
DEFENDANTS' UNDERSTANDING OF SENTENCING

A Review of Research

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EXECUTIVE SUMMARY

- Underpinning the sentencing framework is an assumption that defendants understand sentencing practice and will respond accordingly. For example, policymakers often presume that potential offenders will be deterred from committing offences by the prospect of longer sentences. However, very little is known about the extent to which those being sentenced understand the process and the likely sentencing outcome.
- Decisions made by defendants early in the process, such as whether to plead guilty and, if so, to what charges have a material impact on the sentence imposed so it is important that defendants appreciate the significance of these decisions and comprehend how they will influence their sentence.
- The limited empirical research in this area suggests that defendants may have limited understanding of the sentencing process and will therefore be reliant on professional advice about what factors are likely to influence the sentence and what their sentence means in practice. An understanding of licence conditions, or any conditions attached to a community order or a suspended sentence order, may be a pre-requisite for compliance with the sentence.
- Much more needs to be known about the level of defendants' understanding of sentencing and this paper makes suggestions for future research in this area. This research should explore areas such as: the adequacy of legal advice before, during and after a sentencing hearing; the extent to which defendants fully comprehend the requirements of their sentence; whether defendants understand the reasons for the sentence imposed and consider it to be a fair and legitimate outcome; and whether defendants are satisfied that they have had the opportunity to put all factors they consider relevant to sentencing before the court.
- Further research could also examine how defendants' understanding of sentencing interacts with their desire and ability to comply with their sentence. A failure to fully explain the effect of the sentence and the justifications for it may have an impact on the effectiveness of the sentence and the extent to which defendants are encouraged by the sentencing process to desist from further offending.

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1. INTRODUCTION

The sentencing framework is premised on an assumption that defendants understand how the process works and will respond accordingly. For example, they will be deterred by the prospect of longer sentences or will enter a guilty plea at the first opportunity to maximise their sentence reduction. Without a full understanding of the nature and consequences of their sentence, defendants will be less likely to accept the legitimacy of the sentence, and possibly less likely to comply with any conditions.¹ Moreover, compliance with licence conditions is more likely if offenders are aware that breach of conditions will have consequences – for example, recall to court.² Finally, desistance may be more likely if ex-offenders believe that further offending will lead to prosecution and additional punishment. For a variety of reasons, then, it is important to determine whether defendants understand the sentencing process, the specific elements of their sentence, and the reasons for that sentence. This paper examines defendants' understanding of sentencing. It provides an overview of research on defendant understanding and identifies key research priorities. As the research in England and Wales is limited, some research from Scotland is also included.

2. RESEARCH ON DEFENDANTS' UNDERSTANDING OF SENTENCING

Before the sentencing hearing

As their case reaches the court process, defendants are faced with an important decision: whether to plead guilty. It is essential that defendants understand the potential sentencing implications of their plea. Most defendants plead guilty: in 2019/20, 78.6% of cases in the magistrates' courts were resolved by a guilty plea (Crown Prosecution Service 2020, p. 31) and 73.2% of Crown Court cases were resolved by a guilty plea (Crown Prosecution Service 2020, p. 34). Defendants who plead guilty will benefit from a reduction in sentence (see Gormley et al. 2020). The extent of the reduction is influenced by the stage of proceedings at which the intention to plead guilty was indicated and the circumstances in which the indication was given.³ Earlier guilty pleas should attract greater sentence

1 See Watson (2021) for a full discussion of the issues of respect and legitimacy at sentencing.

2 If people are to comply with the requirements of their post-release licence or their community order or suspended sentence order it is necessary that they understand these conditions and the consequences of breaching them. It should not necessarily be assumed that offenders fully understand their requirements. For example, in a survey of probation officers working in Wales, most respondents cited literacy issues as an 'important obstacle to [offenders'] compliance' (Ugwudike 2013, p. 170).

3 Section 73(2) of the Sentencing Code.

reductions than later pleas and sentencers are guided by the 'Reduction in Sentence for a Guilty Plea' guideline (Sentencing Council 2017).⁴

The Sentencing Council guideline on guilty pleas was devised with the aim of encouraging 'those defendants who were going to plead guilty to do so as early in the court process as possible' (Sentencing Council 2020, p. 3). Defendants who are unaware, or do not understand the significance of the provisions in this guideline, are less able to make an informed decision about their plea. Research published by the Sentencing Council concluded that 'the guideline did not have an impact on the proportion of defendants who pleaded guilty, which was as expected. The guideline also did not have an impact on the stage at which offenders pleaded guilty or on sentence lengths for adult offenders' (2020, p. 2). This study found that all defendants in the Crown Court were aware of the guilty plea scheme (p. 12) whereas only the 'majority' were aware of the same in the magistrates' courts (p. 14). The proportion of defendants who were unaware of the scheme is not provided in the published report. It is impossible to comment further on the significance and cause of the discrepancy between defendant knowledge of the guilty plea scheme in the Crown Court and the magistrates' courts without further information.

The practice of charge-bargaining is also important in light of these considerations. It is common for defence lawyers to ask the Crown Prosecution Service (CPS) to dismiss more serious charges in return for the defendant's plea to a lesser charge, for example, a plea of guilty to assault occasioning actual bodily harm (with a maximum penalty of five years' imprisonment) in a case where the original charge was causing grievous bodily harm with intent (which has a maximum penalty of life imprisonment). A less serious charge will usually mean the defendant receives a shorter sentence as the applicable sentencing starting points for the offence of assault occasioning actual bodily harm are much lower than those for causing grievous bodily harm with intent.

There is no research on the extent to which defendants with legal representation understand and experience charge-bargaining. However, a report by Gibbs (2016) offers some insight into the experiences of unrepresented defendants. One of the prosecutors interviewed stated that: 'There are more 'not guilty' pleas, definitely, because people don't understand the difference between a defence and mitigation. They might accept the conduct... but plead not guilty because they had a good reason to do it. But this is not a reason to plead not guilty' (Gibbs 2016, p. 11).⁵

In 2019, the Ministry of Justice published data showing that 7% of Crown Court defendants in 2015 had no representation at their first hearing (Thomson and Becker 2019). Although there are no official figures for unrepresented defendants in the magistrates' courts, according to a Magistrates Association survey, in 2014 the figure was 25% (Gibbs 2016, p. 4). The Ministry of Justice data was accompanied by findings from 21 interviews with judges and CPS advocates. These explored

4 Section 59(1) of the Sentencing Code requires sentencers to follow any relevant sentencing guidelines unless they are satisfied that it would be 'contrary to the interests of justice to do so'.

5 Another prosecutor cast doubt on the ability of unrepresented defendants to challenge their charges: 'I could count on the fingers of one hand how many [unrepresented defendants] have actually understood the charges. I have had one who was facing a GBH s18 charge, believing he was in court for common assault and being shocked when I had to tell him the serious nature of the charge' (Gibbs 2016, p. 11).

practitioners' views on what effect unrepresented defendants have on the court process and how the court experience could be improved for them. Many of the answers mirrored responses from Gibbs' research.

'Judges interviewed mentioned problems in discussing the concept of pleas and discounts to sentence with unrepresented defendants. This was because they did not think that someone without formal legal training could understand these concepts as easily. They felt it was difficult to explain them to the unrepresented defendant without appearing to tell them to plead guilty.'
(Thomson and Becker 2019, p. 10)

These studies on unrepresented defendants demonstrate that the process surrounding guilty plea reductions is complex and may not be fully understood by defendants. Further research is also recommended on the extent to which represented defendants are able to understand and engage with the rules on both charge-bargaining and sentence reductions for a guilty plea. Questions might include how the rules are explained by defence lawyers, especially to ethnic minority defendants and defendants with vulnerabilities. Peay and Player (2018) have identified these groups as respectively less likely to trust legal advice to plead guilty and more likely to be induced by legal advice to falsely confess.

At the sentencing hearing

In one of the few studies of the Crown Court in England and Wales, Kirby et al. (2014) interviewed defendants to examine their levels of understanding and perceptions of treatment during the court process. Other court users, including prosecution witnesses and counsel, were also interviewed. The research found that defendants often lacked understanding of the law and procedure surrounding their trial and sentence. Moreover, the court process itself did little to address any gaps in understanding and its failure to engage defendants combined with the use of complex language caused those gaps to widen even further. One respondent observed that: '[The legal professionals] used very long, powerful words where if you're not well educated, if you didn't do well at school or didn't go to University or college or anything like that, because I didn't do any of that, it's very hard to take in and understand' (Kirby et al. 2014, p. 9).⁶

The research also found that some respondents felt unable to have an effect on the outcome of their court appearance. When asked whether he 'thought what the prosecution said was fair', one interviewee responded that he 'knew [he] was going to get done, so there wasn't really any point in arguing' (Kirby et al. 2014, p. 7). Similarly, another stated they were 'just there to get [their] sentence and punishment and get out' (Kirby et al. 2014, p. 7). Several interviewees were unable to remember what was said by their advocate in mitigation, or by the judge in their sentencing remarks. This research suggests that if a defendant lacks understanding of the trial process, this may affect the

⁶ One defence lawyer in the same study commented that it was 'up to [lawyers] to explain it to [defendants] properly... and also to the judge as well' (Jacobson et al. 2015, p. 155). However, the defendants interviewed who expressed a lack of understanding regarding aspects of what happened at court shows these explanations are themselves not always satisfactory.

trial's outcome. The 'outcome' here includes both the sentence itself and the defendant's ability to comply with any sentence conditions.

Schinkel (2014) revealed similar findings when she interviewed long-term prisoners in Scotland to determine whether these prisoners saw their punishments as a kind of moral communication. Although we are not told if the prisoners were asked how much of the sentencing process they understood, some of their views on the purpose of their sentence are instructive:

'Others, like Tim, positioned the judge as being bound by guidelines. Despite the absence of sentencing guidelines in Scotland and the only mandatory sentences being those for murder and third convictions of class A drug offences... several of the men said the judge had no choice in their punishment:

M: What do you think the purpose of giving you this prison sentence was for the judge, like why did he give you six years in prison?

Paul: Well that's [clears throat] judging by the crime, that's the guidelines he's went with, nothing else (.) guidelines.'

(Schinkel 2014, p. 585)

Their answers recall the most common phrase used to describe court professionals in Kirby et al.'s study of defendants in England and Wales: 'they were just doing their job' (2014, p. 8). Kirby et al. conclude that this response signals 'the speaker's acceptance that the courts are a world in themselves, on which outsiders have little impact' (2014, p. 8). However, one interviewee in the same study did take comfort in the existence of rules and guidelines:

'Dexter, who had received an 18-month prison sentence for burglary (a sentence he deemed to be fair) had been impressed by another aspect of decision-making. The fact that his lawyer and the judge had 'consulted a whole load of books' in court appeared to reassure him that sentencing was systematic and considered, rather than an arbitrary process. 'The solicitor referred to his books, that's why I like the way he did it. He was just carrying a whole load of books when he went in the courtroom, put them down and started saying, 'Can Your Honour refer to this?' I was like 'Whoa -'.'

(Jacobson et al. 2015, p. 181)

It is noteworthy that 'Dexter' did not start his hearing with the understanding that sentencing operates in this way. Absent a briefing from lawyers, his only source of knowledge was the progress of his own case, watched from the dock. Other responses from Schinkel's interviewees suggest that the best time for learning about sentencing may not be at the sentencing hearing itself. Schinkel states that: 'any censure in the courtroom is unlikely to be taken on board, at least when long-term sentences are imposed... with long-term prison sentences looming, the men were not able or willing to pay much attention to moral communication or to engage with the court as a moral arena' (2014, p. 591). Schinkel also noted that interviewees 'had had very little guidance in thinking about their crime and their punishment, instead being left to create their own meanings' (2014, p. 592).

In each of the studies above, a significant number of defendants admitted to having a poor understanding of the sentencing process. This appears to be made worse by the formal language of court professionals and the tendency to exclude defendants from active involvement in their own hearings. These issues may be exacerbated when a defendant is being sentenced by video link. Defendants can appear at most types of hearing, including sentencing, by video link from prison or the police station instead of being physically present at court. In 2017, Transform Justice gathered data on how court staff and users in England and Wales thought criminal hearings were affected if held by video link.⁷ Findings suggested ‘video hearings reduce defendants’ understanding of, and respect for, the process’ (Gibbs 2017, p. 3).

Importantly, defendants who are not at court during sentence have limited opportunities to communicate with their lawyer:

‘In a traditional court setting, a lawyer usually has the opportunity to talk to their client face to face after the hearing. This enables the lawyer to make sure the client has understood the court’s decision and to discuss next steps. Lawyers say that it is often impossible to have a post court ‘meeting’ with the client when they have appeared on video due to the logistical difficulties. (criminal lawyer)’

(Gibbs 2017, p. 13)

Video links pose particular difficulties for defendants who require an interpreter, unrepresented defendants and defendants with vulnerabilities. Additional support needs, or gaps in understanding, are harder for the court to detect and harder for defendants to declare when parties are in separate buildings connected only by a screen.

The Coronavirus Act 2020 emphasised that sentencing hearings can be conducted by video link and this may become more common in the future. Further research on how video link appearances affect outcomes is important – especially if, as seems likely, the use of video technology becomes a permanent feature of the courts.

After sentencing: Compliance with conditions

Offenders sentenced to an immediate custodial sentence will generally be released either halfway or two thirds through their sentence, depending on the offence committed and the length of the sentence. After release, they will remain bound by licence conditions in the community until the full duration of their sentence has been served. Breaching those licence conditions may result in a return to custody. In 2019, Ministry of Justice statistics show that 26,503 prisoners on licence were recalled; non-compliance with licence conditions was cited as a reason for recall in seven out of ten cases (Ministry of Justice 2020, Licence Recalls Table 5.10). A failure to comply with the requirements of community orders and suspended sentence orders is also evident from the data: in 2019, 15% of community orders and 11% of suspended sentence orders were terminated early on these grounds

⁷ An average of 180 responses were received to each survey question. Respondents included lawyers, magistrates, court staff, judges and academics. In-depth telephone interviews were conducted with eight survey respondents.

(Ministry of Justice 2020, Probation 2019 Table A4.22). Further research is required to establish whether, and to what extent, a lack of comprehension about licence conditions and community order/suspended sentence order requirements plays a part in offenders' non-compliance.

3.

RESEARCH QUESTIONS AND PRIORITIES

The insights about defendants' understanding of sentencing contained in this paper are piecemeal, gathered from research projects with broader aims than to determine defendants' understanding of sentencing law in England and Wales. A comprehensive, qualitative study of defendants in England and Wales drawing on some of the recurring themes from existing research would enable policymakers to more confidently address the dual questions of how defendants' understanding of sentencing might be increased and where in the criminal process new interventions could be most effective. The same study may also collect data on what effectiveness means in this context, for example, how understanding relates to compliance.

Research should include a wide sample of defendants, from both the magistrates' courts and the Crown Court. There should be provision to ensure proportionate inclusion of represented and unrepresented defendants, as well as defendants who are paying privately and defendants who are in receipt of legal aid.

Defendants could be asked questions such as the following:

- What advice/information were they given regarding the Sentencing Council's guilty plea guideline? Who explained the likely impact of pleading guilty, and when? Were they satisfied with the explanation?
- Did their lawyer explain the sentencing process and any relevant sentencing law? How long did they spend with them? Did they feel the explanation was sufficient?
- To what extent did they know what to expect at their sentencing hearing? Did the hearing unfold in accordance with their expectations? If not, why not? Is there anything that they did not know about the sentencing hearing that they would have wanted to know?
- Were they able to relay all of the issues relevant to sentencing to their defence counsel ahead of the plea in mitigation? Was defence counsel able to give accurate advice on the likely sentence as a result? Were they able to intervene to correct or dispute any contentious matters relating to the sentencing?

- For defendants who did feel they understood relevant sentencing law, how do they think that helped them (if at all)? For example, did it help them to make a decision about how to plead or what to say to their barrister in mitigation?
- For defendants who felt they did not understand some or all of the relevant sentencing law, did they feel disadvantaged? If so, how?
- Did they understand what the judge said at their sentencing hearing? Did they understand the reasons the judge gave for their sentence?
- Did the judge engage with them in court? If so, how? Did it help them to understand what was being said?
- For defendants who were given a community order, suspended sentence order or a fine, were the requirements of these explained to them? Who explained them and were they satisfied with the explanation? In respect of defendants found to be in breach of one of these orders, was the breach due completely or in part to a lack of understanding over what was required?
- For defendants subsequently released from prison on licence, were the licence requirements explained to them? Were they satisfied with the explanation? If they went on to breach their licence, was that due completely or in part to a lack of understanding over what was required?
- If efforts had been made to ensure defendants understood sentencing law and the process, would they have felt better disposed towards the system? Would they have been more likely to comply with sentence conditions? Might it have affected their long-term compliance?

Answers related to compliance could then be related to compliance statistics. Questions could also be asked of lawyers and the judiciary. It would be instructive to compare practitioner views of court and defence practices to the views of defendants. Additional research could explore defendants' understanding of their role in the sentencing process. It would be helpful to know how, if at all, defendants' understanding of the relevant sentencing law is linked to a detached legal, as opposed to an engaged moral, view of their sentence. Policymakers can then decide whether defendant engagement is something that the sentencing process should more actively promote. If they agree it is, those in possession of the research data would be in a better position to design a system which leverages legal understanding as a mechanism for defendants to challenge, participate in and morally engage with their sentence as opposed to a mechanism which operates as a scapegoat justifying defendants' resignation.

A study aimed at measuring the impact of video link sentencing on sentence severity is needed. Similarly, consideration could be paid to the relationship of video link sentencing with both

procedural and outcome fairness. This study might seek to compare sentence length for offenders sentenced in person against sentence length for offenders sentenced by video link as well as hosting qualitative interviews about the benefits and drawbacks of video sentencing with offenders and practitioners who have relevant experience.

More research needs to be carried out on the link between understanding and participation during the sentencing process in England and Wales. However, the research by Schinkel (2014) and Kirby et al. (2014) cited in this paper suggest that defendants do not see it as a priority to understand sentencing law unless, by understanding sentencing law, they are empowered to participate more effectively in the sentencing process. Reforms aimed at helping defendants to understand sentencing law may therefore be most effective when defendants believe that they will assume greater agency over aspects of their case.

Finally, future research on defendant understanding of the sentencing process should pay particular attention to vulnerable defendants, including those with learning disabilities who may have greater difficulty following developments in their case (see Jacobson and Talbot, 2009; Talbot 2008; Talbot 2010).

4. CONCLUSION

The research on defendants' understanding of sentencing law in England and Wales is very limited. It mostly involves small samples and potentially unrepresentative samples of participants. These limitations accepted, studies suggest there are gaps in understanding before defendants get to court and these can potentially be widened by factors such as the formal language and procedure of a court hearing. Although much of the evidence in this area is anecdotal, the risk of misunderstanding seems to be higher among defendants who are vulnerable, unrepresented or on video link.

Defendants contemplating entering a guilty plea need to know the consequences of pleading guilty. Offenders appearing for sentencing should have a clear understanding of the reasons for their sentence, any specific requirements attached to the order, as well as the consequences of breaching these conditions. If defendants and offenders do not understand the sentencing process, perceptions of legitimacy, compliance with requirements, and reoffending rates are all likely to suffer. The limited research involving defendants in England and Wales suggests that more needs to be done to ensure that defendants have an adequate level of understanding of the sentencing process.

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