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To Plead or Not to Plead? 'Guilty' is the Question.[1] Re-Thinking Plea Decision-Making in Anglo-American Countries[2]

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Introduction

Anglo-American justice systems are notionally adversarial. Adveserialism has important implications for conceptions of how truth ought to be determined and the presumption of innocence protected. It is a cornerstone of the legitimacy of Anglo-American justice systems based upon the liberal rule of law. Although Anglo-American justice systems have never perfectly operationalized the ideal of the adversarial trial, the ideal remains important. The presumption of innocence, embodied in the adversarial trial, is perhaps the most important idea binding the process together.[3] However, in practice cases are disposed of primarily via guilty pleas and increasingly *alternatives* to prosecution through court, such as police and prosecutor fines.

The dominance of case disposal via guilty pleas means that Anglo-American justice systems' key claim to legitimacy, the full adversarial trial, rarely occurs. Depending on the jurisdiction and the court, Anglo-American justice systems dispose of up to 95% by way of a guilty plea. Nonetheless, defendants still have the right to a trial, even if they *choose* not to exercise it. Why defendants *choose* not to go to trial, and whether they do so freely, is where the subject of one of the great controversies of contemporary criminal justice.

It is widely believed that defendants who plead guilty are likely to receive a reduced sentence compared to the sentence if they are convicted of the very same charges following an evidentially-contested trial. Various terms are used to describe this practice such as

[1] With apologies to The Bard.

[2] This chapter very substantially revises and develops parts of an earlier essay C Tata and J Gormley (2016) 'Sentencing and Plea Bargaining: Guilty Pleas Versus Trial Verdicts' in M Tonry (ed) *Criminology and Criminal Justice: Criminal Courts and Prosecutors* Oxford Handbooks Online Oxford University Press. We would like to thank Cassia Spohn for her invaluable comments on an earlier draft of this chapter, as well as Candace McCoy, Mike Nellis, and Julian Roberts.

[3] Influentially, *Woolmington v DPP* (1935) identifies the principle of the presumption of innocence as "the golden thread" of the entire criminal process. This image of "the golden thread" articulates the sense of its work in holding the legitimacy of the process together (without that thread it falls apart); its golden preciousness; yet also its fragility.

'sentence discount,' 'guilty plea discount,' 'sentence deduction,' 'allowance in respect of a guilty plea,' 'trial tax' and 'trial penalty.' While all these terms refer to the difference a plea can make to a sentence, they are all value-laden implying different normative positions. Those who object to the idea of altering sentences because of the plea contend that it undermines core rule of law principles, most notably the presumption of innocence. Those who object typically refer to altering sentences based on pleas as a penalty for exercising one's right to trial ('Trial Tax' is a widely used term). Those who consider altering sentences based on pleas unproblematic for the presumption of innocence use terms such as 'sentence discount.' As these different terms for altering sentences based on pleas relate to the presumption of innocence, the differences are more than semantics. At stake is the credibility of the criminal law's claims to be fair and legitimate as well as claim to moral authority in society. After all:

> [Law] is the most public of the many institutions that regulate social conduct as well as the one that claims to speak with authority for the moral community as a whole. (Wiseman 2009, p.49).

The underlying claims implicit in these distinct terms are discussed shortly, but for now, in the interests of neutrality, this essay will primarily use the term 'plea-dependent sentence differential,' (or sentence differential for short), to refer to the difference to a sentence that a not guilty as opposed to a guilty plea can make.

The formal foundation for the plea-dependent sentence differential varies depending on the jurisdiction. In some jurisdictions, statute or case law may permit, or even require, a sentence differential. In other jurisdictions, the basis of the sentence differential is guideline schemes. In certain jurisdictions, the sentence differential may have little formal basis and is rooted in the informal practices of legal practitioners. However, regardless of its basis, in all Anglo-American criminal justice systems of which we are aware, there is a widely held perception that how one pleads affects one's sentence.

While there are procedural nuances that vary between jurisdictions, in general, there are two broad ways through which a sentence differential may result. The first way is direct. A direct sentence differential results from a judge altering a sentence on the basis of the plea entered. For example, a judge may, (depending on one's view), reduce a sentence because the defendant pled guilty or inflate the sentence because she was found guilty of some

charges after an evidentially-contested trial. Alternatively, a sentence differential can occur *indirectly*. In this instance, the judge is not altering the sentence because of the plea itself. Instead, the judge is only considering the offense that the offender is convicted of. The sentence differential in this instance arises because plea bargaining can significantly alter the charges and the facts of the offense of which a defendant is convicted. For example, there are plea bargaining practices such as 'charge bargaining,' where defense lawyers and prosecutors agree on a guilty plea to amended charges. These practices are indirect because they do not *directly* concern the sentence. However, often defendants may believe that they will result in a different sentence.

'Sentence discounting,' 'charge bargaining,' and 'fact bargaining' are all theoretically distinct forms of 'plea bargaining' but are related in practice. Practitioners usually consider the net effects of plea bargaining instead of each factor in isolation. Considering the sum of various forms of plea bargaining can create complex dynamics whereby maximizing one form of plea bargaining reduces another. A typical example is that an early guilty plea maximizes the judicially given sentence discount. However, often defense lawyers can extract better charge bargains and fact bargains their client continues to contest the charges.

Accordingly, in the daily work of the criminal justice process, the relationship between plea decision-making and sentencing is one of the most pressing questions. It is thought to influence how defendants plead, affect caseload pressures, and potentially have implications for the presumption of innocence as well as the experience of victims. This essay evaluates the arguments for and against the practice of altering a sentence *as a consequence of* a plea of 'not guilty' or 'guilty' (the sentence differential). It also appraises the state of international knowledge about the practice and proposes agendas for future research.

The essay is organized as follows. **Section I** investigates whether a sentence differential violates the cherished values of the presumption of innocence and the notion of equality before the law. It examines the criticism that the sentence differential operates to penalize those who continue to plead not guilty by imposing (or threatening to impose) a higher sentence than if they plead guilty. It also considers the criticism that the sentence differential may have disparate impacts on different groups (specifically minorities and those who are socially and economically disadvantaged). **Section II** reflects on why, in

light of the dangers to principled sentencing and liberal rule of law values, justice systems continue to persist with guilty plea discounts. Finally, **Section III** investigates the complex dynamics of how the experiences of defendants may be affected by the sentence differential.

I. Does the Plea-Dependent Sentence Differential Undermine Rule of Law Values?

This debate over whether or not the sentence differential is a discount is one of the great controversies of contemporary criminal justice systems. In Anglo-American justice systems, legal practitioners tend to refer to the sentence differential as something like a 'sentence discount' or 'reduction' that 'rewards' a guilty plea. This articulation of the sentence differential as a discount is how legal systems formally argue that the sentence differential does not undermine the presumption of innocence. However, several commentators regard articulation of the sentence differential as a discount as little more than sophistry to assuage the embarrassment that results from routinely and systemically violating the presumption of innocence. For instance, Darbyshire (2000) argues that the sentence differential:

> Undeniably punishes those who exercise their right to trial then are found guilty, however much the Court of Appeal tries to disguise a sentence discount as a reward for remorse. This is stunning hypocrisy in the Anglo-American legal systems, whose rhetoric trumpets the right to trial, especially jury trial, the burden of proof and the presumption of innocence as the hallmarks of the world's finest democracies. (p.901)

Thus, for its critics, by seeking to encourage guilty pleas, (or at least earlier guilty pleas), the sentence differential risks undermining the presumption of innocence by bypassing the safeguards a trial is argued to provide. For example, McCoy (2005, p.90) insists that we must ask 'whether it amounts to institutionalized coercion.' She argues that:

> Implicit plea bargains occur for two reasons: (1) the defendant knows the 'going rate' of punishment and can accept it, and (2) for some defendants who believe they have

> valid legal defenses, the threat of trial penalty will cause them to plead guilty regardless. (McCoy, 2005, p.94)

Any infringement on the presumption of innocence would run contrary to rule of law principles. Policymakers often attempt to rationalize guilty pleas and the sentence differential on the basis that the defendant is usually, and obviously, guilty. However, guilty pleas and sentence differentials challenge the presumption of innocence precisely because the power of the state looms so large over the defendant's decision-making. This power the state exercises over defendants'' decision-making makes it impossible to know for sure whether a defendant's admission of guilt is genuine or motivated by undue factors, such as fear of a higher sentence.

So, how should the sentence differential be characterized? Is it a Trial Tax or a Discount? Does it represent state beneficence or a threat to exercising one's right to trial? Much depends on what one sees as the 'normal,' 'default' or 'baseline sentence.' Terms such as 'reduction' and 'discount' imply that the point of reference is the hypothetical sentence a judge would give if the defendant pled not guilty and was convicted following a trial. From this perspective, the sentence differential is a discount because the judge is giving a lesser sentence than she would have if the defendant pled not guilty. This perspective has its logic and is in-line with legal notions of 'discounts.'

However, not all agree that the post-trial-conviction sentence should be considered the baseline or starting point. The counter-argument is that the post-trial-conviction sentence is a largely fictitious baseline because, in reality, nearly all sentences follow a guilty plea rather than a conviction after an evidentially-contested trial. For example, Lynch argues:

> In a system where ninety percent or more of cases end in a negotiated disposition, it is unclear why the 'discounted' punishment imposed in that ninety percent of cases should not be considered the norm (Lynch, 2003, p.1401).

In England and Wales, the possibility that the baseline sentence should be the normal baseline or starting point has been considered. In one instance sentencing guidelines were locally modified to assume a timely guilty plea, with the sentence in effect increasing where there was a late guilty plea or a not guilty plea (Henham, 2000, p. 439). Using guidelines in this way was normatively troubling, as it came close to formally recognizing

that the sentence differential is a penalty for going to trial. However, the advantage of this local modification was that it bore more relevance to the majority of cases.

Taking the baseline sentence as the lower sentence given in most cases could be considered more straightforward and practical. The usual alternative is a guideline or norm based on a first-time offender who is convicted following a trial. Yet in most jurisdictions, this is atypical. For example, Ashworth and Roberts note that in England and Wales only 12 percent of offenders plead not guilty, 'and only 10% appeared for sentencing without any prior convictions' (Ashworth & Roberts, 2013, p.7). Consequently, the percentage of those sentenced who meet both these conditions is 'obviously much smaller than 10%' (Ashworth & Roberts, 2013, p.7). Thus, guidelines and official norms based on a first-time offender could be said to give a misleading impression as they do not match the everyday reality of most cases.

The argument that the normal reality of sentencing following guilty pleas should form the assumed starting point or baseline challenges the notion that the sentence differential is a discount. However, ultimately the debate is not possible to resolve objectively: it depends on whether or not one sees the likely sentence following an adversarial trial without plea bargaining as the correct starting point. 'Discounts' and 'penalties,' like notions of 'gain' and 'loss,' 'are malleable concepts' (Bibas, 2004, p. 2512). This malleability means that room for different views is inevitable. Consequently, what may matter more is what the defendant perceives the sentence differential to be. While there is a growing interest in 'user perspectives' of the justice system, so far there is only limited knowledge about defendant perspectives – a deficit which we argue in Section III Anglo-American justice systems need to address.

A. Does the Sentence Differential Encourage Innocent Defendants to Plead Guilty?

The central argument in defense of the sentence differential is that the defendant has a free choice to contest her case and go to trial if she genuinely believes she is not guilty. The assumption is that any innocent defendant will choose to maintain her 'not guilty' plea and leave it to the prosecution to try to prove its case if it can. Further protection is provided by the defendant's lawyer who will ensure that she is fully informed. However, is there a

genuine danger that the sentence differential will induce innocent defendants to plead guilty and thus result in wrongful convictions?

To some, it might seem unlikely that an innocent person would plead guilty when they are innocent, and that this risk is merely hypothetical. Surely, the supposition runs, no person would plead guilty to something they have not done; defendants choose rationally and freely how to plead. Moreover, some might expect that this would not happen because skilled lawyers hold steadfastly to cherished values such as the presumption of innocence and protect the best interests of their clients and hold steadfastly to cherished values. However, while this may be true of some defendants, the sentence differential may still contribute to some innocent defendants pleading guilty. Why this might occur in any individual case is complicated, but in general, there are at least six reasons to doubt the supposition that it is implausible that defendants do not plead guilty to charges of which they may not be guilty.

First, the literature on the relationship between criminal defense lawyers and their clients clearly shows that although in formal terms defendants 'instruct' their lawyers, the reality is much more complex. Empirical research 'has consistently highlighted the relative passivity of most clients' (Tata & Stephen, 2007, p. 732, see also Carlen, 1976; McConville et al., 1994; Baranek & Ericson, 1982). In most contexts, there is an inequality of power in the professional-client relationship. However, this inequality of power is especially acute in the context of most criminal cases. The weak educational, social and personal resources of many defendants can severely limit their ability to instruct their lawyers and control their cases.

Additionally, the stress and anxiety of being subject to criminal charges can hinder the ability of defendants to control their cases (especially while held in pre-trial detention); the unfamiliar vernacular; and the requirements of criminal and court procedures (which can vary by the court in some jurisdictions). As a result, it can be difficult for many clients to take firm command of their cases. Indeed, it is not inconceivable that some defendants may not always fully understand the charges against them. Even where a defendant knows what she has done, she may or may not be fully aware of what crime in law it may or may not constitute. While research is urgently needed to explore more fully what defendants do and do not understand, for now, there is a reason to question the assumption that guilty pleas are always made freely and are always fully informed

Secondly, research has shown that the criminal process in the lower and intermediate courts tends to be characterized by a presumption that guilty pleas will settle cases. There is a widespread expectation among court personnel that an admission of guilt by the defendant is inevitable (e.g. McBarnet, 1981; Carlen, 1976; Feeley, 1982; Heumann, 1978; Tata, 2007, 2010). This expectation can become self-perpetuating in very practical ways. For example, court schedules depend on a high volume of guilty pleas to assist in the expeditious processing of cases. In many jurisdictions, the court, the prosecution, and the defense will often overbook in the expectation that most cases will plead guilty and that trials will be unnecessary. This decision to overbook (to be more 'efficient') makes the criminal process dependent on guilty pleas. If the anticipated guilty pleas are not forthcoming, then the typical working practices of the court cannot function. Thus, a belief that guilty pleas will be forthcoming creates a routine where guilty pleas are necessary, which results in a self-perpetuating circle of dependence on guilty pleas that come to be sought by pragmatic means.

Thirdly, while lawyers may endeavor to look after the best interests of their clients, it is now well established that lawyers also have to be cognizant of a range of potentially competing imperatives, including longer-term inter- and intra-professional relationships (e.g. Eisenstein & Jacob, 1977; Heumann, 1978; Tata, 2007) as well as the structuring of financial interests (Tata, 2007). Lawyers not only owe obligations to their clients (to be a zealous advocate), they also owe indeterminate duties to the court (to be an officer of the court). Lawyers must also reconcile these potentially conflicting duties with their interests and the need to remain profitable and secure working relationships with others in court. That lawyers must reconcile their interests does not mean that dedicated professionals discard cherished values for career or financial gain: professional behavior is more complicated than that. It is, however, fair to say that there is a range of competing dynamics which they have to find some way to resolve and which become mesh with advice on plea decision-making (Tata, 2007).

Fourthly, some defendants, even where they do not accept the prosecution case, feel unable to challenge it effectively. For example, defendants may be charged with an allegation when they were under the influence of alcohol or drugs and may have only a hazy memory of events. A defendant with a poor recollection of events relating to a charge may be at a disadvantage, and this disadvantage may make them less willing to contest the charges

(Tata, 2010). Other defendants may not trust the system, or defendants may feel that the court will not believe them and not find them credible. In this case, they may plead guilty due to passive resignation rather than any true acceptance of guilt. How often such issues occur is difficult to quantify, and research on this is crucial.

Fifthly, defendants may make a deliberate choice to plead guilty to charges of which they are not guilty. Initially, this might seem to conflict with theories of decision-making that posit the defendant as a rational actor who would not wish to incriminate him/herself. However, some defendants may feel obliged to plead guilty so that another family member, friend, co-defendant or gang member avoids conviction. For example, the prosecution may sometimes offer to drop related charges against family members of the defendant who is deemed to be the primary perpetrator so as to extract a guilty plea. Other defendants may struggle with the demands of the court process and so conclude that a plea of guilty is the least bad option. Indeed, pleading guilty, even when innocent, can be considered a better option due to the costs which the criminal process inflicts (Feeley, 1982). For example, Albert Alschuler has noted that:

> A misdemeanor defendant, even if innocent, usually is well-advised to…plead guilty at the earliest opportunity…to minimize the painful consequences of criminal proceedings (Alschuler, 1983, p.953).

These painful consequences are especially true where the defendant is held in pre-trial/sentence detention (remand) and the sentence could be backdated to cover, wholly or in part, time served. A guilty plea, when held in remand, is also beneficial where the final sentence is non-custodial (a surprisingly common occurrence). In both cases, the effect of a guilty plea can be immediate liberation.

Sixthly, and finally, the difference in the potential punishment if a defendant goes to trial can be extortionate. Although some argue that innocent defendants still have the choice to go to trial, some commentators have suggested that large sentence differentials can be incompatible with the presumption of innocence or even coercive (Caldwell, 2011; Ashworth, 2006, p. 256-7). As McCoy (2005, p. 90) puts it:

> There is nothing wrong with pleading guilty in the expectation of receiving a ‘going rate’ of punishment. But […] there is a lot wrong with pleading guilty if that

> going rate after trial is so huge as to be the reason a defendant will make a pre-emptive guilty plea.

A defendant may run the risk of a much higher sentence by not pleading guilty. Some of the most infamous examples of this are where going to trial has prompted the prosecution to charge under 'three-strikes-and-you're-out' laws. In these circumstances, where there is a perception of a large trial tax, an individual may rationally choose to plead guilty even if they are innocent: paying a small but certain cost to avoid the risk of a contingent but larger cost if convicted following a trial. From the perspective of such defendants, this is a meaningful choice. Indeed, statistical theory may also bear this out to be rational in some circumstances

How large the sentence differential must be before it becomes 'coercive' is a matter of ongoing debate. Like Appeal Courts, reformers have wrestled with the question of 'how large a percentage difference is too large?' Although the question of magnitude is critical, it is defendants' perceptions that determine their pleading decisions. Defendants form their perceptions of the likely sentence differential by making evaluations through the lens of a broader range of other criminal justice process costs (not least, for example, being held on remand) and a range of personal (e.g. health and family) circumstances.

For all these reasons, and more, it is unsafe to assume that innocent persons never plead guilty. The sentence differential may add to this issue by making it more likely that an innocent person will plead guilty. Exacerbating this problem is that legal guilt is often a nebulous concept. Thus, despite legal rhetoric to the contrary, it seems that the sentence differential does pose challenges to the presumption of innocence.

B. Do Plea-Dependent Sentence Differentials Violate Legal Equality?

One criticism of the Plea-Dependent sentence differentials is that they have a disproportionately adverse effect on minority groups, thereby making the practice indirectly discriminatory and undermining the principle of legal equality (e.g. Savitsky, 2009). However, identifying indirectly discriminatory practices is challenging, as 'a wide variety of practices that are facially neutral… have racially disparate effects' (Tonry, 2012,

p. 87). One infamous example of this was the USA's drug laws penalizing the use of crack cocaine more severely than powdered cocaine. While this seemed racially neutral, it disproportionately affected poorer minority groups more likely to use the cheaper crack cocaine (Provine, 2002; Tonry, 2011, p.1).

The sentence differential may indirectly discriminate against minorities if minority defendants:

> Are in a worse bargaining position than white ones, and that this differential bargaining power makes [minority] defendants more likely to make worse bargains than similarly situated white defendants' (Savitsky, 2012, p.135).

Unfortunately, it seems that minorities may both start from a disadvantaged position and also be treated differently and receive poorer bargains from prosecutors. According to Sah, Robertson, and Baughmn (2015),

> Although the U.S. Constitution theoretically limits the discretion of prosecutors (to target a particular race prejudicially, for instance), such protections are exceedingly difficult to invoke, especially if a prosecutor's unconscious rather than intentional bias is in play (p.70).

Given that most sentences follow a guilty plea, the receipt of worse bargains may lead to a more severe charge on conviction and a higher sentence, even if judges' sentencing is not affected by any implicit racial bias. The effect of this can be significant and Berdejó (2018) has argued that:

> White defendants are twenty-five percent more likely than black defendants to have their principal initial charge dropped or reduced to a lesser crime. As a result, white defendants who face initial felony charges are less likely than black defendants to be convicted of a felony. Similarly, white defendants initially charged with misdemeanors are more likely than black defendants to be convicted for crimes carrying no possible incarceration or not being convicted at all (p. 1188).

It is also possible that inequality could be the result of minority groups being disposed to plead differently from majority groups. Indeed, Henham (2017) has noted that:

> Research suggests that the fact ethnic minority offenders were more likely to contest the charges against them inadvertently subjected them to a form of indirect

> discrimination since the system encouraged sentence discounts for guilty pleas. (p. 4).

One factor that may influence whether a defendant pleads guilty or contests the charges is their level of trust in the justice system and legal actors. The effect of trust on plea decision-making is problematic as there is evidence that certain minority groups have less faith in the criminal justice system than majority groups (e.g. Shute, Hood, & Seemungal, 2005; Weitzer & Tuch, 2002). This mistrust may be demonstrated by the higher proportion of black defendants in England who plead not guilty and choose to contest their case before a jury of their peers, rather than to trust a judge sitting alone (Hood, 1992, p.196; Thomas, 2010, p.21). Furthermore, Michael Tonry has noted that 'black defendants less often plead guilty and when they do, they do it later' (Tonry, 2012, p.75).

These differences in inter-group pleading behaviors are significant in justice systems where pleading decisions may dramatically affect sentences due to a sentence differential. For example, if a 'guilty plea discount' is one-third (e.g. 120 days down to 80) then by not pleading guilty a defendant's sentence will be 50 percent higher than a comparable defendant who pleads guilty (i.e. a sentence of 120 days is 50 percent more than one of 80 days). Indeed, Hood's study suggested that pleading not guilty accounted for 13 percent of the total difference 'in the black male general population and their proportion among those serving [custodial] sentences' (Hood, 1992, p. 203).[4] Thus, lower levels of trust may mean that the sentence differential indirectly contributes to racial disparities in criminal justice systems.

Why some minorities may have lower levels of trust cannot be thoroughly explored within the confines of this essay. However, as Bennett (2016) implies, such lower levels of trust should hardly be surprising:

> That implicit racial bias may affect sentencing should come as no surprise. There 'is a rich and overlapping literature' documenting implicit racial bias by white Americans favoring whites over blacks, and commentators 'almost universally agree' that racial disparities are pervasive. (p.396).

[4] If anything the plea-dependent sentencing differential may have increased since the time of Hood's study (Sentencing Council of England and Wales 2014 Table 4.2)

However, one factor may be that some groups are more likely to feel victimized by agents of the criminal justice system. For example, minority groups may feel targeted in various ways, such as through 'racial profiling' (Tator & Henry, 2006; Welch, 2007). The result of this, according to Tonry (2012) is that:

> Put into a single sentence: young black men [and others] who believe themselves unfairly treated by the police understandably become angry and uncooperative, and are punished more severely as a result (p.74).

However, understanding and empirically testing the potentially discriminatory effects of the sentence differential is not easy. There are many variables to consider (e.g. intersectionality between race, class, and gender) and the information is limited, particularly regarding defendants' subjective perceptions and how these influence pleading decisions. Though, for now, it seems safe to suggest that, while ostensibly neutral, the sentence differential may contribute to wider racial disparities (Tonry, 2012, p.87).

II. How is the Sentence Differential Justified?

There are potentially serious problems with the sentence differential. It may be a threat to the presumption of innocence and notions of equality before the law. Given the significance of these potential problems, why is the sentence differential tolerated and even encouraged by policymakers around the world? Three main rationales are advanced to justify the sentence differential (deemed to be a discount) at a policy level. The section explores these rationales.

The first rationale is the Remorse Rationale. The Remorse Rationale is the argument that guilty pleas demonstrate remorse and that this warrants the reduction. The second rationale is the Victim Rationale. The Victim Rationale claims that reductions are justified on the basis that the guilty pleas spare victims from the further ordeal of a trial. The third rationale is the Efficiency Rationale. The Efficiency Rationale supposes that reductions are legitimate as they induce justified guilty pleas and earlier guilty pleas by people who are guilty, thereby saving resources such as court time and money. However, all three of these rationales have serious limitations, which begs the question of whether there is some other

reason that the sentence differential exists. Let us first scrutinize these three justifications before asking whether there are any other reasons for the sentence differential.

A. The Remorse Rationale

Remorse, empathy, and compassion are difficult questions for judges when sentencing and, more generally, pose challenges for the rule of law itself (Bandes, 2017). Using remorse to justify sentence discounting relies on the notion that a remorseful offender is less deserving of punishment, or that the remorseful offender is worthier of mercy. It also relies on the assumption that the guilty plea is a sign of remorse. However, there are problems with this rationale in both practice and theory. The first problem lies in identifying genuine remorse. The second problem is explaining why remorse justifies a lesser sentence. These are dealt with in turn.

Identifying genuine remorse is difficult (e.g. Bandes, 2016; Leverick, 2004, pp. 370-372; Rossmanith, 2018; Weisman, 2014). It might be assumed that the guilty plea itself is evidence of remorse. However, the perception of a sentence differential means that this argument is weak. As long as defendants perceive that they can, in relative terms, benefit from a guilty plea it cannot be known whether a guilty plea indicates remorse, a tactical decision to try to benefit from a discount, or both. Additionally, even if the sentence differential were not a factor, there are many other reasons why a defendant might plead guilty, such as to avoid the stress and uncertainty of a trial or to be liberated from pre-trial/sentence detention.

Despite these problems, many may feel that they can identify genuine remorse through their ability to empathize with the defendant. However:

> The problems arise from selective empathy and from empathic inaccuracy (Bandes, 2009). For judges, these are acute problems, because judges are encouraged to believe in their own omniscience. (Bandes, 2017, p.192)

A judge may empathize differently with those who are similar to themselves than those who are different, which may contribute to inequality. For example, emotions may be expressed differently by different cultures and things that add credibility in one culture (e.g. norms regarding eye contact) may not be present in another. As well as adding to

inequality, the ability to empathize is imperfect. There is also a risk that some defendants tendering guilty pleas for tactical reasons will be thought remorseful and therefore will benefit from a discount. At the same time, others who are pleading guilty because of genuine remorse may be thought disingenuous and therefore will not benefit.

The second issue with justifying the sentence differential based on remorse is that it is unclear why remorse should justify a reduction in sentence. Maslen and Roberts argue that 'desert theory provides the primary theoretical basis for sentencing guidance' (Maslen & Roberts, 2013, p.125). If this is correct, the remorse rationale is questionable as it does not affect culpability or harm. Remorse occurs after the fact of the offense (Leverick, 2004, p. 370).[5] Thus, remorse does not affect what the defendant did, nor how blameworthy they were at the time. There is also little evidence that displays of remorse reduce the risk of reoffending and, if remorse is thought to be intrinsically painful for the person, it is questionable whether sentencing should consider this extra-judicial punishment. These limitations of the Remorse Rationale mean that it is hard to pinpoint a logical reason why a remorseful defendant should receive a reduced sentence based on penal principles. Indeed, on this view, the sentence differential may serve to undermine the logic of principled sentencing.

The Enduring Appeal of Remorse: Affective and Legitimacy Explanations

Despite the normative problems that rewarding defendants for expressing remorse create, there is widespread support for the notion that remorse is important and that it *can* provide an acceptable reason for a reduced sentence (Maslen & Roberts 2013, p.124). Remorse can also be an important factor for policymakers as well. For example, in Scandinavia reductions for admissions have been 'rationalized in terms of contrition or acceptance of responsibility' (Tonry & Lappi-Seppälä, 2011, pp.16-17). In the U.S. discounts for 'acceptance of responsibility' tend to be *premised* on a remorse rationale.

Perhaps the reason for remorse's enduring appeal is linked to the expressive, affective, and normative elements of the criminal law. Throughout its history, it seems law has never

[5] Though some have argued that remorse can make an offender less blameworthy and therefore justify a (slightly but not significantly) lower sentence (see McCoy, 2005, pp.79-82).

been solely an enterprise concerning the objective application of rules in a formalistic fashion. Indeed, as the classic critiques of formalism powerfully demonstrate (c.f. Leiter, 2010), this is not possible. Law is always indeterminate to some extent and judges are human and fallible.

Moreover, imposing punishment can present moral challenges for judges. Judges facing moral challenges is not a new phenomenon, and judges have long struggled to reconcile the punishment they impose with notions such as compassion. For example, at one point 'police court missionaries were welcomed in the courts because they provided justifications for lenience to magistrates who were increasingly concerned about the harsh effects of the cumulative principle in sentencing' (Vanstone, 2004, p.36). Indeed, regardless of how it is articulated, (whether it is called 'leniency,' 'mercy,' or 'acceptance of responsibility'), these expressive, affective, and normative elements are intrinsic to the criminal law. Indeed, Vogel (2007) traces the origins of plea bargaining to older discretionary concepts of leniency:

> One notable legal innovation developed as men and women drew on the language and forms of the time-honored tradition of episodic leniency and reforged it, along with indigenous elements of the Puritan religious practice of admonition, to produce a new discretionary form—namely, that of plea bargaining (p.133).

Thus, while a sentence differential (especially a large differential), because an offender is remorseful, is hard to justify in terms of penal principle, remorse does have some enduring appeal. The legacy of formalism creates an inescapable bind which seeks to deny the affective, expressive, and normative role of law. It supposes specific that punishments are the inevitable consequences of the application of formal law to self-evident case facts, rather than cathartic retributions, empathetic reactions, etc. Ultimately, this formalistic view obscures the fact that 'in law, we are always making choices about which emotions advance legal goals' (Bandes, 2017, p.185) and in making this choice remorse may play an important part.

Thus, a central and inescapable paradox afflicts the courts in its search for genuine remorse. On the one hand, there is the pervasive professional desire for speed, control, and predictability by settling cases as far as possible by way of guilty pleas. On the other hand, there is also a professional requirement to know whether or not the person fully and freely

accepts responsibility for the offense he has formally admitted to. Ambiguous, insincere, or confused formal admissions of guilt are highly problematic for court professionals. Formal admissions which appear to be contradicted by the person's account, (for example in a pre-sentence report or plea in mitigation or allocution by the defendant to the court in which she may explain her position in terms of the formal guilty plea), imply difficult questions about the fairness and voluntariness of the process through such admissions are generated (Tata, 2019). In a sense, court communities have to live with the perpetual doubt which they generate: has she pled guilty because she accepts that she really is guilty? Or is she pleading guilty for fear of the sentence differential; or, to get out of remand; or, to take the rap for someone else; or, because she doesn't expect that she would receive a fair trial, etc.? Operating in the shadow of law's threats, and inducements means court professionals are condemned to keep guessing as to whether or not the person's formal guilty plea is really free and genuine.[6]

This requirement to feel that the defendant fully and freely accepts responsibility may be where expressions of remorse play a key role. As Weisman (2014) so well explains, remorse must not simply be experienced by the person but be shown and displayed to the court. The court must look for *signs* of remorse. It is not enough to hear that a defendant feels contrite. That contrition and regret must be *shown* to the court. Such a showing should be convincing, authentic and heartfelt. Court professionals talk of knowing remorse when they are able to sense and feel genuine remorse in front of them (Rossmanith, 2015). Experiencing the defendant's signs of remorse shows the court (and the wider public) that the person fully, and freely accepts her responsibility for her offending (Tata 2019). She can be understood to be within the court's (and wider community's) moral community (Weisman 2019). There is no equivocation or resistance, no ifs, buts, or excuses in 'genuine remorse.' The remorseful defendant is seen by the court (and the wider

[6] The controversial American phenomenon of 'Alford Pleas' (sometimes called a best interest plea) permits defendants to plead guilty while protesting innocence. Bibas (2012: 61-4) reports that judges dislike Alford Pleas, and indeed equivocal guilty pleas more generally, because of the "the message which they send. Pleas without confessions leave victims unvindicated and defendants defiant and resistant to treatment….Moreover, some judges and prosecutors worry that equivocal guilty pleas undermine public confidence, leading defendants' family, friends, and the public to suspect injustice….Guilty-but-not-guilty pleas send mixed messages, breeding public doubt, uncertainty, and lack of respect for the criminal justice system. " Equivocal guilty pleas fail to *show* to the court that the admission of guilt is sincere and accepted by the defendant (Tata 2019).

community) to accept responsibility completely: so much so that even before sentencing she is almost punishing herself. The genuinely remorseful defendant fully, freely and sincerely accepts responsibility and the fairness of the impending punishment. In this sense, then, signs of genuine remorse are sought by the court (at least in part) because they are seen as the ultimate signs of the legitimacy of the criminal-penal process. Convincing signs of authentic remorse reassure court professionals of the fairness of their penal work (Tata, 2019), and assure the wider community that the defendant is not a fundamental threat to the moral order (Weisman, 2014)

B. The Victim Rationale

Another rationale for sentence differentials is that there are benefits for victims of crime. This rationale assumes that a guilty plea will best serve a victim as this means that he will not be subjected to the trial process. Indeed, it is true that a trial can be an arduous ordeal for a victim that, among other things, can require the victim to be cross-examined and have his integrity questioned – an experience that some victims may prefer to avoid (Dawes et al. 2011, para 3.2).

However, while sparing victims the further ordeal may appear to be compassionate, there are reasons to question this rationale. One reason to object is that in many cases where a sentence reduction is given the only witnesses are police officers. (Page et al., 2010, para 7.1.2). In these cases, the victim rationale does not apply. Secondly, it is wrong to stereotype victims. Just as defendants' circumstances vary, so do those of victims. These variations are significant as there are victims who are not well served by sentence discounting (Darbyshire, 2000, p.905). For example, some victims may prefer a contested trial if this means they will learn more about the offense and the offender – which may help them obtain emotional closure. Indeed, there is an ongoing debate about whether victim impact statements may be beneficial for victims (Bandes, 2016). Additionally, some victims may resent being 'spared' for the simple reason that the cost of this is that the defendant who wronged them receives a lesser sentence: though this risk must be weighed against the increased odds that an offender will not be convicted without a guilty plea.

Thus, while 'sparing' victims is a noble endeavor, these good intentions do not always have positive results. While the victim rationale seems plausible, it does not apply to many cases where a discount is given, as there is either no victim or the victim is not one who would benefit from being 'spared.' Additionally, something is troubling about the criminal process when it becomes so burdensome on victims that they need to be protected from it, potentially at the expense of sentencing principles. Indeed, Leverick (2004) has criticized the victim rationale for focusing attention on avoiding flawed criminal processes rather than improving them. For example, in some instances, an issue with the trial process has been that alleged attackers may cross-examine victims. However, the solution to the flaws in the trial process should be to alter the trial process, rather than avoid the trial altogether for the good of the victim (Padfield, 2012, pp. 361-377).

Another drawback of minimizing the victim's participation is that it is detrimental to the function of the criminal trial as a public communicative forum playing out the nature and limits of social mores. In this sense, the trial is not something that is only for the disposal of cases concerning the interests of its immediate participants but also serves as a forum for wider public discussion and debate. Through public displays of emotion, ritual, and drama, the trial may demonstrate the polity's commitment to justice. It plays an essential cathartic role for victims and the public, which is increasingly encouraged to identify with 'the victim' (Sparks, 2011). In so doing, in daily practice and especially in high-profile cases, the trial enables a moment of collective moral expiation, which in turn helps to constitute a sense of community. In this way, the phenomenon of the vanishing trial not only silences the victims and defendants, but it also denies the ability to hear their stories publicly and for the law to show that it has listened to victims and defendants before coming to a decision.

The decreased incidence of trials and the participation of victims entails the loss of public displays of emotion, drama, and ritual, in turn perpetuating a feeling that criminal justice has become a sterile automated process devoid of moral drama and meaning. An effect of this is that it tends to undermine public confidence in the legitimacy of sentencing and the broader criminal justice system (Tait, 2002).

C. The Efficiency Rationale

Those promoting an efficiency rationale for the sentence differential propose that, while trials may be the ideal way to safeguard the presumption of innocence, resource constraints require that this ideal cannot be achieved in most cases. Consequently, it is deemed necessary to incentivize early guilty pleas with a sentence differential. Thus, the efficiency rationale is based on a claim of pragmatic necessity: inferring that without guilty pleas the system would collapse under the increased workload. In many ways this claim is persuasive. It is uncertain how Anglo-American justice systems, so accustomed to guilty pleas and plea bargaining, would respond to many contested trials.

Additionally, it is important to note that the efficiency argument, properly made, is not necessarily amoral. The justice system runs on public money, and there is a moral duty to ensure it is spent wisely. Thus, the efficiency rationale *can* be made in such a way to provide it with a moral (utilitarian) foundation.

However, is this claim that plea-dependent sentence differentials save money factually accurate? While removing the sentence differential may result in fewer (and later) guilty pleas, there are other reasons why defendants plead guilty (Schulhofer, 1984, p.1040; Feeley, 1979). These other reasons why defendants plead guilty mean that it should not be assumed that all guilty pleas are the result of the perceived sentence differential. Indeed, research on why defendants do and do not plead guilty is desperately needed (a point this essay will stress later).

Moreover, several commentators have suggested that the caseload necessity thesis is not as certain as may be assumed. For example, Weigend (2006) notes that the thesis:

> Has little evidence to support it – the time and location of system changes from trial to non-trial adjudication are not related to significant increases in case input. This is especially true for countries where the introduction of bargained case dispositions did not result from overburdened courts' search for an outlet but was the product of comprehensive legislative reform (p. 213).

Indeed, from both international and historical perspectives, the empirical link between the rise of the sentence differential (and plea bargaining more generally) and the level of workload is at best tenuous (e.g. Eisenstein & Jacob, 1977; Feeley, 1979, 1982; Heumann,

1975, 1978; Mather, 1979; Vogel, 2007).[7] By comparing low and high court volumes across time, it has been found that remarkably similar proportions of cases result in a guilty plea. McCoy (1983) sums up the point neatly:

> The finding that a high percentage of cases conclude with guilty pleas even when there is very little caseload pressure undermines the conventional wisdom that explains plea bargaining in terms of efficiency (p. 59).

Thus, it cannot be assumed that the sentence differential is necessary and there is a good reason to be skeptical of the efficiency argument. There is also reason to be skeptical of the assumption that the sentence differential promotes the expedient disposal of cases and that guilty pleas save resources. Ironically, the expectation that cases will invariably settle by way of guilty pleas or be dropped can itself lead to a wasteful delay in court proceedings. Prosecutors may tend to be more improvident in how they file charges than they would if they expected a trial, in the partial expectation that those charges will later become useful bargaining chips (Caldwell, 2011, p. 65). Defense lawyers may respond to this by not pleading guilty to the charges initially filed out of a belief that these are exaggerated and can be reduced. Lawyers may also adapt by delaying settlement until trial, which may be a tactic to extract a better deal from a time-pressured prosecutor (Tata, 2007, p.512).

This expectation of a guilty plea means that prosecutors and defense lawyers tend to avoid a thorough examination of the evidence at the earliest opportunity in the expectation of settlement later in the process, or of withdrawal of the case (Tata & Stephen, 2008; Bradshaw et al., 2012, para 6.14). This expectation is self-perpetuating. The expectation of guilty pleas also leads to a lack of preparation and an 'adjournments culture' (Kemp, 2008), which from the perspective of individual practitioners is rational and prudent, but from a system-wide perspective is inefficient. Thus, the sentence differential may work to normalize an inefficient culture and contribute to 'phenomena aimed at delaying the progress of cases' (McInnes, 2004, Chapter 28; see also Bradshaw et al., 2012, para 6.14 for a discussion of reasons to delay a guilty plea).

Additionally, there can be a tendency to assume that the processes encouraging guilty pleas cost nothing. However, while the costs may be hard to quantify, they do exist and it is

[7] Though it has been suggested that, even if changes in criminal workloads were not related, changing civil workloads may have placed pressure on the courts (McCoy, 2005, p.77).

incorrect to assume that they are 'trivial' (Schulhofer, 1984, p.1040). Lawyers may have to devote time to persuade defendants to plead guilty, and prosecutors may have to devote time to overcharging and haggling with the defense. Furthermore, even seemingly minor delays related to guilty pleas have consequences. Schulhofer (1984) has noted that in his sample various delays meant that the average case involved 35 minutes of waiting, and the 'average guilty plea proceeding in fact required 55 minutes of courtroom time for the conviction stage alone' (pp.1056-1057). While these figures do not take account of the entirety of the potential culture of inefficiency that results from practices designed to promote guilty pleas, they do suggest that the costs might be more significant than is generally assumed.

Moreover, it is worth noting that even if the removal of the perception of a sentence differential did increase the workload of the justice system, it might adapt rather than grind to a halt. Some have suggested that a simplified trial procedure could be used, while others have argued that a total ban on guilty plea discounts may be unsustainable, but a partial ban could work (Schulhofer, 1984; Alschuler, 1983; Gazal-Ayal, 2005). Thus, while the necessity argument cannot be dispelled completely, it should not automatically be taken as true.

Finally, the widely-cited concept of 'efficiency' bears scrutiny. Efficiency is, of course, a laudable goal with which no one can reasonably disagree. However, implicit in the debate about the Sentencing Differential is profound disagreement about what counts as 'efficient.' Measuring 'efficiency' in the justice system is not a value-free exercise. It implies normative claims about what is 'just,' what is 'necessary,' and what is 'wasteful.' These claims are based on different and competing perspectives about the 'correct' role of prosecution, defense, judge and indeed the justice of the criminal process as a whole (Tata, 2007). It is easy to imagine that 'efficiency' is about doing things more productively. The prevailing image is the factory assembly line where production of the desired output from no more input (e.g. labor, outlay) equals greater productivity. When the output is shoes or widgets, it is relatively clear and easy to measure. Yet, what should be the desired output of criminal justice? Is it the sheer number of cases processed? Surely, the output of a justice system must be justice. Therefore, an increase in case disposals which primarily results in injustice is, by definition, self-defeating and therefore inefficient. In other words, when even the cheapest justice system produces injustice, it fails to be efficient.

In the same way, injustice can only ever be a mark of inefficiency: the system has failed to produce what it should. In other words, logically, it cannot be enough to justify the sentence differential on the grounds of cost alone. Noting the tenuous link between justice and efficiency is not to deny that the sentence differential may dispose of cases in a way that also dispenses justice, but the link between the two cannot be assumed: it is tenuous and contingent.

D. Is there another reason for the Sentence Differential?

Notions of the sentence differential *may* be propagated at a policy level by a belief that they result in more cases pleading guilty and pleading guilty at an earlier stage. However, policies do not explain the existence of sentence discounting. In almost all jurisdictions perceptions of a sentence differential, (whether through sentence discounting, plea bargaining, or other means), pre-date formal policies of the same effect. The perception of a sentence differential emanates from the bottom up (in the reality of daily practice) and eventually finds itself expressed in formal law and policy, with at least one the three rationales noted above ascribed to it.

Vogel (2007) offers a nuanced account of the origin of the sentence differential, attributing its origin to wider social and political changes:

> An urban political elite, seeking to maintain its position of power, played a key role in its establishment. This privileged group, responding to political challenge in a specific social and temporal context, shaped much of the imaginative construction of American legal ideas during this formative era. It was this elite's perception of crisis and threat, along with its effort to preserve social order, the legitimacy of self-rule, and its own dominance, which shaped the practice of plea bargaining in a single locale that would then become a national and, eventually, an international phenomenon (p.5).

These grassroots origins of the sentence differential do not appear to be limited to Anglo-American systems. For example, Rauxloh (2010) notes the emergence of informal mechanisms for case disposal via a sentence differential in Germany and how the formal

law was changed to match practice, rather than the other way around. But why does daily practice generate this perception of a sentence differential?

In the case of Anglo-American justice systems, their adversarial nature is thought of as a cornerstone of the legitimacy of the process. However, this notion of Adversarialism does not accord with the reality of what actually happens in practice. Several commentators have argued that plea bargaining has brought about the demise of adversarialism:

> Blumberg is not alone in ascribing the demise of the adversary system to the rise of plea bargaining. In what have quickly become classics, University of Colorado law professor Albert Alschuler has examined plea bargaining from the perspectives of the prosecutor, judge, and defense attorney... He concludes that from each of these views the prevailing incentive is one of institutional convenience and organizational maintenance rather than the interests of the accused and the concern with justice. (Feeley, 1982, p.339).

In practice, especially in the lower courts, legal actors work together in many complex but collaborative ways (Eisenstein & Jacob 1977). Legal practitioners form relationships with others in court, case disposals are generated through collaborative means, etc. Even though there is no perfectly adversarial system (it is an *ideal (or pure) type*) the reality is so far removed from this ideal that it poses uncomfortable questions about the validity of Adversarialism as a touchstone of legitimacy. In fact, the manner in which most cases are disposed of in Anglo-American justice system has about as much in common with Inquisitorial ideals as it does Adversarial ones.[8]

Regardless of how one characterizes the operation of Anglo-American systems, it is clear that in many ways the lack of Adversarialism and the predominance of collaboration is congenial for legal practitioners. For example, guilty pleas serve various ends. Structures of publicly-funded remuneration for defense lawyers may not pay significantly more for the extra work of a trial, and prosecutors and judges may like to clear their cases without

[8] This is not to say Anglo-American systems have become Inquisitorial as there are still significant divergences from this ideal. Perhaps, this means Anglo-American systems are somewhere in between and the challenge is to pinpoint where. Alternatively, it may be that these ideal types are losing their relevance to practice all together. If so new conceptual frameworks may be necessary, along with new yardsticks for what is normatively desirable and new touchstones to ground claims of legitimacy.

the uncertainty and stress of going to trial. However, this collaboration is problematic in terms of the perceived legitimacy of the process since legitimacy is partly drawn from notions of adversarialism and the selflessness of ethical legal practitioners. The sentence differential, in daily practice, works to mitigate this issue. Let us explain.

If it appears the guilty plea benefits the defendant, then it also appears that the choice to plead guilty has been made by a defendant freely. The guilty plea also serves a symbolic role in having the defendant affirm the righteousness of the criminal process. When defendants admit their guilt to the court and show remorse, they affirm the legitimacy of the court. This cements the court's position as a higher form of authority.

In the midst of this, the benefits to legal practitioners can be glossed over, and the benefits to a defendant can be presented center stage. This protects the professional self-image of the honorable, diligent, selfless lawyer. Part of the social capital (the prestige) of being a legal professional is that they serve a higher calling beyond their self-interest. For legal practitioners, they serve the court and the wider interests of justice. Indeed, as Flexner (2001) notes, professionals may be expected to self-sacrifice to serve this higher calling:

> Devotion to well-doing is thus increasingly likely to become an accepted mark of professional activity; and as this development proceeds, the pecuniary interest of the individual practitioner of a given profession is apt to yield gradually before an increasing realization of responsibility to a larger end (p.156).

This is often drawn upon to justify (sometimes) high salaries and ground claims of the honorable duty of their work (Sommerlad, 2015). It is also used as a reason why professions ought to have more autonomy to regulate themselves (e.g. Marshall, 1939; Parsons, 1939):

> Society's granting of power and privilege to the professions is premised on their willingness and ability to contribute to social well-being and to conduct their affairs in a manner consistent with broader social values. (Frankel, 1989, p.110)

However, this argument is tautologous. The system creates its own rules. The legal profession, in particular, has a high level of self-regulation and an ability to set its own standards. In doing so it has generated the perception of a sentence differential and a permissibility for plea bargaining. It then uses this to explain away high levels of guilty

pleas and treats the sentence differential as an inevitable fact over which it has no control. This is akin to a casino claiming it merely provides the games for customers to play and washes its hands of the odds which mean that overall the house always wins.

Another explanation of the persistence of the sentence differential is that, if defendants plead guilty, it makes the limitations to adversarial ideals of the justice system less notable. There is less scrutiny of the process through which guilty pleas are generated than almost any other part of the criminal process. Indeed, it is remarkable just how prevalent plea bargaining in England and Wales became before it was formally acknowledged (Baldwin & McConville, 1978). Even today, when there is recognition of widespread plea bargaining, there is little extra scrutiny. When a defendant pleads guilty in the public court, the details of the plea bargaining rarely emerge. Thus, for practical purposes, plea bargaining remains very much in the shadows. This invisibility of plea bargaining makes it appealing to legal professionals who strive for autonomy, certainty and are habituated into this way of working.

III. Defendants' Views and Perspectives

An area which requires much deeper research is defendants' views and perspectives about the sentence differential. Most of the research which has been conducted examines the views and practices of defense lawyers, prosecutors, and, to a lesser extent, judges. Yet, we know remarkably little about the perspectives of defendants. Much of what we think we know is, in fact, derived from the views and assumptions of practitioners.

The views of defendants may be overlooked on the basis that they might be thought to be less informed than those of legal experts. They may also be overlooked because legal experts often claim to speak on behalf of defendants. Even research on issues faced by defendants tends not to interview the defendants whose experiences the research was seeking. To take just one example, Gibbs (2016) very usefully explores the challenges faced by unrepresented defendants in England and Wales. However, this did not involve interviewing defendants. Instead, the research interviewed prosecutors and other practitioners, who spoke of what they took to be the experience of defendants. This

limitation is increasingly notable in light of the growing volume of research on user perceptions of law, legal consciousness, and user perspectives of desistance studies of how people move away from offending, (e.g. Maruna, 2001; McNeill, 2015; McNeill & Weaver 2010; Schinkel, 2014; Weaver, 2016). This highlights that the views of defendants cannot be assumed. As Casper (1978) notes:

> It is the defendant who must most directly live with the consequences of the administration of criminal justice; moreover, given the current concern with crime, it is the defendant's past and future behavior that is of concern not only to him but also to society at large. Thus, to examine what the defendant thinks is happening to him, the roots of his behavior, and the lessons he learns from his encounter with criminal justice is of importance in understanding the operation and impact of one set of institutions of […] government (p. XI).

Whether the aim is to understand potential normative issues or explore new ways to promote efficiency, research directly asking defendants about their experience has significant potential. However, there is some work which has explored defendants' perspectives. Notably, Casper (1978) set out to elicit the perspectives of defendants in the American criminal process. More recently, Jacobson, Hunter, & Kirby (2016) examined the experiences of those attending court as witnesses, victims, and defendants in the Crown Court of England and Wales. Rather like Casper (1978), they noted a degree of cynicism about what was perceived as professional 'game-playing,' as well as resigned or 'passive acceptance.' Swaner et al. (2018) surveyed a sample of those with experience of being proceeded against and interviewed 102 persons 'who had significant experience with the police, the courts, and corrections' (Swaner et al., 2018). Although four-fifths of respondents felt respected by court officials, they were less satisfied with their ability to participate (e.g. ask questions and tell their side of the story and with waiting times).

However, far more needs to be understood about defendants' experiences and data is needed from the defendants themselves to explore the extent to which their perspectives are shared or influenced by practitioners. Most of the research conducted to-date examines the views and practices of defense lawyers, prosecutors, and, to a lesser extent, judges. Yet, we know remarkably little about the perspectives of defendants. Much of what we think we know derives from the views and assumptions of practitioners. How is plea decision-making approached and interpreted by defendants? How does it connect with their life

contexts and previous encounters with the justice system? Do defendants consider the sentence differential to be a discount or a penalty? How do they understand the meaning of guilt in the particular context of their case? What impact do their perceptions about their treatment (including as to how to plead) play into broader views of the justice system and authority? How might a sense of processual fairness assist (or exacerbate) the desistance journey away from offending? For example, it was already suggested that a guilty plea does not necessarily indicate remorse. However, even if this is true, it may be that the defendant nevertheless comes to internalize some aspect of the guilty plea.[9]

A. Defendant Perceptions of the Differential and the Presumption of Innocence

Whether the sentence differential violates the presumption of innocence has been the subject of intense debate. Yet, by comparison, astonishingly little research has been devoted to understanding the experiences and interpretations of those who have to make plea decisions. A recent small research study in Scotland has explored the perceptions of the criminal process of twelve people who had been accused of a criminal offense (Gormley, 2018).[10] For these defendants, the baseline was taken as the likely sentence following a guilty plea. From this perspective pleading not guilty, and being convicted at trial, ran the risk of a higher sentence.

That defendants considered there to be a risk of a higher sentence is significant as there are different views. For example, Abrams (2011) argued that the correct comparison should be between the sentence if pleading guilty and the sentence if pleading not guilty. This would factor in the realistic chance of a non-conviction (whether by way of an acquittal or the case being dropped by the prosecution or dismissed by the court). While those such as Abrams make an argument for this approach, this was not how defendants evaluated the sentence differential in the research in Scotland. That defendants perceived there to be a

[9] In the case of white-collar offenders, it has been suggested that 'acceptance or rejection of guilt has an impact upon the process of desistance at various stages' (Hunter, 2015 p.182).

[10] The research observed non-jury court cases in two neighboring intermediate-level courts and interviewed 17 sentencing judges, defence lawyers, prosecutors, and 12 defendants about the relationship between guilty pleas and sentencing.

risk of a higher post-trial sentence raises key questions about the nature of the sentence differential and the presumption of innocence.

Consequently, defendants viewed going to trial as posing a 'risk' of a higher sentence. This perception of going to trial challenges the claim that the sentence differential does not undermine the presumption of innocence. While policy architects *may* genuinely hold the view that the sentence differential is a reward or discount, this view was not shared by the defendants themselves. The practical reality of the presumption of innocence is significantly diminished if defendants perceive (even incorrectly) that it does not operate in practice. For example, Jack[11] reported that he pled guilty only to avoid a higher post-trial sentence, rather than seeing it as a way of benefiting from a sentence discount:

> I just pled guilty because they had my [social media evidence]. They would've thought I was lying. So, I just pled guilty otherwise I would've got more of a sentence.

Of course, it is not possible to test the veracity of Jack's claim of innocence. Yet, it is significant that even in this small sample of defendants there is one who claims he pled guilty, even though innocent, to avoid 'more of a sentence.' This raises questions about whether sentence discounting, and other elements of the Scottish justice system, might lead those who are innocent of the charges against them, or at least those genuinely believe themselves to be innocent or are simply uncertain, to plead guilty. Frank felt the sentence after a trial was worse directly because of his earlier not guilty plea:

> Because you're wasting the court's time, wasting the court's funds, and fucking them about. 'We [the court] are too busy.' And I agree they are too busy and that [the sentence differential] is the shit they have to go to - the underhand tactics.

Indeed, for Frank, plea bargaining was an underhanded tactic. Other interviewees expressed disdain for this apparent gamesmanship, which was felt to undermine the legitimacy of the law and trivialize their case. Another defendant interviewee, while accepting wrongdoing, was unclear as to what he was being charged with and had only a vague understanding of the nature of the charges. Others noted that by the time formal charges were presented they were already in court and had to decide how to plead within

[11] Pseduonymns are used to protect the anonymity of interviewees.

minutes. Defendants felt that having only a short time to decide added pressure. Jack also noted that he felt pressured:

> I would've got locked up if I didn't plead guilty. That's why I pled guilty.
>
> [Interviewer: 'Did the Judge tell you that because you pled guilty you didn't get the jail?']
>
> No, my solicitor. He said that to me. That if I didn't plead guilty, that if I said, 'not guilty,' they've got [evidence]…so I would've got fucked if I plead not guilty…
>
> It felt like I had pressure put on me and that.
>
> [Interviewer: 'From the court, or the lawyer, or just everything?']
>
> The court. Fucking bullshit like.

Interestingly, while interviewees spoke of pleading not guilty as a risk, they also regularly spoke of the 'one-third sentence discount' as a matter of fact. For example, Alan noted the 'discount of up to one-third' as a reason why it might have been beneficial to plead guilty. That defendants mentioned the sentence differential was significant as the interviews were designed so as to avoid mention of the sentence differential so as to see if defendants would identify it themselves without any prompting and, if so, how they would describe it. Defendants did identify the sentence discount, though this was often conflated with other perceived effects of pleading (namely charge bargaining and fact bargaining). Indeed, defendants seemed to care little for the legal distinction between sentence discounting and other overall effects of a guilty plea.

It might be thought that where defendants spoke of the sentence differential as a "discount", they did not tend to feel that the sentence differential infringed on their right to a trial. At first blush, this is a puzzling contradiction. However, upon further questioning, it transpired that defendants were repeating what their lawyers had told them. Interviews with defense lawyers revealed that they advised clients of 'sentence discounts' of 'up to one-third' in more straightforward and more certain terms than the formal law

suggests.[12] Thus, this apparent incongruity between the perception of a longer post-trial sentence and the use of the term 'discount' was less significant than it appeared.

Consequently, defendants used the term 'sentence discount' unreflectively and repeated what their lawyers had relayed to them. Several then asked the interviewer if they recalled the law correctly. But, when reflecting on the plea decision-making process, they did not, in fact, consider it to be a discount. The overall effect of the sentence differential was seen by them to work against the presumption of innocence. Where it had the most significant impact was in cases like Frank's, where the plea was thought to be the difference between a custodial sentence and a non-custodial sentence.

B. The Pains of Being a Defendant[13]

The pains of being a defendant may be easily overlooked by some in the belief that those with criminal histories become more or less immune to the process costs of the criminal system. This belief that defendants are more or less immune to process costs can result in a more relaxed attitude to the risks of the sentence differential. For example, there seems to be a perception that those who are in and out of prison and are socio-economically disadvantaged, have little to lose compared to those who seem to enjoy the prospect of brighter futures. For example, a judge observed:

> You sometimes think that the whole process of having to stand in the dock, and plead guilty, and be found guilty. It is a big thing to a lot of people…the court process can be quite a deterrent for a lot of these people in itself…
>
> I think, *if you are a person that leads an otherwise respectable life* and you're not familiar with the courts, the fact of having been charged and going to court can be a significant deterrent.

[12] Gormley (2018).

[13] This term alludes to the work of Gresham Sykes (1958), who argued that the mental 'pains of imprisonment' may be less visible than physical affliction, and so require our attention:

> Attacks on the psychological level are less easily seen than a sadistic beating, a pair of shackles on the floor, or the caged man on a treadmill, but the destruction of the psyche is no less fearful than bodily affliction. (p.64)

While there may be truth in this, it is potentially problematic from the perspective of equality before the law. As Bandes (2017) has argued, compassion may lead to a 'break' for those a legal actor:

> Instinctively understands, sympathises with, [and] identifies with. In the US and elsewhere, this kind of compassion may be selectively doled out based on racial bias and class bias, unconscious or otherwise. (p.190)

This selectivity in how judges give 'breaks' might lead to the 'the danger of cultivating selective empathy for those…who live 'respectable lives'' (Bandes, 2016). It is also important to note that how defendants experience the criminal process is very poorly understood, but it does seem that defendants interpret events in significantly different ways. In the research in Scotland, those defendants who were less familiar with the criminal process found it unnerving in a way that those with more experience did not. However, the interviews did show that even defendants with extensive experience of incarceration and a notable criminal record can experience profound emotions from going through the process and facing the prospect of custody. Thus, while the experiences may be interpreted differently, the dynamics are complex and even experienced defendants are far from immune to the process costs of the criminal justice system.

While the sentence differential may appear minimal to legal professionals, when combined with other aspects of the process, it may have a significant impact on defendants' thinking. These burdens of the law underline Sarat's (1990) claim that for those caught up in the system, 'the law is all over:'

> The recognition that **'. . .** the law is all over' expresses, in spatial terms, the experience of power and domination; resistance involves efforts to avoid further 'spatialization' or establish unreachable spaces of personal identity and integrity. (pp.347-348)

<u>The Pains of Waiting</u>

We typically conceive of Plea Bargaining as involving intentional efforts to encourage Guilty Pleas. For example, the State may purposefully implement some systematic '*discount'* for those who plead guilty. Alternately, judges, prosecutors, and defense lawyers may consciously implement Plea Bargaining practices themselves from the

bottom-up. However, Scottish defendants noted that waiting and court process costs were a significant factor that made Guilty Pleas tempting. Thus, the State offering defendants a way to end the wait with a Guilty Plea is a powerful dynamic in the reality of Plea Bargaining.

While waiting may seem neutral (it is an absence a decision) and trivial, it posed significant problems for defendants. Some unemployed defendants had to travel far to attend court and they incurred a significant cost. Others had to arrange childcare or miss work. Following this, many were told to attend another day as the court was unable to hear their case for one reason or another. As one defendant lamented:

> You get told to be there at quarter to ten. And then to come back at two o'clock. You know they are never going to get to you. Look how many people they have to get through. I know it, and they know it. But they still make you come, and you have to wait until they tell you, 'we are putting it back.' Why can't they tell you that in the morning? They know it's not going to happen today, but you still have to wait for them to tell you to go away.

Another commented that one of his biggest criticisms was:

> Repetition! You're going to court, and like the police aren't there?! They should be there! Come on to fuck; they're the ones that brought it there. All this, 'A trial can't go ahead because PC Shiny Buttons is in Marbella for a week.'
>
> PC Shiny Buttons knew court was coming so he shouldn't have booked his holiday. He chose that profession. Or they could do it by video link.

Indeed, it is the uncertainty of waiting which can be especially stressful because of its attendant uncertainty:

> The wait is devastating because it is associated with uncertainty, doubt, inability to control, constant questioning and confronting one's fears. It is associated with constantly thinking about what has happened – magnifying every detail and reaction, every piece of information – in an attempt to find spaces of control… (Sales 2016, p.57.)

Court observations revealed that judges told defendants who had traveled significant distances were instructed that, as part of bail, 'you will have to make yourself available to the court at short notice.' In another observed instance, a defendant had been waiting for his case to call since 9.45am. A court officer informed the defendant that he was to come back after lunch to see *if* it will call at that time. A friend of the defendant, (many attended courts alone), pleaded with a court clerk that this was not possible:

> You don't get it. He's an alcoholic. If he goes for lunch, he is not coming back. That's just not something he can do.

After lunch, the case did in fact call and, as the friend had warned, the defendant was not present. Possibly, (per the friend's warning), the defendant, having stayed sober all morning, had missed court due to his dependency issues. Unfortunately, information about the difficulties of this defendant did not (at least at that time) reach the judge. Instead, the judge was informed, (in open court by a different clerk who had not heard the friend's warning), that a phone caller had left a message that the defendant had to go to a hospital for an unspecified reason. The caller left a clearly fictitious and humorous name which elicited laughter in the public gallery.[14] Regardless, the difficulties of this accused did not reach the judge at this time. Instead, the impression provided to the judge was that the defendant was mocking the court. The judge appeared singularly unimpressed and noted that the court would seek evidence of this hospital visit, which the defendant had better be able to provide.

These difficulties that defendants experience are similar to those of other groups, such as those dependent on welfare:

> Power and domination are…represented in the legal consciousness of the welfare poor in temporal as well as spatial terms; thus, the people I studied often spoke of an interminable waiting that they said marks the welfare experience. In that waiting they are frozen in time as if time itself were frozen; power defines whose time is valued and whose time is valueless. (Sarat, 1990, pp.347-348.)

[14] Why the phone caller (whether the accused or an acquaintance) chose this immature route instead of explaining the difficulties to the clerk is unknown.

In the criminal process, professional actors seek to control time. It is the demands of legal actors and the legal system that primarily determine when cases call, not the defendants. In this way, the criminal process almost becomes like a part-time prison in various respects. Defendants are physically deprived of their freedom in that they must attend court on multiple occasions, and each occasion may consume the better part of a day. More than this, mentally defendants can struggle to leave the court process behind.

These deleterious properties of waiting and uncertainty mean that criminal justice systems can be highly taxing on defendants only through their manner of operation (e.g. Cheng et al. 2018). Even simple matters of routine can have consequences for defendants that are hard to predict. Indeed, research on defendants' perspectives in the US shows:

> Delays that filing of motions or demanding trial can produce – place strong pressures on the defendant to get it over with, to cop out and 'escape' to prison (Casper, 1978, p.16).

Even aside from the pains of being held in custody on remand awaiting trial, in themselves these pressures of waiting mean support Feeley's (1979) observation of 'process costs' (see also Cheng et al., 2018). These waiting-based process costs mean that it is little wonder that some defendants claimed they might plead guilty to end the pains of being a defendant. The effect of waiting in encouraging Guilty Pleas means that, by accident, the lamentable process costs of Anglo-American justice systems have become a powerful component of Plea Bargaining.

C. Further Research into Defendants' Views and Perspectives

There is a pressing need for research to devote itself to a much more thorough investigation of defendants' experiences and perceptions about the sentence differential. Why has there been so little research into defendants' perspectives and experiences? One reason may simply be convenience for researchers and research-funders. In general, it is much easier to secure interviews with legal professionals than it is with defendants. Some defendants may also live chaotic lives and may be difficult to follow-up. This chaos can make it difficult for researchers to plan interviews and court-case observations. Secondly,

ethical standards of research clearance have to be higher when speaking to defendants who are in a much more vulnerable position that, for example, lawyers. Thirdly, policymakers, professionals and academic researchers can easily tend to be dismissive of defendant perspectives, which are so often punctuated by loss or gaps in memory, marked by addition and poor health, and confusion about the case. It is commonly assumed that there is little point in seeking the views and experiences of defendants who can offer little certain or factual knowledge. Much better, it is assumed, to stick to seeking the views of informed professionals. However, this assumption is problematic given the 'very obvious demographic chasm' between typical defendants and legal actors (Tata, 2008, p.31). Research should not assume that legal actors will fully understand the perspectives of defendants whose backgrounds are usually significantly different to their own. Moreover, for all its limitations, perceptions help to determine decision-making as well as the sense of the legitimacy and authority of the court. A fourth reason that research on defendants' perspectives is sparse may be that some defense lawyers may be disinclined to allow their clients to speak to researchers out of concern about what might be said, unfairly implying some failing on the part of the lawyer.

Despite these challenges, research on defendants should seek to combine defendant interviews with court observations and interviews with defense lawyers and judges. Furthermore, an understanding of how defendants are invited to consider the future consequences of their plea decision-making should be central to future work. Although academic work tends to divide up the criminal process into discrete phases of 'adjudication'(trial), 'mitigation' 'sentencing,' and 'corrections,' this is not necessarily the experience of defendants. Defendants may have to consider the consequences of being found guilty following a trial and the prospect of being seen as either 'a chancer' (i.e. someone who is trying to exploit the system) or 'in denial' at sentencing and missing out on possible mitigation (Tata, 2019). Such a defendant may also face being deemed less suitable for community-based sentences, and if sentenced to prison may find that her earlier denial makes it more difficult to access prison programmes – often a crucial way to show that she is progressing in the prison system to gain earlier release (e.g. Schinkel, 2014). So, while academic and professional work divides the criminal process into seemingly autonomous individual decision points, the defendant's experiences of plea decision-making may be more inter-linked and comprehensive.

Finally, research on defendants' perspectives can be challenging to relate to the formal legal process. Defendants may not speak of their case in the same way that legal actors do. Indeed, they may not always fully grasp the charges against them and may have only a vague understanding of the process. This difference between how defendants and legal practitioners communicate means that defendant interviews are challenging to carry out without court observations or interviews with legal actors involved in the case. While these difficulties may pose a challenge, they do not negate the benefit of research on defendant perspectives. One particularly useful area worthy of investigation is that of defendants' perspectives on the presumption of innocence and the plea-decision making process. A better and deeper understanding of defendants' perspectives would enable more informed and effective policymaking which may encourage the expeditious disposal of cases while not undermining (or at mitigating) the risks to cherished Rule of Law values.

Conclusions

This essay has investigated issues and questions surrounding the sentence differential that is perceived to exist in most Western jurisdictions. Part I examined the philosophical nature of what constitutes a reward for pleading guilty and what constitutes a penalty for going to trial. While there are valid arguments on both sides, and the matter is open to interpretation, it was highlighted that since most defendants plead guilty, it would make sense to consider the post-guilty plea sentence as the baseline. This raises the question of whether the sentence differential deters defendants from going to trial and thus compromises the presumption of innocence. Part I also scrutinized the criticism that the sentence differential may have a disparate impact on certain groups, such as racial and ethnic minorities. It was argued that a sentence differential that favors guilty pleas (or disadvantages not guilty pleas) means that those pleading not guilty will fare worse. This is problematic since some groups appear less likely to plead guilty. This section concluded that it was likely that the sentence differential contributes to disparate sentencing outcomes.

Part II of the essay scrutinized why, considering all the criticism and controversy, some justice systems allow the sentence differential to continue and others seek to encourage and

bolster it. To this end, three main rationales are discussed: the remorse rationale, the victim rationale, and the efficiency rationale. All three were found to be limited, but each has its appeal. Notably, courts may be impelled to seek signs of remorse, at least in part, to affirm the validity and authority of its own work. Of the three, the efficiency rationale is generally considered dominant in legal discourse. However, this paper argues that for the sentence differential to be efficient it must produce justice; otherwise, it cannot, no matter how many trials it avoids, be considered efficient. The essay also questioned whether the sentence differential, and other practices related to securing guilty pleas, actually save resources, or whether there is, in fact, adaptive behavior and a consequential culture of delay.

Part III scrutinized the crucial questions regarding defendants' perspectives of the sentence differential. This is the most critical set of questions facing future research. Defendants have a complex view of the criminal process and their place within the system. This view is multifaceted but poorly understood. The two key points of this section were that defendants may view the sentence differential as violating the presumption of innocence, but that they may speak of it by repeating the terminology of legal actors. The first point has serious normative implications. The second point has important implications for how future research should explore the perspectives of defendants.

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