable distinction in socioeconomic status between legal professionals and lay clients in these areas (Sanders, 1985; Phillips et al., 1998; Cooper et al., 2009; Bywaters et al., 2016; Law Society, 2016, 2020; The Sutton Trust, 2019; Bar Standards Board, 2020). The interviews and subsequent thematic analysis focused on what the online court experience can uncover about the socioeconomic disparity between those judging and those being judged.

Prior to reviewing the empirical data, I explore the extent of socioeconomic inequality in the justice system and argue that there is a socioeconomic divide between professionals and lay clients that is embodied in different ways of speaking, dress and presentation (Jacobson, Hunter and Kirby, 2015; Carlen and França, 2019), and represented physically in the layout of traditional courtrooms (Mulcahy, 2011; Jeffrey, 2019). I subsequently review previous reports and studies regarding the introduction and development of technology in UK courts and its connection to recent funding reforms within the justice system. The analysis of the interviews reveals how legal representatives go beyond the requirements of their role to support their clients in ways that are inherently connected to the socioeconomic dynamics of the courtroom. It is these tacit functions of legal practice that have been disrupted by the online system and are being overlooked in proposals to extent and expand technology in the courtroom. The data also suggests that concerns about preserving the solemnity of court proceedings require further examination given that the means of such preservation, by way of formal courtrooms, dress and etiquette, are inherently connected to the embodied socioeconomic differentials which

render the court process so challenging for less privileged individuals (Jacobson, Hunter and Kirby, 2015). Ultimately, I conclude that further studies are needed to explore the impact of virtual courts on vulnerable and socioeconomically disadvantaged lay clients prior to making determinations about the permanency of the current online system.

Socioeconomic Inequality and Court Experience

Socioeconomic status is a commonly used but ill-defined concept, often treated interchangeably with social class, but without clarity as to the meaning of either term. It is beyond the scope of this paper to consider this connection in detail, however, I argue that Bourdieu's (1987) theory provides a useful basis for understanding socioeconomic status within the courtroom environment. Bourdieu's model envisages social class or socioeconomic status as comprising three 'capitals': economic capital, including income, wealth and property rights; cultural capital, incorporating educational attainment, hobbies and cultural tastes; and social capital, relating to networks and connections with others. Some of these 'capitals' present a greater challenge to empirical measurement than others, however, this three-dimensional understanding is important, as it enables us to comprehend social class beyond financial privilege – or lack thereof – alone, allowing the social and cultural components to be recognised and assessed. In empirical studies, commonly used socioeconomic indicators including occupation, income and education level (D'Alessio and Stolzenberg, 1993) capture aspects of the three capitals – however, even these indicators can be difficult to assess in the courtroom. Therefore, the ways in which these capitals are embodied – in forms of accent, clothing and appearance (Bourdieu, 1986; Granfield, 1991; Ramsey, 1991; Mugglestone, 2003; Sigelman, 2012) – are crucial for understanding socioeconomic status within the justice system.

This is particularly true given the limited data available on socioeconomic status within the legal profession and the justice system more

broadly. The professional organisations of barristers and solicitors have now begun to collect information on parental university attendance and education at fee-paying schools, demonstrating an overrepresentation of individuals from more privileged backgrounds within the profession (Law Society, 2016, 2020; Bar Standards Board, 2020)¹. Further, the Sutton Trust (2019) recently reported that 65% of senior judges attended independent schools, with “the independent school to Oxbridge pipeline alone account[ing] for more than half of all senior judges (52%)” (p. 55). This is perhaps unsurprising given the professions’ well-known ties to ‘elite’ sections of society (Rogers, 2010). Comparable data for defendants and lay clients in the Courts is hard to come by; however, studies have shown (Sanders, 1985; Phillips et al., 1998) that in the criminal jurisdiction the unemployed and low paid workers are arrested and prosecuted at disproportionate rates, and anti-social behaviour interventions are used more frequently in deprived areas of the UK (Cooper et al., 2009). Similarly, in the family jurisdiction, children from the most deprived quintile are five times more likely to be in foster care and nine times more likely to be on a Child Protection Plan (Bywaters et al., 2016).

These studies and statistics reveal the socioeconomic disparity between those employed within the criminal and family justice systems and those who are subject to it as defendants and lay clients. This disparity is arguably “by design not mistake” (Reeves, 2014, p. 340) owing to the development of the criminal law as a “political response to the misdeeds of the deprived” (Reeves, 2014, p. 340). Further, the increasing emphasis on efficiency and standardisation within the modern justice system (Mant, 2017; Welsh and Howard, 2019) has perpetuated this inequality by reducing the ability of advocates to effectively represent their clients (Welsh, 2017;

¹ It is notable that the Law Society does not collect such data regularly – there is a four year gap between the most recent reports – and that 48% of respondents at the bar did not answer these questions, in comparison with less than 1% who did not answer the questions about gender (Law Society, 2016; Bar Standards Board, 2020).

Campbell, 2020). Such reforms have also encouraged criminal justice institutions to target more vulnerable populations as they are often easier to police and punish as a result of their disadvantaged position (Skinns, Welsh and Sanders, 2021 Forthcoming). Accordingly, Becker's (1997) assertion that it is "the middle class who make the rules [and] the lower class must obey" (p. 17) appears to retain its relevance in the contemporary justice system.

This socioeconomic disparity is "embodied in the different modes of speech, dress and lack of courtroom inhibition exhibited by the court staff and magistrates"² within in the criminal courts (Carlen, 1976; Carlen and França, 2019, p. 10). These physical manifestations of socioeconomic difference also encompass lawyers, who have been noted to "walk briskly and purposefully [...] heels clicking and gowns swishing" whilst lay parties are left to "sit restlessly or slouched on benches outside courtrooms waiting to be let in" (Jacobson, Hunter and Kirby, 2015, p. 12). This uninhibited presentation of professionals sits in stark contrast to the feelings of fear and anxiety expressed by lay parties, who have described the Crown Court as "very frightening and very daunting" (Jacobson, Hunter and Kirby, 2015, p. 8). The perception of lay parties was aptly described by one criminal defendant as follows: "well, it's posh innit? The courts are posh. It's all posh to me, everyone in wigs. Everyone talks in this funky language" (Jacobson, Hunter and Kirby, 2015, p. 12). I argue that these observations are examples of embodied cultural capital – "in the form of long-lasting dispositions of the mind and body" (Bourdieu, 1986, p. 243) – and as such, demonstrate that socioeconomic inequalities exist not only within the statistics on a macro scale, but are performed in individual courtrooms and cases.

These socioeconomic differentials are further entrenched by the architecture of the Courtroom, including raised sections of floor, barriers and enclosures, holding the "potential to create insiders and outsiders;

² Noted to include whispering to one another, walking in and out of the courtroom and using laptops and smartphones during hearings.

empowered and disempowered” (Mulcahy, 2011, p. 1). Participation can be enabled or constrained by changes in the height of platforms and to sight lines (Jeffrey, 2019) and as such, the layout of the courtroom can serve to – sometimes literally – elevate the professionals, whilst side-lining lay participants to the edges and back of the court where docks, jury seating and the public gallery are placed. These physical placements thus underline “the marginalised outsider position” of lay participants (Jacobson, Hunter and Kirby, 2015, p. 3).

The online process’ disruption of these embodied and physical manifestations of power dynamics holds the potential to expose – and thus represents a unique opportunity to assess – the ways in which socioeconomic status is performed within the court environment. However, it is important to situate these discussions in the context of recent funding reforms and how these are connected to the development of the technology in the justice system. The next two sections shall briefly explore these issues before reviewing the recent studies on the current online court system.

Reforms and Reductions in Legal Aid

An understanding of the reforms that have befallen the criminal and family justice systems over the past decade is imperative to a full comprehension of the current online system. Numerous studies have argued that the drastic reduction in criminal legal aid provision has diminished the ability of lawyers to effectively represent their clients (Welsh, 2017; Campbell, 2020). The severe reduction of profit margins has meant professionals are less able to prioritise client needs over economic demands (Sommerlad, 2001), leaving those that want to do a good job facing “a constant battle to do so” (Gibbs and Ratcliffe, 2019, p. 34). The reality of representation at these greatly reduced rates is that advocates are perceived by some to “do little more than process their clients through the [Criminal Justice System]” (Campbell, 2020, p. 4). Similarly, in the family courts, cuts and restructuring have left

many lay clients to “battle alone or drop out of the struggle” (Wong and Cain, 2019, p. 9). Thus, lay clients with sufficient economic capital (Bourdieu, 1986) to pay for private representation are at a distinct advantage; whereas those unable to pay face the “ritualised procedures” (Jacobson, Hunter and Kirby, 2015, p. 21) of the courtroom without – or at least without effective – representation (Campbell, 2020).

Since 2010, the government’s reform agenda has also included the large scale selling off of the Court estate, resulting in the closure of 295 Court facilities³ (Ministry of Justice, 2018; Sturge, 2020). This has resulted in a significant backlog in the criminal courts⁴ (Sturge, 2020), which has been exacerbated, but certainly not caused by, the reduced capacity to conduct in-person hearings during the pandemic.

These drastic reductions in the Court estate and expenditure on legal aid were presented as a pragmatic response to the need to reduce costs in the legal sector (Mant, 2017; Madge, 2019). However, it is notable that the savings made have been largely matched by increased expenditure on technology in the courtroom (Ministry of Justice, 2016; House of Lords, 2019),⁵ and in relation to the Court estate, sales are now explicitly acknowledged to be subsidising the modernisation reforms (Ministry of Justice, 2018; Madge, 2019). Therefore, far from being a necessity, these reforms arguably represent a deliberate choice to redirect funds from physical court buildings and the provision of legal advice to investment in

³ This includes 162 Magistrates’ Court, 90 County Courts, 17 Family Courts and 8 Crown Courts, raising approximately £223 million in revenue.

⁴ In March 2020 the backlog of cases in the Magistrates’ Court was just over 300,000 and in the Crown Court just under 40,000; these figures had risen to 532,800 and just over 50,000 respectively by November 2020 (Sturge, 2020).

⁵ The MoJ has committed approximately £1 billion to its ‘modernisation’ programme to increase technology in the Courts. It has been reported that approximately £900 millions of savings have been made since the introduction of the Legal Aid Sentencing and Punishment of Offenders Act 2013 (House of Lords, 2019), which removed legal aid provision for the majority of civil and family cases, and that approximately £223 million had raised by the sale of Court buildings by 2018 (Ministry of Justice, 2018).

courtroom technology. Accordingly, the current online system is inherently linked to the reform agenda.

Technology in the Courtroom

There has long been discussion of ‘online’ or ‘virtual courts’ with many realising the potential of the internet and computer technology to transform the justice system (Bermant and Woods, 1994; Widdison, 1997). Several theorised amenities have already come to fruition, including electronic filing and online law libraries. However, others – such as the full scale virtual reality presentations and action replays of evidence (Bermant and Woods, 1994; Widdison, 1997) – are unsurprisingly not included in the current provisions. Whilst it is accepted by some that technology holds the potential to improve the court system and access to justice (Rowden, 2013), it is important to heed Widdison’s warning that “whilst [...] IT is morally neutral, our management, mismanagement or non-management of it is not” (Donoghue, 2017, p. 1024).

One concern that has long arisen in discussions of online hearings is whether the solemnity or seriousness of proceedings could be maintained in a virtual setting (Bermant and Woods, 1994; Lederer, 1999; Ward, 2015). This issue was described by the Director of JUSTICE⁶ as follows:

Being summoned before a TV screen is not the same as being summoned before a court... Being arrested, taken to a police station and then on to court is a shaming process. It is an extremely unpleasant experience to stand in a dock and be told by a judge that you're going to receive a sentence. There is a danger than this process would be debased by being made to look like a reality TV game (Rowden, 2013, p. 103).

These concerns warrant further consideration of the way in which the physical court space contributes to the legitimacy of the legal system (Jeffrey, 2019). However, I argue that additional critical reflection on why

⁶ JUSTICE is a ‘law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom’ (JUSTICE, 2020).

the solemnity of proceedings is considered of such importance and whether the court process should be 'shaming' – especially as many who are arrested and prosecuted are not subsequently found guilty – is also required.

Technology in UK Courtrooms

It is predominantly over the last 11 years that there has been a steady increase in technology in UK courtrooms, starting with the 2009 pilot of defendants appearing by video link from police stations (Gibbs, 2017). The evaluation of this pilot scheme (Terry, Johnson and Thompson, 2010) concluded that any savings had been exceeded by the additional costs of implementation. It also reported concerns regarding the difficulty of defendants and representatives being physically separated, the inadequacy of the 15-minute slots allocated to each case and the problem of the court imposing its authority remotely.

Despite these equivocal findings, the use of video links has continued to increase amidst rising concerns about the lack of proper research and insufficient data collection on the impact of such hearings (Gibbs, 2017; House of Commons, Justice Committee, 2019, 2020). The current court reform programme's stated vision is to "modernise and upgrade the justice system so that it works even better for everyone, from judges and legal professionals, to witnesses, litigants, and the vulnerable victims of crime" (HMCTS, 2018). However, concerns have continued to be raised that both lay client participation and the importance of the built environment (Rowden, 2013) are being overlooked in favour of "achieving reductions in expenditure and meeting fiscal imperatives" (Donoghue, 2017, p. 1024). The Justice Committee (2019) has also recently warned that insufficient steps have been taken "to address the needs of vulnerable users" (p. 16) in particular regarding the adequacy of legal advice and support provided remotely. It is important to note that it is this system which has been 'fast tracked' during the pandemic; although it remains "unclear to what extent

the measures taken to respond to Covid-19 will become permanent and how they fit within the overall reform programme” (House of Commons, Justice Committee, 2020, p. 3).

Online Courts during Covid-19

Following the implementation of fully ‘remote’ hearings in April 2020, several studies were rapidly undertaken (Mulcahy, Rowden and Teeder, 2020a, 2020b; Ryan, Harker and Rothera, 2020a, 2020b). The Nuffield Family Justice Observatory (FJO) Report collated in excess of 1000 survey responses from lawyers, judges and lay clients (Ryan, Harker and Rothera, 2020a). Many concerning incidents were reported, including one mother giving evidence from her garden shed as it was the only private location available to her (Ryan, Harker and Rothera, 2020a). There were also reports of parents engaging in emergency proceedings to remove their children by calling in from the side of the motorway and numerous difficulties with clients having insufficient phone credit or wifi data (Ryan, Harker and Rothera, 2020a). The report echoed previous reservations (Rowden, 2013; Donoghue, 2017) about the impact of virtual hearings:

[There are] significant concerns [...] about the fairness of remote hearings [... relating] to cases where not having face-to-face contact made it difficult to read reactions and communicate in a human and sensitive way [and] the difficulty of ensuring a party’s full participation (Ryan, Harker and Rothera, 2020a, p. 1).

The follow-up report published in October 2020 reiterated “concern about the difficulty of creating an empathetic and supportive environment when hearings are held remotely” (Ryan, Harker and Rothera, 2020b, p. 19). It also reported significant concerns regarding a loss of formality in proceedings, which had not been raised in the earlier study, and a divergence of views between professionals – who felt that hearings were fair most of the time – and parents and family members – the majority of whom had

concerns about how their cases had been conducted (Ryan, Harker and Rothera, 2020b).

In the criminal jurisdiction, JUSTICE convened a study involving virtual mock trials that simulated the online court environment (Mulcahy, Rowden and Teeder, 2020a). It was reported that the proceedings were less stressful for lay participants, and defendants were potentially afforded greater dignity than when they are placed in the dock (Mulcahy, Rowden and Teeder, 2020a). There was also a significant focus on the solemnity of proceedings, a key lesson being that court dress and a visible coat of arms were vital to guard against a shift to informality, with the authors highlighting “a need to develop new forms of ceremony and ritual” in the online system (Mulcahy, Rowden and Teeder, 2020a, p. 6).

The follow-up study completed in June 2020 argued that any possible technological advances must be balanced carefully against ensuring both sufficient confidence in the legal system and addressing concerns about the “digitally excluded” (Mulcahy, Rowden and Teeder, 2020b, p. 3). It cited the report by JUSTICE (2018), which noted that more than 11 million adults in the UK lack basic digital skills. The Justice Select Committee, reviewing the online court process in July 2020, also highlighted that resolving issues of ‘digital exclusion’ was not as simple as providing the correct equipment, noting that ‘high-tech kit’ and strong wifi will not assist individuals who do not have sufficient computer skills and knowledge of the legal process to engage in online proceedings (House of Commons, Justice Committee, 2020). Access to technology is perhaps the most obvious manifestations of how economic capital (Bourdieu, 1986) – in the form of owning the appropriate devices or having sufficient funds to purchase them – operates in practice. Further, given that it is self-evident that the ability to use technology must be learned, individuals who have had access to IT training or practice using it in a professional setting – examples of cultural capital (Bourdieu, 1986) – are at an advantage.

It is from this vantage point that the analysis of the fully remote hearings now in operation, and the ways in which socioeconomic status may impact lay client experiences of such hearings, must be conducted.

Interviews

I interviewed six legal professionals in July 2020: two criminal barristers, two criminal solicitors, one family barrister and one family solicitor, all of whom had predominantly court-based practices. The interviews were semi-structured, lasting between 50 and 80 minutes. The small sample and focus on only professionals was partially owing to practical limitations; however, these qualitative methods enabled in-depth exploration of how the online process affected the court experience. Therefore, whilst it is not possible to draw broad causal conclusions from this study, it highlights themes that could be further examined in future research including a range of participants such as lay clients, judges and other court professionals. Nonetheless, the participants were well placed to consider the differences between remote and ‘in person’ hearings and provide one perspective on inequality in the online court system in place since March 2020⁷.

The interviews covered many issues regarding the functionality of the technology, the difficulty of assessing vulnerability and mental health conditions remotely, concerns regarding the efficacy and privacy of online conferences, difficulties of communicating with clients during hearings and fears that remote hearings will be used to justify further cuts to public funding. Accordingly, it has not been possible to examine the entirety of the topics discussed, however, the thematic analysis of the interview transcripts below collates responses as they relate to socioeconomic inequality in the court. This enabled an understanding of how socioeconomic disparities operate within the courtroom and the potential of remote hearings to ameliorate or exacerbate such issues.

⁷ There are no references to specific interviewees in this section to support the preservation of participant anonymity.

Technological Inequalities

Participants highlighted many ways that clients might suffer unfairness owing to their lack of access to technology. One criminal representative noted that many clients do not have access to smart phones, computers or tablets. Another reported being unable to contact a defendant who was on bail owing to him not having access to wifi. In the family jurisdiction, the use of e-bundles was noted to be a particular problem, as it requires multiple devices to enable a person to 'appear' in the video hearing whilst simultaneously looking at documents on a separate screen. One participant reported a client having to conduct a five-day hearing via only their smartphone. In circumstances where a lay client was unable to join by video, they were either dialled in using a phone – meaning they attended by audio only – or they attended court in person, often without their advocate in attendance.

It was not only the lack of access to devices, but also the lack of knowledge of how to use the relevant software that inhibited participation. Some participants reported that even where clients had the necessary devices, downloading and logging into different programmes and using the appropriately compatible browsers remained challenging, although one participant did not agree that this caused problems in the Crown Court.

As discussed above, access to technology represents a clear example of how both cultural and economic capital (Bourdieu, 1986) can impact an individual's ability to attend and engage in online court proceedings. Thus, lay clients with sufficient economic and educational resources can avoid being reduced to 'audio-only' litigants. Participants noted that when attending by audio only it was more difficult for clients to intervene by speaking up where necessary and more for them difficult to follow proceedings. It may also not be immediately obvious if parties or advocates have lost connection during audio-only hearings. This means that where there is a video-call option, those in a more privileged position have a greater opportunity to effectively engage in court proceedings than their less privileged counterparts.

Physical Separation from Legal Representatives

Participants raised numerous concerns regarding their physical separation from their clients. The most obvious was the increased difficulty of communication and taking instructions during hearings. One family participant commented: “that’s the whole idea. You are their mouthpiece. How can you be the mouthpiece of someone you can’t see or speak to?” A criminal practitioner gave an example of a professional client appearing frustrated by a representative not raising certain points, noting that “had she been there, he may be able to have that tap on the shoulder and tell her ‘don’t forget this’”. Another criminal participant, practising predominantly in the Magistrates’ Court, noted the difficulty of obtaining instructions in private during a hearing: “I’d normally just say ‘can I turn my back to take instructions?’ Whereas you can't do that. Because ultimately, if you say ‘can I take instructions?’ You're asking the client, and whatever the client says everyone's going to hear”. The Crown Court practitioners had not experienced this problem, which may indicate a difference in how these hearings are conducted in the Magistrates’ and Crown courts, despite the formal procedures being similar.

This practical difficulty of taking instructions was exacerbated to some extent by the way that the physical separation inhibited participants’ ability to develop a trusting relationship with their clients. The family practitioners noted the vulnerability of many clients within public law proceedings and reported that attending a hearing with a client was partially a “hand-holding exercise” and an opportunity to “form the relationship that meant it wasn’t too [...] horrible for them”. They felt that their inability to be physically present with their clients reduced their ability to do this, with one stating that “it’s really important to me that I can take care of these people, but I just can’t do that online.”

The criminal participants also felt that their consultations were negatively affected by being remote as they were unable to develop a rapport

with clients. The criminal solicitors reported that their online consultations were more “mechanical” and involved less “chitchat”, with one noting that it is not as easy to speak to people over the phone or on a video call. One solicitor reported that clients at the police station are often distrustful of them, with some clients asking if they work for the police, and that it is more difficult to dispel such concerns when they are not there in person. Another explained, “the thing with a client is that a level of trust is the starting point”, suggesting that if representatives are only able to speak to clients on the phone or a laptop, defendants may be less likely to follow the advice.

This desire of practitioners to build a trusting relationship with the clients appears to have a dual role. It is partially to enable the provision of effective legal advice, as clients are less likely to follow advice from representatives they do not trust. However, both criminal and family practitioners also reported wanting to make the process less “scary” and “more bearable” for their clients. This indicates a pastoral aspect to the advocates’ roles, which, whilst not strictly required ‘by the book’, is nonetheless a crucial aspect of criminal and family practice.

One participant explicitly linked this pastoral aspect of the role to clothing and accents – both arguably physical manifestations of socioeconomic status (Bourdieu, 1986; Granfield, 1991; Ramsey, 1991; Mugglestone, 2003; Sigelman, 2012) – acknowledging that “barristers all dressed in suits [...] who maybe speak with a different accent” can be a “daunting” experience for clients. These examples of embodied capitals (Bourdieu, 1986) demonstrate how the socioeconomic divide between professionals and lay participants might contribute to the fear and apprehension of the court process (Jacobson, Hunter and Kirby, 2015). Therefore, this tacit pastoral aspect of legal practice could be viewed as an example of professionals attempting to assist their clients to navigate the socioeconomic divide of the courtroom.

Physical presentation and non-verbal communication

The physical presentation of lay clients was mentioned multiple times as related to the outcomes in the criminal jurisdiction, and especially in relation to sentencing decisions. In particular, some participants expressed that it was preferable for clients to wear a suit, or at least not have their hoods up, hats on or present as scruffy. These comments suggest that being dressed appropriately indicates to the court that defendants are being respectful and recognising the seriousness of the situation. There was also an emphasis on presenting as sufficiently remorseful and a suggestion that where clients failed to comply with such presentation it was likely to be beneficial to appear remotely as court would not be able to see them. Correspondingly, one participant commented that “the ones who are truly remorseful [...] they're the ones that suffer” because the court may not be able to see their non-verbal communication of remorse and consider their sentence in light of this.

The importance of such appearances was further emphasised in the examples given by participants across both jurisdictions of clients breaching behavioural norms online in ways that may not have occurred if clients had attended in person. These include speaking out of turn, having their hoods up, visibly smoking on camera and slumping in their chairs. One example included a male defendant appearing in an online hearing “bare chested” and visibly drinking a takeaway coffee, prompting his representative to have to tell him to put a top on.

The focus of the participants' comments was not on criticising their clients but instead on their frustration at not being able to intervene to prevent their clients from behaving in ways that were unlikely to be viewed favourably by the court. One criminal representative explained that during online hearing if clients behave inappropriately “you can't control them, and you can't say to them ‘Be quiet’ [...] Whereas if they're in court, you can look at them and go ‘sit up, sort your tie out, tuck your shirt in, take your hat off’”. Another participant reported a representative warning the other advocates in pre-

hearing discussions that she was unable to calm her client down and there were likely to be problems during the hearing with her speaking out of turn.

These comments, whilst impolite, also portrayed a protective concern for clients and a frustration that advocates were unable to assist them in the ways they usually can during in-person hearings when cases are conducted remotely. As such, they reveal another tacit aspect of the lawyer's role: marshalling their clients' conduct to conform to expectations.

Several aspects of such presentation can be directly linked to socioeconomic status and embodied manifestations of economic and cultural capitals (Bourdieu, 1986). The suggestion that clients should dress in certain ways – preferably in a suit, but at least without a hood or a hat – must be considered in light of the financial resources needed to purchase such clothes, as well as studies having linked clothing to perceptions of wealth and class (Granfield, 1991; Ramsey, 1991; Sigelman, 2012). Further, concerns regarding clients speaking out of turn or shouting out during proceedings are evocative of Carlen's (1976) claim that defendants seeking to challenge the process are characterised as 'out of place, out of time, out of mind or out of order' within the procedural strictures of the court. Carlen (Carlen and França, 2019, pp. 8–10) has more recently argued that reprimanding defendants for breaches of courtroom etiquette contributes to the court process being infused with "taken-for-granted class differentials which [...] have the effect of disadvantaging, or even disrespecting or othering [...] the poor, ethnic minorities and immigrants". Accordingly, the legitimate concern of professionals to assist their clients in adhering to the required etiquette might be understood as a further example of supporting clients to traverse the socioeconomic divide.

Solemnity

In line with the literature on virtual courts, participants expressed concern about whether the seriousness and solemnity of proceedings was sufficiently

conveyed during remote hearings. Some participants explicitly linked the issue of solemnity to the dress and physicality of the court space, noting that the lack of wigs and gowns made hearing participants more relaxed and that in cases where the judge appeared on video from a courtroom it assisted with preserving the seriousness of proceedings. It is important to note that it was not only clients who were perceived as more relaxed. One participant noted that everyone – professionals and clients alike – are simultaneously in court and at home, where they may be balancing childcare, home schooling or other responsibilities, which necessarily transforms the court experience.

On being asked whether this reduction in the solemnity of proceedings was beneficial for clients in making the experience less intimidating, participants provided mixed responses. Some of them agreed that it was likely to be less intimidating but did not consider this to be beneficial to the lay participants. Two practitioners, one family and one criminal, reported that whilst the online courtroom probably allowed clients to feel more comfortable, any benefit was outweighed by the increased difficulties of communication between lawyers and clients, as explored above. The ability of lay clients to engage in hearings was therefore not increased by the online hearings. One criminal participant gave an example of how this might manifest in practice: in the online system, they were on occasion unsure whether their clients had understood that they had attended a court hearing and received a sentence. They reported that they felt their clients were less able to engage in proceedings, explaining that even being placed in a dock at the back of the courtroom was preferable to appearing remotely because “on a screen you actually feel far” given the low quality and bad framing of the court cameras. Accordingly, from the perspective of the representatives, it appears that the difficulties of effective communication with clients and ensuring their appropriate presentation negated any benefit of – and perhaps were partially caused by – a less intimidating court process.

However, participants also reported some ways in which the online environment was equally, or even more, intimidating. One criminal practitioner noted that media representations of the justice system mean that clients expect their solicitors will be present with them and when that does not happen in the online system it makes the process more “daunting” and “scary”. A family solicitor refuted that hearings were less intimidating, reporting that the remote hearings made some clients feel “powerless” and unable to speak up.

Some criminal practitioners also lamented the reduced solemnity of proceedings in the online environment precisely because it was less intimidating for clients. One criminal participant felt that without the formality of the court building, “you lose the scariness, you lose the seriousness of [...] the situation you’re in”. They explained that the experience of going through the criminal process was “horrendous” and often appeared to have a deterrent effect on clients that was lost when hearings were conducted remotely. Another criminal practitioner similarly reported that the solemnity of court proceedings contributed to defendants understanding “the seriousness of their situation” and may contribute to them learning from their mistakes and not appearing before the court again. They explained further that whilst they considered that the online process was less intimidating for defendants, “that needs to be balanced against the purpose of what the Crown Court is meant to do.”

The idea that the solemnity in the criminal courts is enacted, at least partially, through the physical court environment and process is an important point. The participants’ belief that the solemnity of proceedings operates as a deterrent to criminal activity echoes the view set out above that part of the purpose of the court system is to be a “shaming process” (Rowden, 2013, p. 103). However, this position appears at odds with expressed intentions to make the process less ‘scary’ for clients. This justification for the solemnity of proceedings suggests that the purpose of court hearings is,

to some extent, to viscerally enforce norms of ‘deviance’ (Becker, 1997) through the physicality of the court process, which is sufficiently ‘solemn’ and ‘scary’ to encourage defendants to avoid returning. Accordingly, it cannot be ignored that the same court dress and etiquette which are considered to maintain the solemnity of proceedings (Mulcahy, Rowden and Teeder, 2020b) are representations of embodied economic and cultural capitals (Bourdieu, 1986) and, thus, also of the socioeconomic disparities between professionals and lay clients. As such, the solemnity of proceedings and the socioeconomic divide of the courtroom are in some ways inherently connected.

Only one participant considered that the loss of solemnity had the potential to benefit defendants:

I think that judges have been very good understanding that for certain defendants who aren't particularly experienced that the solemnity of the occasion might be lost [...] because sometimes clients are a bit more relaxed and a bit more almost chatty that the judges have almost warmed to them more and been able to establish a bit more of a connection [...] I don't really feel there's been a negative effect of that because of that combination of the judges allowing a bit more and them being able to see the defendant as a more three dimensional person, perhaps, than they would be if they were just standing there in the dock.

This account demonstrates the potential of virtual hearings to disrupt traditional courtroom dynamics and foster greater communication - and possibly also greater understanding – between those judging and those being judged. It is important to note that only one participant reported a benefit to the reduction in solemnity of the proceeding and, therefore, it should not be assumed that such benefits are regularly occurring. However, this example reveals how the online process might transcend the boundaries of “insiders and outsiders; empowered and disempowered” (Mulcahy, 2011, p. 1) that are ordinarily enforced by the physicality of the court environment.

This potential is evidently not being realised consistently in the current online system, as the issues raised by participants above demonstrate. Instead, participants indicated that the prospective benefits of

a less intimidating court environment are negated by technological inequalities, hampering of communication with advocates and decreased engagement with – and possibly decreased understanding of – the court process. Therefore, if lay clients are held to the same standards of etiquette and behaviour despite the more limited assistance from representatives, the online system leaves them at a comparative disadvantage. In combination with the already reduced capacity of representatives to assist their clients owing to the reductions in legal aid (Sommerlad, 2001; Welsh, 2017; Gibbs and Ratcliffe, 2019; Wong and Cain, 2019; Campbell, 2020), the online system potentially exacerbates rather than ameliorates the impact of the socioeconomic disparity between professionals and lay clients, to the detriment of the latter.

Conclusion

The complex picture which emerges is one in which the current online system must be considered not as a standalone process, but instead as encumbered by historic entrenched inequalities and inherently connected to recent fiscal reforms. The system described by the participants of this study is one in which those without sufficient economic means or IT training face 'digital exclusion' (JUSTICE, 2018). The physical disconnection of lawyers and clients inhibits the provision of advice and support, revealing how representatives go beyond what is strictly required of them to assist clients to navigate the norms of the courtroom. These norms are, I argue, inherently linked to the historically 'elite' legal profession and the on-going socioeconomic inequality within the justice system (Rogers, 2010; Law Society, 2016, 2020; Bar Standards Board, 2019, 2020).

In light of these conclusions, reducing lay client exposure to the embodied socioeconomic differentials and the "ritualised stripping of dignity" (Mulcahy, 2008, p. 481) created by physical court space might be considered a benefit of the online process. However, the views of the

participants clearly did not support such an inference. Most participants reported that online hearings resulted in a reduction in the solemnity of proceedings, which they did not consider to be beneficial. These views indicate a potential conflict with participants' expressed concerns to support clients to navigate the 'scary' court system, as the conflict arising from the maintenance of solemnity (by way of the same aspects of the physical courtroom, such as wigs and gowns, and courtrooms themselves) have been reported as rendering the process 'very, very frightening' to lay participants (Jacobson, Hunter and Kirby, 2015).

Given that this study relied upon only a small sample, comprising solely legal professionals, broad and casual conclusions cannot be drawn. Yet I consider the findings to indicate that further studies on the purpose and operation of 'solemnity' in court proceedings and the tacit and unacknowledged aspects of lawyers' roles in assisting their clients to navigate the norms of the courtroom are warranted. Such studies should include the views of lay clients, and in particular explore how the online court system would impact vulnerable individuals and those from disadvantaged backgrounds. Nonetheless, this study has demonstrated how remote hearings have disrupted the traditional courtroom to expose some of the ways that socioeconomic status manifests within the justice system and revealed how legal representatives attempt – consciously or otherwise – to assist their clients in navigating the court environment.

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