

# Transforming ‘Summary Justice’ through Police-led Prosecution and ‘Virtual Courts’ – Is ‘Procedural Due Process’ Being Undermined?

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## Introduction

The administration of ‘summary’ justice in the lower tier magistrates’ courts in England and Wales (E&W) is currently the subject of debate and change (Ministry of Justice, 2014a; Chambers *et al.*, 2014). The White Paper ‘*Swift and Sure Justice*’ (Ministry of Justice, 2012) laid out the government’s ambitions to reform the system and pinpointed areas for modification. Broadly, the ideas indicated the desire for a more streamlined lower court system. Concerns were expressed with the volume of cases coming before these courts and the consequent delays caused to case hearings and the justice process more generally. Ideas were put forward for the enhanced use of digitised systems, such as audio visual technology in courtroom proceedings, electronic case file administration, an expanded role for the police in charging and prosecution decisions, among other bold visions for operational practice. Yet, a broad premise put forward by some criminal justice scholars is that ‘swift justice’ is not necessarily fair justice, and that ‘procedural due process’ might be challenged by objectives of economics and speed (Raine and Willson, 1993; Morgan, 2008; McEwan, 2011).

Accruing alterations have been occurring to criminal court process for some years, generally connected to improving systems for convicting the guilty and achieving satisfaction for crime victims (H. M. Government, 2001), but these latest reforms sit within a rigorous economic agenda rationalised by the need to achieve greater efficiencies, and cost reductions. This is not least because of the financial pressures facing national governments and the need for downward revisions in public spending, including in areas previously considered immune from budgetary restraint, such as the criminal justice system (Bell, 2011). Hence, in the UK we are seeing swingeing transformations to areas of criminal justice that can both be celebrated for introducing ‘modern’ and efficient ways of working, but conversely criticised for fundamentally altering the way justice is delivered.

This paper notes some of the changes occurring to operational practice within the lower tier magistrates courts’ in E&W, and argues these are reflective of political economic governance and the application of ‘neo-liberal’ economic policies that have been occurring for some time and in other jurisdictions. It centres on two specific areas - the expanded role of the police in the prosecution process, and the introduction of ‘virtual courts’ where accused defendants appear via

video link from police stations to magistrates' courts for 'first hearing' plea entries, and bail or remand, and sentencing decisions.

The paper argues these two areas of change call into question fundamental principles of procedural due process and makes the case that such modifications may be cumulatively stripping justice back to its bare bones. It is essential any adjustments made to criminal court procedure adhere to principles of 'due process' (Galligan, 1996). This construct underpins criminal court operation in many common law jurisdictions and is seen as a central feature of 'rule of law' systems (Bingham, 2010). Thus, the question can be asked, are some of the alterations occurring to criminal court function in the lower tier magistrates' courts undermining principles of procedural due process? In asking this question, the paper unpicks the construct. Despite its increasing popularity in criminal justice discourse, it is not always evident what procedural due process refers to. To make an assessment of whether it is being undermined, it is necessary to make clear what it is. The paper concludes, we may be creating a lower court system that is beginning to look like one with a diminishing human face and one where notions of enhanced police powers is not an inaccurate description.

The paper describes these changes in detail and provides some critique from other jurisdictions where similar models of practice already occur and where streamlining processes within the criminal courts have been taking place for some years. A number of the proposals laid out within the *Swift and Sure Justice* report match structures already implemented in Australia and New Zealand. Since the 1970s, NZ has been altering its criminal court system (Harkness, 2009), from one which replicated the English system of incorporating a substantial 'lay' magistracy in criminal court decision-making to one presided over by mainly legally qualified professional judges (Sanders, 2001:19) and one that envelopes a narrative of business acumen and efficient economic management. Similar principles of 'swift justice' have underpinned NZ's streamlining processes, as well as a desire for economic rationalisation across public sector organisations (Bridgman, 2013).

The critique presented in this paper is drawn from ongoing research the author is carrying out into operational practice in the lower tier criminal courts in E&W and NZ. It draws upon documentary analysis as its main method, focusing on reporting from governmental publications and statistics, policy research, legislative reform, academic critique, and other criminal justice related reporting.

The paper firstly discusses the concept of 'neoliberalism' and how neo-liberal economic policies are influencing the streamlining and efficiency alterations we are seeing within the criminal courts, before moving onto provide detail on the expanded role of the police in prosecutorial decision-making and the introduction of virtual courts.

### **Neoliberalism and criminal justice**

The concepts of political economy and neoliberalism are relevant to analysing the changes occurring to the lower courts in E&W, and the administration of justice within them. There is a body of literature that links neoliberalism to the increasingly punitive responses to crime we have seen in several 'advanced liberal democracies' (see for example Cavadino *et al*, 2013; Harcourt, 2011; Lacey, 2008; O'Malley, 2008; Wacquant, 2009; Stenson, 2001). The trend is variously termed<sup>1</sup>, but scholars point out it is evidenced in developments such as expansions in prison populations, the progressively privatised prison estate, 'new commercial agencies of security', the

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<sup>1</sup> Terms such as the 'new punitiveness' and the 'new penology' are used to illustrate the trend towards harsher punishments and Harcourt (2011) uses 'neoliberal penalty' to emphasise the influence of economic restructuring in this shift.

prevalence of CCTV monitoring, new technologies to assess and manage ‘dangerousness’ and ‘risk groups’ (cf. Feeley and Simon, 1992), for instance ‘sex offenders’ residing in the community (Stenson, 2001: 22), among other advances that continue to emerge. Links are also made between neoliberalism and the criminal justice functions that have become the preserve of the private commercial sector, such as privatised prisons, prisoner transport services (Jones and Newburn, 2007), and now in E&W community-based offender rehabilitation services (Corcoran, 2014). But, there is much less work which links the swingeing alterations to criminal justice process and procedure within the criminal courts to neoliberalism.

Neoliberalism is variously interpreted, and is indeed applied in a multiplicity of contexts. Flew cites the observation that it is ‘an oft-used term that can mean many things (Mudge, 2008 cited in Flew, 2012:45)’. In general terms, neoliberalism refers to an economic ideology in which it is believed by liberalising state control and regulation in the economy - ‘rolling back the frontiers of the state’ in the ownership and delivery of public services - and injecting competition and enterprise into it, then prosperity naturally follows. Historically and technically referred to as ‘*laissez-faire*’ economics (cf. Bell, 2011: 140), the theory holds that wealthy state economies come from liberalised, ‘unfettered’ markets and that profits generated through individual enterprise ‘trickle down’ to the advantage of wider society. Indeed, this is not believed to be the case, and the influence of neoliberalism generates much material for social scientists who associate it with distinct societal division and inequality, a rise in social problems, and the enhanced ‘cultures of control’ that have emerged in many advanced liberal democracies (Garland, 2001).

The theory of neoliberalism has a long history. Harcourt (2011) provides a detailed account emphasising its root in 18<sup>th</sup> C political philosophy and liberal thought on governmentality, state intervention and ‘wealth creation’. However, the common reference point is the ‘Chicago School’ and the writings of Hayek and Friedman that influenced the economic and social restructuring occurring in the USA and Britain from the 1980s. Indeed, specific time periods are highlighted for when neoliberalism has shaped governments’ politics and actions (Flew, 2012; Harcourt, 2011; Piven, 2007). The ‘Reagan era’ in the 1980s is typically earmarked, and in Britain its implementation is associated with the politics of Margaret Thatcher who during her supremacy fought a sustained campaign of moral authority combined with the introduction of free-market economic policies, welfare cuts and rolling back the state in funding public institutions. The ‘Third Way’ political governance of Tony Blair from the late 1990s also holds a special place in the application of neoliberalism (Flew, 2012). Ushered in on the back of a modernisation and reform agenda, third way politics mixed private sector funding with public state run service provision and introduced business models of management into many areas of delivery (McLaughlin *et al*, 2001; Newburn, 2007).

Indeed, neoliberalism in its common modern usage is associated with the displacement of state provision to private, market-led provision, but in the way other scholars have done, I broaden it out to consider the way neoliberalism as an economic ideology has ushered in models of corporate and managerial efficiency into public sector service design and delivery, including within criminal justice administration. While the two criminal justice agencies I am writing about – policing and the criminal courts - are still the purvey of the state, it is undeniably the case that the business models these institutions are operating on are fundamentally linked to neoliberal economic policies. I take on the comment by Corcoran (2014) in her discussion of ‘marketization’ in criminal justice to emphasise the way free-market concepts and techniques have become blended into service design, delivery and management - ‘privatisation, of course, is one aspect of a broader cultural and political alignment of institutional and social behaviour with the laws of the market (*ibid.*:2).

The new style of public sector organisation that really took off under 'New Labour' was referred to as 'New Public Management' (NPM), and in narrations of the model the three buzzwords of efficiency, effectiveness and economics underpinned its strategy (Raine and Willson, 1993, 1995). Newburn (2007) noted the model introduced the same level of organisational and business acumen seen in the private sector into state run institutions. To explain, he stated 'The perceived attributes of the well-run private sector company (of high efficiency, of explicit accountabilities, of clear objectives, and of measured performance) have increasingly been applied to management in the police, prison and probation services and other agencies' (Raine and Willson, 1993 cited in Newburn, 2007: 17).

Bell (2011) is a recent author making the link between neoliberalism and the design of criminal justice services in Britain. She centres on criminal justice legislative reform where it has left an indelible mark emphasising the rise in 'out-of-court' justice, and the now wide range of activities that can be penalised through civil sanctions (ie Anti-social Behaviour Orders ASBOs, parenting orders etc.). She argues this is a true example of the contradictory nature of neoliberalism where freedom and liberalisation are key features, but where tighter social control apparatuses emerge at the same time (*cf.* Harcourt, 2011). Bell links the transformations to the criminal justice system to managerialist public sector reform. She says 'the changes made to the criminal justice system must be seen in the wider context of neoliberal public service reform which has led to the contracting out and privatisation of core state functions and the logic of the free market formerly thought of as immune from such influences' (*ibid.*: 5). She continues 'the penetration of the market logic of neoliberalism into the criminal justice system has led to punitiveness in a number of different ways. The spread of management ideology has gradually altered the culture of criminal justice services which have become increasingly concerned with narrowly-defined targets' (*ibid.*:5).

There is important earlier work by Raine and Willson (1993, 1995) relevant to these arguments. In writing on NPM in criminal justice, they questioned whether economic efficiency principles could legitimately be applied to criminal court processes where performance targets and speeding up case progression for example, can undermine principles of 'due process'. They pointed out there are aspects of the criminal court process that cannot be put through expedient 'managerialist' values and strategies. They referred to the 'legality condition' in the context of criminal court work which demands 'the process is highly structured, predictable and disciplined' (*ibid.*: 37), and the fundamental principle that criminal justice in the criminal courts is a public process meaning cases should be heard in 'open court'. The legality condition restricts flexibility in the way where case hearing slots become available in the courts they cannot be easily filled by other waiting cases in the way they might at a doctor's surgery. This implies endeavours to cut time wastage and achieve efficiencies in the courts are not straightforward. Such examples Raine and Willson argue severely reduce the opportunity to meet competence targets. Moreover, they refer to the human rights protections enshrined in European statute which relate to the fair treatment of accused defendants, such as the 'right to trial' for those who plead not guilty (*ibid.*: 36) and the right to legal representation. They ask the questions of NPM - 'Might the steady progress made over many decades regarding human rights be put at risk by managerialist pressures?' And 'might justice be put at risk as a result?' (Raine and Willson, 1995:39) These same concerns strike at the heart of this paper.

In Britain the introduction of managerialist models across the spectrum of public services has been occurring since the 1980s (Bell, 2011), but the alterations to criminal justice that are being cemented in place today (Ministry of Justice, 2014a) are a radical escalation of the managerialist project and with some calls for concern.

Before moving on to discuss the two specific areas of criminal court process that I am concerned with, it is necessary to define procedural due process.

### **Defining procedural due process and why it's important**

Since this paper is suggesting that procedural due process may be undermined by some of the streamlining processes being put in place in the lower criminal courts, it is necessary to establish what it refers to. The terms procedural justice, procedural due process, procedural fairness, procedural rights and the 'rule of law' are often used interchangeably in reference to criminal justice systems and fairness of procedure (*cf.* Galligan, 1996:xvii). Despite an increased reference to these principles within the literature, the conceptual clarity surrounding them is sometimes lacking.

The rule of law in democratic society is a longstanding principle of justice and liberty. This was noted in a speech delivered in 2006 by the then Attorney General Lord Goldsmith. He stated '... it seems to me clear that the rule of law comprehends some statement of values which are universal and ought to be respected as the basis of a free society' (Rt. Hon. Goldsmith, 2006:2). In answering the question of who is responsible for upholding the rule of law, Goldsmith commented 'all organs of the state – the executive, legislature and judiciary – have a shared responsibility ...' (*ibid.*:11). The speech foregrounded the courts as playing a central role 'providing the critical long-stop guarantee' for upholding the rule of law (*ibid.*: 11).

Tyler (2008, 2010) writes extensively on 'procedural justice' within areas of criminal justice specifically policing, the courts, and 'correctional services' and links it to notions of institutional legitimacy. He draws on psychological principles to note that if defendants perceive their experience of criminal court procedure to be fair and just, then they are more likely to comply with the sanctions handed out to them even if the penalties themselves are not welcome.

Procedural due process though differs from this and applies to fair and proper administrative procedures within state institutions. Galligan (1996) writes about due process and fair procedures with particular reference to it as a doctrine applicable within administrative contexts. He highlights '.....the duty to provide fair procedures comes into play whenever a person is affected by an administrative process' (*ibid.*:316). He states 'procedural fairness is very much concerned with the way persons are treated in legal processes' (*ibid.*: 52) and that 'legal procedures are fair procedures to the extent that they lead to or constitute fair treatment of the person or persons affected' (*ibid.*: 52). Galligan takes it from the point of political morality to legal processes – 'the hearing principle' and the right to be heard, the elements of a hearing such as notice and disclosure, and the right to legal defence.

Some jurisdictions have constitutional documents stating the rights of citizens before the law, most notably the USA who since 1789 have had a written constitutional charter. The different articles within it state people's general and judicial rights, such as 'no person be deprived of life, liberty, or property without due process of law' (Brennan, 1985). A written statutory legal document or penal code is not something we have in the UK, but the same principles of fair judicial procedures are enshrined in democratic governance and the doctrine of the rule of law which historically guides the practice of criminal justice process and procedure (Bingham, 2010). These days in the UK procedural rights are protected in law under the *Human Rights Act* 1998 which incorporates values drawn from the European Convention on Human Rights (ECHR). Article 6 - 'the right to a fair trial' – in particular contains the protections most pertinent to procedural fairness relating to case hearings in criminal courts. It leads with the statement: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial

tribunal established by law' (H.M. Government, 1998: 23). It states the rights of individuals charged with an offence, such as being promptly informed and in detail of the accusation against him/her, the right to adequate time and facilities to prepare his/her defence, the right to defend him/herself or have legal aid and to examine witnesses.

This following discussion centres on two specific areas where alterations to criminal justice is becoming established, where they can be linked to streamlining processes and economic rationalisation, and where it can be questioned whether issues of procedural due process are being undermined. The first of these is the enhanced role of the police in prosecutorial decision-making. The language being used promoting this change is unquestionably situated within a managerialist agenda of cutting bureaucracy and injecting efficiency (Barden, 2014).

### **Police-led Prosecution**

The White Paper *Swift and Sure Justice* laid out the current government's ambition to speed up the criminal justice process (Ministry of Justice, 2012: 13), and a part of that plan was to expand the role of the police in prosecutorial decision-making (Ministry of Justice, 2012:6). The precise way this was to occur was to increase the range of offences the police themselves could prosecute. In doing so, it was claimed unnecessary bureaucracy would be removed, and many hours of police time saved (Ministry of Justice, 2012; Barden, 2014). This move though essentially sets back in place a system of police-led prosecution that attracts criticism on a number of fronts (Frye, 2012; Stone, 2012; Stenning, 2009; Beck, 2006).

Commentators raise concerns about the development of police-led prosecution in relation to the independence and impartiality considered necessary at this stage of criminal procedure. Critics generally argue it is problematic for the police to be responsible for crime accusation and investigation, as well as objectively assessing the weight of evidence before deciding to bring a case forward for prosecution. This is due to the risk of police bias and the sometimes difficult task in standing back from their own presumptions of a person's guilt (*cf.* Raine and Willson, 1993). Lea (2006), in writing about the prosecution process and the introduction of the independent Crown Prosecution Service (CPS) in E&W in 1986 notes how historically, the police held responsibility for prosecutorial decision-making, but over time this 'dual' role drew criticism for the part it played in a spate of wrongful convictions, as well being behind high levels of case acquittals due to weak and flawed evidence (*cf.* Raine and Willson, 1993). The 'Maxwell Confait'<sup>2</sup> case is cited as a watershed event regarding these issues and from where the 1981 *Royal Commission on Criminal Procedure* recommended an independent prosecution service (Sanders, Young and Burton, 2010: 371).

On establishment of the CPS, and in a move to create a distinction between the police as crime detection and investigation agents and prosecutorial decision-making, crime prosecution became the task of government employed lawyers working autonomously from the police. In theory, the police lost power to prosecute in all but low-level routine offences, such as road traffic violations of speeding or failing to produce a driving license. However, various practical impediments, such as occupational power struggles, the construct of 'constabulary independence', crime volume and stretched resources meant the separation of roles did not occur entirely in the way it was envisaged even following the 'statutory charging scheme' introduced in 2004 (Brownlee, 2004; Sanders *et al.*, 2010). As such it might be argued the police retained a hand in crime prosecution all the way along. The move to grant a greater role to the police in prosecution as has occurred in this latest iteration to prosecution maybe merely an endorsement of already occurring practice.

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<sup>2</sup> The Maxwell Confait case was that of three youths wrongly convicted of murder (see Sanders, Young and Burton, 2010: 371).

The alteration to the police's role in prosecutorial decision-making that this paper is centred on was put in place in November 2012 by 'statutory instrument' (Barden, 2014), which is an executive amendment to existing legislation. This amended the *Prosecution of Offenders Act 1985* and legislates that instead of the police being obliged to forward cases to the CPS for independent scrutiny, they themselves can make prosecution judgements in a specified range of offences (Barden, 2014). This expanded from low-level motoring offences to include criminal damage under the value of £5000, careless or inconsiderate driving, disorderly behaviour while under the influence of alcohol, alcohol consumption in a designated place, shoplifting goods beneath the value of £200, behaviour likely to 'cause harassment, alarm or distress', among other more and less serious offences. Restrictions are in place where in disputed cases, or cases where a person pleads 'not guilty', and/or is aged under 16, continue to be passed upwards to the CPS for oversight. This expanded police role, it is argued, will speed up the way cases proceed to completion (Ministry of Justice, 2012). Following an arrest and a person's acceptance of guilt to an assigned charge, the case can be sent straight to sentencing rather than going before the CPS for verification. The Home Office estimates the change allows the police to take prosecution decisions on an additional 90,000 cases per year putting them in charge of over half of all 'summary' cases falling within the lower court jurisdiction (Barden, 2014). In the year ending September 2013, a total of 1,076,392 'summary' cases were recorded (Ministry of Justice, 2014b: 14). Assuming the statistic just referred to is accurate this translates to the police making prosecutorial decisions in over 500,000 cases per year.

There is some useful work, and indeed criticism that emerges from other jurisdictions on police-led prosecution applicable to the discussion in this paper (*cf.* Beck, 2006; Stone, 2012; Frye, 2012). Beck, from her research describes the bound up nature of police-led prosecution where the police are involved at all stages of a criminal prosecution - '...police decide whether to investigate, whether to initiate a prosecution or pursue alternatives, choose the charge and, where available, decide whether to proceed summarily or by indictment' (Beck, 2006:150). Beck describes the NZ system where the role of 'police prosecutor' is located within an arm of the police service and is filled by serving officers, or by law graduates with at least two years practice experience. She says around 87% of police prosecutors came through as 'sworn officers' with the remainder coming through the law graduate pathway. Beck criticised the 'duality' of the police as accuser and prosecutor and the potential for bias within this structure. She notes there are problems with police appointees being in a prosecutorial position since it contradicts notions of impartiality necessary for independent decision-making. Moreover, Beck criticised the inadequacy of the guidelines and training the police received (*cf.* Frye, 2012), which she viewed as inefficiently emphasising the importance of maintaining 'a neutral role' and adhering to 'ethical standards' (Beck, 2006: 151). Beck also points to the reality of policing where officers are encouraged to develop close loyalties with fellow police, and the sense of 'mission' encouraged out in the field against crime. These latter aspects, she says combine to make up the phenomenon of 'police culture' and that this gets in the way when tasked with deciding whether to prosecute a colleague's arrests, or not.

Stone (2012) in his work on miscarriages of justice similarly reviews the role of the police in NZ's prosecutorial system. He gives a description of the NZ model where historically they held onto a structure tasking the police with prosecutorial decisions in all but the most serious cases of murder and manslaughter. Stone says 'this system fails to adequately address the fundamental issues of transparency, legitimacy and independence that are necessary in a modern criminal justice system. ....Any prosecution by police officers (either "sworn or "unsworn") cannot be truly objective, as police camaraderie and cohesion preclude this' (*ibid.*: 73).

Frye's work (2012) also raises concerns regarding the blurring of 'distinction between enforcement and prosecution' (Frye, 2012:340). From his work on police prosecution in the US state of New Hampshire, Frye argues it 'jeopardises the fundamental fairness of the criminal justice system' (*ibid.*: 340) and states the most effective way of addressing fairness questions and protecting a defendant's due process rights is to 'eliminate police prosecution altogether' (2012: 340).

Returning to the situation in E&W, the expansion of offences the police can now take prosecutorial decisions on is similarly problematic to the concerns just rehearsed. It is fair to say that assigning the police the role of judge and jury takes us back to the period pre the independent CPS. The approach problematizes the importance we pin on maintaining objectivity, and having in place an independent prosecution service to scrutinise cases and decide on appropriate charges, or indeed discard cases that don't pass the 'threshold test' for prosecution (CPS, 2013).

The same expressions of concern that have been raised in connection with the rise in 'out of court' penalties in E&W (Bell, 2011; Padfield, 2012*b*; Ashworth, 2013) can be applied to police-led prosecution. They both have the issue of 'police discretion' at their heart. The criticisms of out-of-court penalties are generally in the way a number of more serious and violent offences escape prosecution, when evidence suggests they should come before the courts for impartial adjudication (Fassenfelt, 2012; Travis, 2013). What is less criticised, and is just as valid in this argument is the number of people who *are* processed for prosecution, when their case could have been dropped for not meeting the 'public interest' part of the CPS full code 'threshold test' (CPS, 2013). This was found in previous research carried out by the author on the prosecution of small quantity drug possession. For example, Ward (2013) suggested cases in which a person was in possession of one cannabis cigarette, or a £10 bag of cannabis leaf should have been dropped for not meeting the public interest aspect of the test.

So, what is being argued here is that the police will preside over a wide degree of discretion in the fixing of the correct criminal charge, and in leading prosecutorial decisions in an expanded range of cases. As we have seen with the variable application of out-of-court penalties across different force areas (Padfield, 2012*a*: 134), similar discrepancies might emerge.

The police certainly do witness crime occurring at the street-level and where a person readily admits guilt to a crime, but it is also the case where aspects of a criminal or civil transgression can be reasonably explained and/or disputed, for example the person is homeless, alcoholic and disabled, and not easily able to move to an area of a borough where public alcohol consumption is tolerated etc., or the person is a registered drug addict and is in possession of a small quantity of drugs for personal consumption. It is these cases that become highly problematic in police-led prosecution, because we understate the power of police authority and how this dynamic plays out at the street-level in encounters between the accused and accuser. For instance, is there pressure from the police for a person to accept guilt to an accusation which then leads to a criminal conviction with consequences to bear?

This alteration to the prosecution process in the interests of cutting bureaucracy and driving efficiency has removed a layer of independent scrutiny of what could be police bias and in doing so, fundamental principles of 'due process' such as the right to independent adjudication in a court of law is being undermined. We need to remind magistrates and judges working in the lower criminal courts of their right to acquit cases through 'judge directed acquittals' if they don't view them as passing the 'threshold test'. Jehle and Wade (2006) argue in this time of 'mass crime' coupled with limited resources to cope with it, that there is a rise in 'prosecutorial power'



(*ibid.*: 5). Prosecutorial power takes the form of cases being acquitted by the judiciary on reaching court, and before a plea is entered. This paper argues that lay magistrates and professional ‘District Judges’ who hear cases in the lower tier magistrates’ should filter out criminal prosecutions they deem too trivial and that don’t meet the full code threshold test.

We also need to keep a check on the total number of police-led prosecution cases that are coming forward, for what misdemeanours, and who exactly is receiving them, to analyse whether any significant difference is occurring in trends and patterns with police-led prosecution, as opposed to that previously performed by independent state prosecutors. Wherein, it might be expedient to introduce changes such as police-led prosecution, it is vital that procedural due process principles are upheld and confidence in police power is not diminished.

The other aspect of criminal justice process and procedure that has seen important streamlining alterations, and which similarly attracts questions of whether due process is being undermined in efforts to achieve efficiency, is the introduction of virtual court hearings (*cf.* Ridout, 2010; Rowden, 2013).

### **The introduction of virtual courts**

The use of video link technology within criminal court processes is being advanced in a number of jurisdictions, and in a range of ways (Fabri and Contini, 2001; Young, 2011; Rowden, 2013). For example, witnesses giving evidence from a different geographical location, ‘live links’ from prisons to courts where prisoners’ bail or remand hearings are conducted (Plotnikoff and Woolfson, 1999), and defendants appearing in court via video link from remote rural areas (Rowden *et al.*, 2013) and across international borders (Gray, 2004). But, this paper is concerned with the more recent development of virtual courts in E&W where an accused defendant appears via video link from a police station to court for a ‘first hearing’ plea entry, bail or remand decision, and/or sentencing (Terry *et al.*, 2010). This style of operation has been in place since 2009<sup>3</sup> when it was first piloted, and is now being rolled out in different areas across the country and may well be the future of summary justice hearings (Ministry of Justice, 2014a).

It does though draw criticism from legal defence professionals and criminal justice commentators who argue accused defendants are disadvantaged (Atkinson, 2012; Dean, 2012; Ridout, 2010). They contend the important interactions defendants have in physical courtroom settings, and conversations with their legal advisors are missing (Rowden, 2013). It is these arguments the author is interested in since they point to issues of procedural due process rights and principles of ‘open justice’ being weakened in some domains. These need careful consideration in the movement forward with virtual court developments.

Information is not publically available on the total number of cases being processed through the existing virtual courts in operation in E&W (ie. in Kent, Hertfordshire, Cheshire and North Devon), and for what type of offences, but in some police force areas there is enthusiasm for the time and efficiency savings these technologies provide (BBC News, 2012). Since an amendment to the *Crime and Disorder Act* 1998 enacted through the *Coroners and Justice Act* 2009, a person no longer has the right to refuse appearing via video link from a police station following a charge being assigned to them (Terry *et al.*, 2010). Thus, those being arrested in a virtual court police force area may well have their case started and finished at a police station at an officer’s discretion. Some protections are in place set out through the ‘suitability criteria’ guidance which prohibits the use of these video links with some categories of accused defendants (Law Society, 2012). These are people defined as ‘vulnerable’ in that they require the support of an ‘appropriate

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<sup>3</sup> A pre-pilot prototype was tested over 12 weeks in 2007.

adult' and who have not had face-to-face guidance from a legal advocate, those under 18 years of age, those with language difficulties and who require an interpreter, someone in need of immediate medical treatment, as well as other exclusion criteria (see Office for Criminal Justice Reform, 2010: 10).

The main arguments in favour of video link technology in courtroom proceedings are the time and cost savings (Ministry of Justice, 2011), since it speeds up the rate at which cases progress through the system, and removes some of the logistical issues and discomfort that comes with transporting prisoners from police stations and prisons to courtrooms for remand and other hearings. It facilitates the giving of evidence from vulnerable or intimidated witnesses who might otherwise be put off through fear of coming into contact with the crime perpetrator at the courthouse (Plotnikoff and Woolfson, 2004), and satisfaction has been found from crime victims at the swift pace a person can be punished following the commission of an offence (Terry *et al*, 2010:27). It is also argued video link facilities remove prisoner escape risks, which are a reality with prisoner transportation (*cf.* Rowden *et al*, 2013).

However, there are also criticisms that need to be taken seriously, such as removing the personal element of a court appearance. In a similar way the live links project which connected remanded prisoner's for court hearings drew criticisms (see Plotnikoff and Woolfson, 1999), virtual courts have too. The Law Society put forward various disapprovals mainly the weakening of the link between a defendant and their legal advisor (Dean, 2012). Claims emerge from defence counsel that arrangements to communicate with clients via video link compromises the privacy of legal advice conversations, and has removed an important element of meeting and discussing in person (Terry *et al*, 2010; Ridout, 2010; Atkinson, 2012). Published documentation on virtual courts states defendants in police custody have access to private video and phone calls to legal advisers if the duty lawyer is unable to attend the station where the person is being held (Office for Criminal Justice Reform, 2010). But, the quality of this and the practical impediments have been put forward by the legal defence fraternity. Richard Atkinson (2012), then Chairman of the Law Society's Criminal Law Committee in discussing the way remote meetings are set up states it 'frequently means that defendants don't meet their lawyer before the court decides upon their case'. Some defendants are sent to prison without ever having seen their lawyer in person'. He also highlights that guilt or innocence is not merely whether someone did something wrong or not, but that the mental elements of a case need considering, such as the 'perpetrator's intention'. Atkinson states, 'defences such as 'duress' or 'reasonable excuse' may require the defendant to reveal delicate or personal information which they may not feel comfortable doing to a stranger over a video link, while sitting in a room at police station'.

Ridout (2010) also expresses concerns emphasising the physically remote process undermines the importance of conversations and arrangements that take place in courthouses between defendants and probation staff, the way fines can more easily be paid, and the greater ease for necessary discussion between prosecution and defence counsel that avoids later case adjournment and delay. She draws attention to the principle of 'equality of arms' that underpins court adjudication contending that the prosecution who are present in the magistrates' court are likely to hold an advantage over the defendant and their lawyer who appear remotely via a video screen.

An evaluation of the early virtual courts in E&W (Terry *et al*, 2010) aimed to ascertain whether they were more efficient in terms of time and cost savings, and to assess notions of fairness in the judicial process. The evaluation analysed case throughput in the virtual court pilot area, which included two magistrates' courts and 15 police stations and compared it with throughput in the comparator London area. Interviews with legal defence practitioners, magistrates, District

Judges, prosecutors etc. were also conducted as a part of the evaluation, and a number of important findings were revealed.

Firstly, that the average time from charge to first hearing was quickened, which appeals to the objectives of reducing delay in criminal case progression. It has since been presented that for some offence types such as drink driving, the time from charge to sentence can be achieved within 90 minutes (Platt, 2014). The number of failures to appear in court for first hearing was lessened by the virtual court at 1% compared to 5% in the comparator traditional courts (Terry *et al*, 2010:iv). But, some other important results also emerged. For instance, guilty pleas were slightly higher among defendants appearing in the virtual courts at 75% when assessed against the comparator area at 72%. Wherein, some might argue this is a positive finding, there are those who are sceptical of the high rate of guilty pleas entered in the lower courts, because they point to the way the system incentivises guilty plea entries (Sanders *et al*, 2010:438). This point is discussed further later. It was put forward by the evaluators that police stations were possibly not 'sufficiently neutral' spaces and that defendants might be being encouraged to plead guilty in this context (Terry *et al*, 2010:21). A lower proportion of defendants were legally represented in the virtual court sample at 54% compared to the comparator area at 68%. Moreover, guilty pleas were higher among those who were unrepresented at 78% compared to 74%. This raised questions of whether those who were without legal representation while in police custody faced greater pressure to plead guilty. Custody as a sentence outcome was also higher for people appearing in the virtual court at 10% compared to 7% for those appearing in a traditional courtroom and community sentences were lower at 14% compared to 17%. Statistics were not revealed on the proportion of defendants who were remanded into custody to await trial, but this is an important avenue to explore in further analysis of procedural fairness and due process within the virtual court system.

Analysis of the interviews with criminal justice practitioners involved in the virtual court pilot found reservations. It was reported the physical separation of defendants made it harder for defence and CPS advocates to communicate before and during hearings. The defence solicitors put forward defendants may be encouraged to plead guilty and refuse legal representation to speed up the case, and who may see the police as part of the prosecution rather than as an institutional body making an accusation to which the defendant has the right of challenge. Magistrates and District Judges found the short time slots within which cases were allocated for hearing created a form of 'hasty justice' and that some case types were not considered suitable for virtual court hearings such as complex bail applications. Magistrates and District Judges also thought the court had difficulty imposing authority remotely and perceived defendants took the process less seriously than they would if they appeared in court in person (*ibid.*:22).

These findings chime with the criticisms put forward by other legal defence practitioners who as noted, argued defendants don't have the same access to legal defence in this setup. This argument is refuted by supporters of virtual courts who claim defendants can communicate with lawyers by telephone. However, it needs to be acknowledged that defendant's rights are being pushed into occurring within the non-neutral space of a police station, and whilst a person is in police custody and under the control of a custody sergeant. It fundamentally moves away from a defendant being able to have the case heard against them in an open impartial court (*cf.* Ridout, 2010).

The same criticisms and concerns can be raised in regard to virtual courts that the author has put forward with police-led prosecution and that is, it is the police who are in the role of overseeing the defendant's plea entry and in this instance from within the police station. It is possible there are pressures for defendants to plead guilty in order to arrive at early case closure. It is presented

in criminal justice policy documentation that defendants want cases closed promptly (*cf.* Ministry of Justice, 2012), but this detracts from the reality a guilty plea means a criminal conviction. Some criminal justice commentators argue guilty pleas are entered too freely and without adequate consideration of a challenge to the prosecution (Sanders *et al*, 2010: 438). Research is needed with defendants who experience this style of court hearing to gauge their perceptions of fairness, and whether there are any nuances within the procedure that could be deemed as undermining due process, or that they find less impartial than the traditional style of court adjudication (*cf.* Rowden, 2013:102).

It is important to bring these technicalities and areas of concern regarding virtual courts to life, because the issues at stake such as admission of guilt to a criminal charge, even to a low-level charge leads to a criminal record, with life changing implications. Moreover, bail or remand decisions determining whether a person spends the time between charge and trial at liberty in the community, or on remand in prison are pivotal. As yet we have been unable to scrutinise whether these are more likely case outcomes in virtual court hearings, but it is evident research is needed that looks more comprehensively into these procedural prosecution issues. Rowden (2013) goes back to an earlier claim by the Ministry of Justice that there will be ‘no loss of quality’ for a defendant experiencing a virtual court hearing compared to a traditional one. From this she says ‘The implicit assumption underlying this rhetoric is that videoconferencing technology is benign and neutral and can be easily inserted into existing conditions and used without significantly altering the nature of the experience’ (*ibid.*: 102). She continues ‘...one wonders whether people who have appeared in court under this new system agree with the Ministry’s claims of no loss of quality’ (*ibid.*:102).

It can be argued that the institutional body of the police in overseeing the extraction of a guilty plea, or the admission of guilt by an accused person either at the street-level or at the police station, removes from the process being heard before an impartial tribunal. It is well known there is encouragement for defendants to plead guilty to summary offences in the lower court jurisdiction and at the earliest stage within the process. This was officially incentivised through ‘the sentence discount principle’ enacted through the *Criminal Justice Act* 2003 where a reduction in sentence is granted for early guilty pleas. Ashworth and Redmayne (2010) state ‘In E&W the law provides a strong incentive to plead guilty, in a provision that now appears in s144 of the *Criminal Justice Act* 2003’ (*ibid.*:291). Wherein, many people charged with summary offences may indeed be guilty, the system is designed to encourage a high rate of guilty pleas. This typically stands at around 65 to 70%. Case outcomes at magistrates’ court between April 2012 and March 2013 recorded 68.4% of the total 707, 777 (excluding motoring offences) were entered by guilty plea (CPS, 2014). It is possible to contemplate that when an accused person is in police custody being quizzed on their culpability, and where there is not the presence of an independent legal advisor to inform them of the alternative options, that an accused person may feel compelled to accept guilt to the charge.

It is also an argument of the author that issues of identifying vulnerability and/or mental disorder or incapacity is likely to be complicated within this design. A large volume of police arrests are drug and/or alcohol addicted people and people with mental health issues (Prison Reform Trust, 2013). There is a discourse that locates these within the spheres of law and psychiatry (Peay, 2012). In this virtual court model, the judgement of whether a person is too vulnerable, or is in need of immediate medical attention and therefore does not qualify for a virtual court hearing is down to the police. It is noted by other commentators on mental disorder and the criminal court process that diagnosis can often be overlooked in the process and by the police (McEwan, 2013). Peay (2012) states it is ‘important to note that surveys of the incidence of mental disorder at the earliest stages will be an under-representation as the police, the Crown

Prosecution Service (CPS), and the courts are likely to identify only those with the most obvious symptomatology...' (*ibid.*: 433). These therapeutic needs are more likely to be identified if a person is presented in court where a legal advocate meets with them in person and is more able to identify those with mental disorder conditions who require diversion or other special measures.

Despite the concerns raised by different commentators, virtual courts linking defendants from police stations to magistrates' courts' for first hearings, bail or remand decisions, and/or sentencing decisions have now been rolled out across different areas of the country (ie. Kent, Cheshire, Hertfordshire, and North Devon), with more in the pipeline. It seems there are definite advantages with virtual courts such as quicker case progression, which may even result in more positive evaluations of procedural due process by accused defendants. There are also advantages in that they contribute to police efficiency savings (time and cost). But, it is important detailed empirical research is carried out to ascertain whether the innovation of virtual courts is working for all those affected by them, especially accused defendants, many who have drug, alcohol, and/or mental health problems (Prison Reform Trust, 2013), and who may be disadvantaged by more streamlined ways of working.

Rowden (2013) concludes from her research into virtual courts that a key question needs to be asked before we proceed. She is interested in the impact virtual courtroom adjudication has on perceptions of justice and procedural fairness, and asks how we can capture the 'myriad ways in which the setting of the court can influence the way the court is perceived by the individual, by the group and by society as a whole?' (*ibid.*: 109).

## **Conclusion**

This paper has presented two areas of criminal court process and procedure that have undergone significant streamlining alterations in a recent time period - police prosecutorial decision-making, and the use of video link technology in courtroom proceedings. In general terms, reservations can be levelled at these changes since it can be argued notions of judicial impartiality and procedural due process are being undermined. Accruing changes in criminal justice process are not new, but these recent alterations are audacious in form. It is vitally important within the various transformations that are occurring to working practice in the magistrates' courts and the dispensing of justice within them, principles of due process and procedural due process are adhered to. This is so we hold onto the sense we are working within the bounds of a legitimate criminal court system. While there are some strong arguments in favour of these more streamlined approaches, it is vitally important a suitable level of distance, independence and objectivity is maintained between the police and their role as state crime control agents and what we are constitutionally signed up to in the form of an open and neutral criminal court system. Protections in place to shield citizens from the powerful arm of state crime control might gradually be being eroded within these modern efficiency savings (*cf.* Chakrabarti, 2012). It is citizens who are least able to understand the importance of not conceding to pleading guilty for matters of policing expediency and who should request the right to legal advice while in police custody who need most guidance.

Any alterations that make criminal court working practice better, more human, and more efficient for crime victims and accused defendants is superb, but it is vitally important that ideals of economic efficiency and expedience in service delivery does not overlook or shortcut the safeguards that must remain in place for the wrongly accused and all those who have the right to mount rebuttals to a criminal charge.

On top of exploring procedural due process and answering whether it is being undermined, this paper has linked the changes in the two specific areas I discuss to neoliberalism and the introduction of neo-liberal economic policies. This has manifested in radical streamlining and economic rationalisation that has been ongoing and under successive governments in E&W since the 1980s. These have permeated many areas of public services and now include the criminal courts and criminal justice process and procedure. In my reference to the important earlier work of Raine and Wilson which queries whether there are some areas of public life that just cannot be confronted with efficiency savings and tight business strategies and targets, the question needs to be asked - is this chipping away a bit too far into important embedded rights and protections?

Raine and Willson's (1995) comments drawn together from their analysis of NPM and economic efficiency and criminal justice is poignant in this debate. They say 'what is needed, ...is a more mature form of public management .... one which is more consciously concerned with the fundamentals of human rights, the independence of the judiciary and due process; one which places 'justice' at the top of the quality of service agenda; one which more actively seeks to balance the legitimate interests of the direct users ...with those of the community at large; one which seeks to reduce delays not so much for efficiency reasons but more on moral grounds, for the injustice which they can represent' (*ibid.*: 40).

This statement is a reminder that notions of efficiency within the criminal courts ought to be being based on the way people experience their passage through them, and whether it can be assessed as a fair and just one.

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