DOI: 10.1111/jols.12360

ORIGINAL ARTICLE

The inefficiency of plea bargaining

JAY GORMLEY

Centre for Law, Crime and Justice, University of Strathclyde, Glasgow, G1 1XQ, Scotland

Correspondence
Jay Gormley, Centre for Law, Crime and Justice, University of Strathclyde, Glasgow, G1 1XQ, Scotland
Email: jay.m.gormley@strath.ac.uk

Abstract

The fundamental assumption underlying plea bargaining is that it is 'efficient'. Even ardent critics of plea bargaining often accept the assumption that it is efficient in being cost effective. For proponents, beliefs about plea bargaining's efficiency are used to argue that it is beneficial, even necessary, on pragmatic grounds. From this assumption about efficiency, volumes of laws and policies have been created. This article uses empirical data to demonstrate the flaws in this foundational tenet of plea-bargaining logic. The article shows that, in reality, plea-bargaining practices have imported their own inherent inefficiencies into the criminal process. These inefficiencies are detrimental not only to cost effectiveness but also to justice and fairness. Foremost among these inefficiencies are the (some argue iniquitous) game-playing cultures that, ironically, policymakers have unintentionally fostered in striving for efficiency. The article demonstrates the pressing need to better recognize and understand these counterintuitive inefficient consequences of plea bargaining.

1 | INTRODUCTION

Plea bargaining is an umbrella term covering a wide range of practices. Some form of plea bargaining, or a functional equivalent, is found in many justice systems throughout the world.[1]

[1] S. Thaman, *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial* (2010).

There are various reasons why plea bargaining may exist in reality.[2] There are, separately, also various reasons put forward by policymakers why plea bargaining is necessary or even desirable. This article focuses on the latter and, in particular, the justification that is commonly used by policymakers: cost-effective efficiency. While policymakers can draw on several rationales, 'efficiency is the only convincing justification … in the vast majority of cases'.[3]

In this context, 'efficiency' has a narrow meaning that is worth clarifying at the outset. This article uses the term 'efficiency' in the same way that most policymakers do by narrowly equating it with the expedient disposal of cases. However, this is not the only way in which efficiency can be understood. Indeed, academics have questioned whether the expedient disposal of cases is enough to be considered 'efficient'. For example, McConville and Marsh use the term 'cost effectiveness' to refer to what much of the policy literature would call 'efficiency'. In doing so, they highlight considerations beyond cost, such as fairness.[4]

Yet, whether critical or supportive of plea bargaining, little of the literature challenges the dominant rationale that it leads to 'efficiency' in the sense of cost effectiveness by promoting the expedient disposal of cases through earlier and/or more guilty pleas. Consequently, much of the literature has struggled to comprehensively challenge the pervasive policy belief that plea bargaining is an inevitable consequence of the clash between the ideals of due process (and humane, individualized treatment)[5] and the pragmatic demands of high criminal caseload pressures in the real world. In Packer's terms, this can be framed as a tension between due process values and crime control values.[6] The result is that, in countries such as Scotland, policy debates concerning plea bargaining (where they occur) are often about where the balance should be struck.[7]

This article highlights that empirical research examining plea bargaining's effects on cost-effective efficiency is limited. This means that plea bargaining's supposed efficiency is primarily assumed rather than proven. The article also shows that plea bargaining has its own inefficiencies and, paradoxically, that it can create compelling reasons to plead not guilty. Thus, whether

[2] For example, it may serve functions of social control, or it may be part of a broader trend towards administration. See I. Kohler-Hausmann, *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing* (2018); P. Carlen, *Magistrates' Justice* (1976); M. E. Vogel, 'The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830–1860' (1999) 33 *Law & Society Rev*. 161; M. Langer, 'Plea Bargaining, Conviction without Trial, and the Global Administratization of Criminal Convictions' (2021) 4 *Annual Rev. of Criminology* 377.

[3] F. Leverick, 'Tensions and Balances, Costs and Rewards: The Sentence Discount in Scotland' (2004) 8 *Edinburgh Law Rev*. 360, at 380.

[4] M. McConville and L. Marsh, 'Adversarialism Goes West: Case Management in Criminal Courts' (2015) 19 *International J. of Evidence & Proof* 172.

[5] C. Tata, *Sentencing: A Social Process – Re-Thinking Research and Policy* (2020).

[6] H. L. Packer, 'Two Models of the Criminal Process' (1964) 113 *University of Pennsylvania Law Rev*. 1. Plea bargaining represents concessions towards crime control values as part of what Duff renames the 'efficiency model'. P. Duff, 'Crime Control, Due Process and "the Case for the Prosecution": A Problem of Terminology?' (1998) 38 *Brit. J. of Criminology* 611.

[7] See for example W. N. Welsh and P. W. Harris, *Criminal Justice Policy and Planning: Planned Change* (2016) 31; T. Lynch, 'The Case against Plea Bargaining' (2003) 26 *Regulation* 24; M. McConville and L. Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain* (2014) 112–114; B. Leveson, *Review of Efficiency in Criminal Proceedings* (2015), at <https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>; Lord Chancellor's Department (UK), *Review of the Criminal Courts of England and Wales* (2001); Leverick, op. cit., n. 3, pp. 375–380; *Gemmell* v. *HMA* [2011] HCJAC 129; Sentencing Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2017), at <https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-Plea-definitive-guideline-SC-Web.pdf>.

or not plea bargaining is overall net inefficient, there is reason to doubt that it is as efficient as is commonly assumed.

2 | RESEARCH IN SCOTLAND

This article is largely based on research that took place in Scotland. I observed non-jury triable ('summary') court cases in two neighbouring intermediate-level courts. These intermediate courts are known as sheriff summary courts. These are low-/mid-level courts that hear the vast majority of criminal court cases in Scotland. They are presided over by legally qualified judges.[8] Sheriff summary courts can sentence an offender to up to 18 months of imprisonment with a bail aggravation, and up to 12 months otherwise. Scotland also has a wide range of alternatives to imprisonment, which are formally available.

The research included court observations in two sheriff summary courts (referred to here as Auld Sheriff Court and Braw Sheriff Court) and in-depth interviews.[9] I conducted interviews with five sentencing judges, eight defence lawyers, two prosecutors, and 12 defendants[10] about the relationship between guilty pleas and sentencing in the two sheriff summary courts. The cases observed were varied and included driving offences, breaches of the peace, drug offences, crimes of dishonesty, and crimes of violence. All defendants in this sample were legally represented, and all but one had this representation funded through legal aid. Indeed, it has been argued that the Scottish system of legal aid compares favourably to that of other jurisdictions in that most defendants are eligible.[11] However, the legal aid system is not without critics. One effect of Scotland's introduction of fixed-fee legal aid payments (intended to promote cost effectiveness and facilitate early guilty pleas) is that law firms specializing in criminal legal aid appear to have reduced client contact time and increased their caseloads.[12]

Auld Sheriff Court and Braw Sheriff Court are strikingly similar in most metrics (such as size, case volume, and types of cases heard). I confirmed these outward similarities by asking interviewees about the official figures. Interviewees supported the view that the two courts are very similar. For example, in terms of caseloads, one Braw Sheriff Court defence lawyer noted that '[Braw Sheriff Court], out of all of these [referring to a list of courts and statistics that I provided], is a very busy court. [Auld Sheriff Court] is busy as well.'

Yet despite these similarities, a significant difference existed between Auld Sheriff Court and Braw Sheriff Court: the two courts had very different pleading trends, which legal professionals attributed to 'court cultures'.[13] These cultures meant that, despite the same formal measures concerning plea bargaining, the effects were very different. Due to guilty pleas later in proceedings,

[8] These judges are known as 'sheriffs' (not to be confused with law enforcement officers in the United States). Sheriff summary courts differ from magistrates' courts in England and Wales, which are presided over by lay magistrates.

[9] All names of courts and participants are pseudonyms.

[10] Known as 'the accused' in Scotland.

[11] M. Evans, *Rethinking Legal Aid: An Independent Strategic Review* (2018), at <https://www.gov.scot/publications/rethinking-legal-aid-an-independent-strategic-review/>.

[12] C. Tata and F. Stephen, 'When Paying the Piper Gets the "Wrong" Tune: The Impact of Fixed Payments on Case Management, Case Trajectories and "Quality" in Criminal Defence Work' in *Transforming Lives: Law and Social Processes*, eds P. Pleasence et al. (2007) 186.

[13] F. Leverick and P. Duff, 'Court Culture and Adjournments in Criminal Cases: A Tale of Four Courts' (2002) 4 *Criminal Law Rev*. 39.

Auld Sheriff Court took a long time to dispose of cases (compared to the national average for Scotland). By contrast, Braw Sheriff Court disposed of cases significantly quicker due to a higher proportion of early guilty pleas. Consequently, Auld Sheriff Court and Braw Sheriff Court present something of a natural experiment concerning 'efficiency'. Scotland is a small jurisdiction, and the same rules concerning plea bargaining apply to both courts.[14] This difference between the two courts, and in particular the operation of Auld Sheriff Court, show the potential inefficiencies of plea bargaining.

3 | THE SCOTTISH PLEA-BARGAINING CONTEXT

Plea bargaining itself is an umbrella term encompassing a wide variety of practices concerning the manipulation of (dis)incentives based on whether and when a defendant admits their guilt. In Scotland, plea bargaining consists of explicit charge bargaining and fact bargaining between the defence and the prosecution (the Crown Office and Procurator Fiscal Service (COPFS)). Following bargaining, the prosecution may accept a guilty plea to an amended charge and/or present an agreed narrative of the facts of the case. While judges are not directly involved in these negotiations, there can be an expectation that such negotiations will take place. Different judges and courts may facilitate the negotiations in various ways, and local court cultures can play a key role in how bargaining is expected to proceed. Although charge bargaining and fact bargaining do not result in any pre-agreed sentence and judges provide no sentence indications,[15] the defendant will generally hope that the resulting sentence is less than it would have been if they were convicted of the same charges following an evidentially contested trial.

In addition to charge bargaining and fact bargaining, Scotland also has a statutory system of 'sentence discounts' for guilty pleas that was introduced with Section 196 of the Criminal Procedure (Scotland) Act 1995 and clarified with subsequent case law.[16] These discounts are not individually negotiated between defendants and judges and instead operate as something akin to a standing invitation to plead guilty (or a systemic disincentive to proceed to trial). While judges are under no obligation to grant any discount for a guilty plea (on occasion, no or little discount may be given),[17] the expectation is that an early guilty plea will generally result in the notional headline sentence being reduced by a *stated* amount of up to one-third.

Consequently, broadly speaking, in Scotland, there are two ways in which plea bargaining can affect a defendant's sentence. The first is via judges directly taking how a defendant pleads into

[14] See for example Section 196 of the Criminal Procedure (Scotland) Act 1995 (requiring judges to take plea status into account when sentencing). Likewise, the same prosecutorial guidance applies across Scotland, such as the COPFS regulations concerning plea adjustments and discussions with the defence. See COPFS, *Book of Regulations* (2001) ch. 23, at <https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Book_of_Regulations/Book%20of%20Regulations%20-%20Chapter%2023%20-%20Plea%20Adjustment.PDF>.

[15] In Scotland, there is no equivalent of the English and Welsh *Goodyear* sentence indications. *Goodyear* indications provide a defendant contemplating a guilty plea with a statement from the judge about the maximum sentence that could be imposed if they plead guilty. Therefore, in Scotland, in contrast to England and Wales, when a defendant is deciding how to plead, they cannot know in advance the maximum sentence that they could receive. *R* v. *Goodyear* [2005] EWCA Crim 888.

[16] *Du Plooy* v. *HMA* [2005] 1 JC 1; *Spence* v. *HMA* [2007] HCJAC 64; *Gemmell* v. *HMA*, op. cit., n. 7; *Murray* v. *HMA* [2013] HCJAC 3.

[17] *Murray* v. *HMA*, id.

account at sentencing.[18] The second is through concessions from the prosecution, which affect the basis upon which the defendant is ultimately convicted.

In Scotland, most cases do result in a guilty plea at some stage: '[T]he proportion of cases settled by a guilty plea ranges from 63% to 97%, depending on the level of court in which the case is prosecuted.'[19] Intermediate courts, such as sheriff summary courts, see a guilty plea in about 90 per cent of cases. While a guilty plea does not necessarily mean that plea bargaining has taken place between the defence and the prosecution, the potential offer of a Section 196 discount is an ever-present form of bargaining. Moreover, although there are no official statistics, my research found that both negotiations between the defence and the prosecution and Section 196 discounts are the norm.

3.1 | The expediency argument for plea bargaining

Trials take time and cost money. Guilty pleas supposedly save these costs by averting the need for an evidentially contested trial. Indeed, the cost difference between an early guilty plea and a jury trial can be substantial.[20] Similarly, while the cost savings per case are lower in non-jury trials, the far greater number of non-jury cases means that substantial savings can accrue from early guilty pleas. Therefore, seeking to reduce costs and save time, policymakers aim to induce more and/or earlier guilty pleas through encouraging plea bargaining.

Policymakers have made various attempts to manipulate plea-dependent (dis)incentives in the expectation that this will result in more and/or earlier guilty pleas. The statutory sentence discounts noted above are one example, and so too are the changes to legal aid payments (which make guilty pleas conducive to defence lawyers' financial interests).[21] Additionally, policymakers have attempted to promote plea bargaining in other ways. For instance, the guidance given by *Practice Notes* and other sources is that proactive discussions between the defence and the prosecution (with the aim of agreeing on matters) are now expected:

> To promote greater efficiency and the better use of available resources … the Crown and the defence should make every effort to have productive discussions in advance, identifying clearly, for the benefit of the court, both those matters which are capable of agreement and those which remain in dispute.[22]

Where such agreements are not reached satisfactorily, judges now have a more formal and traceable authority to chastize the parties, and the parties themselves have more explicit obligations to discuss/bargain.[23]

[18] For clarity, I consider sentence discounts for a guilty plea (permitted by Section 196 of the Criminal Procedure (Scotland) Act 1995) to be a form of plea bargaining.

[19] F. Leverick, 'Plea and Confession Bargaining in Scotland' (2006) 10 *Electronic J. of Comparative Law* 1, at 19.

[20] Id.

[21] C. Tata, 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and "Ethical Indeterminacy" in Criminal Defence Work' (2007) 34 *J. of Law and Society* 489.

[22] Scottish Criminal Courts, *Practice Note No. 2 of 2019: Case Management in Summary Criminal Cases Project* (2019) 1, at <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/summaryprocedurepn_final2019.pdf?sfvrsn=6>.

[23] See for example *Ashif and Ashraf* v. *HM Advocate* [2015] HCJAC 100.

Subsumed within the efficiency rationale for plea bargaining is the necessity argument. This suggests that justice systems not only desire plea bargaining to function efficiently but *require* it to function at all. The idea of plea bargaining as an inevitable and necessary response to caseload pressures for the judge, for the prosecution, and also for defence lawyers (due to the fixed payment system of legal aid noted above) is long-standing: 'Although plea bargaining has been attacked on various grounds, it remains an essential component of our criminal justice system. Despite any perceived flaws, it provides the flexibility necessary to administer justice in an overburdened court system.'[24] Today, efficiency and related necessity arguments continue to be a significant rationale for plea bargaining, with concerns over costs and delays being powerful justifications: 'In most criminal cases, plea bargaining is necessary and inevitable – at any rate, that is the view of nearly all knowledgeable scholars and practitioners and much of the public at large.'[25]

The perceived need for plea bargaining is the result of the archetypal trade-off of due process for efficiency. Indeed, while some proponents have argued that plea bargaining serves a smorgasbord of aims,[26] *Du Plooy* v. *HMA*[27] and *Gemmell* v. *HMA*[28] affirmed that administrative expediency is the dominant legal and policy rationale in Scotland.[29] In fact, courts in Scotland have largely dismissed attempts to attribute normatively principled rationales to plea-bargaining practices such as Section 196:

> The euphemism 'utilitarian value' may be thought to give the principle of discounting some ethical content; but … [i]t is not based on any high moral principle relating to the offence, the offender or the victim … [T]he primary benefit that is realised in every case is the saving of administrative costs and the reduction of the court's workload.[30]

Thus, the primary policy reason for plea bargaining (arguably not just in Scotland) is its presumed cost-effective efficiency. Indeed, case disposal times are one key metric through which the performance of courts may be judged by policymakers.[31] There is even a statutory provision in Scotland to the effect that the principal judge for each court area (sheriffdom) in Scotland 'is responsible for ensuring the efficient disposal of business'.[32]

3.2 | Does plea bargaining induce guilty pleas?

The primary policy rationale for plea bargaining rests on the fundamental belief that it will lead to more guilty pleas or at least 'encourage those who are going to plead guilty to do so as early

[24] D. B. Wright, 'Plea Bargaining: A Necessary Tool' (1983) 16 *Connecticut Law Rev*. 1015, at 1019.

[25] S. J. Schulhofer, 'Is Plea Bargaining Inevitable?' (1984) 97 *Harvard Law Rev*. 1037, at 1037.

[26] Leverick, op. cit., n. 3, p. 380.

[27] *Du Plooy* v. *HMA*, op. cit., n. 16.

[28] *Gemmell* v. *HMA*, op. cit., n. 7.

[29] J. Gormley et al., *Sentence Reductions for Guilty Pleas: A Review of Policy, Practice and Research* (2020), at <https://sentencingacademy.org.uk/wp-content/uploads/2021/04/Sentence-Reductions-for-Guilty-Pleas.pdf>.

[30] *Gemmell* v. *HMA*, op. cit., n. 7, para. 34.

[31] See Audit Scotland, *Efficiency of Prosecuting Criminal Cases through the Sheriff Courts* (2015), at <https://www.audit-scotland.gov.uk/report/efficiency-of-prosecuting-criminal-cases-through-the-sheriff-courts>.

[32] Courts Reform (Scotland) Act 2014, s. 27.

in the court process as possible'.[33] The abstract logic for this belief is straightforward: reasonable and rational people will plead guilty more often or earlier because plea bargaining makes doing so in their best interests. Yet the complexities of criminal justice often mean that the real world works differently than we might assume based on abstract notions. For example, in the abstract, the deterrence rationale behind severe punishments is straightforward; hence, it makes sense to scare young offenders straight with a 'short, sharp shock'. Nonetheless, in the real world, evidence shows that these assumptions are severely flawed.[34] With plea bargaining, we should also be cautious about assumptions – even if they seemingly make sense in the abstract. In doing so, we should seek empirical evidence.

The counterfactual situation – where a plea decision is made without the possibility of some form of plea bargaining – does not exist in Scotland. However, the evidence that we do have challenges the simple abstract logic underpinning plea bargaining. The idea that cases settle in 'the shadow of the law' (in a rational manner based on expectations of the outcome following a trial) is problematic for a number of reasons, such as information asymmetry (in other words, one party may possess more key information than the other and be able to use this to their advantage) and risk tolerances.[35] Likewise, even the basic idea that plea bargaining is a necessary response to caseload demands is also tenuous:

> The notion that plea bargaining and case pressure 'go together' must be re-examined … It should now be evident that guilty pleas will be proffered and accepted for reasons other than case pressure, and that at a minimum, implicit plea bargaining will be the norm even in those courts that handle few cases annually.[36]

Indeed, some argue that various traits that are seen in adversarial systems (including plea bargaining) serve other goals entirely, such as social control:

> Given the volume of cases flowing into courts and the lack of matching resources, legal actors must evaluate if conviction and formal punishment are essential for doing something satisfactory with the types of cases and defendants they encounter every day. Various other means are available to court actors that make it possible to do something other than adjudication, something that is not so radically different in its function from what criminal law has always been about – social control – by using different tools, or familiar tools in different ways.[37]

Moreover, research in a number of jurisdictions has found that various factors other than plea bargaining can induce guilty pleas. The stresses of court appearances, the significant time involved in attending court, and the uncertainty of a pending conviction already provide plenty of

[33] Sentencing Council, op. cit., n. 7, s. B.

[34] L. McAra and S. McVie, 'Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime' (2010) 10 *Criminology & Criminal Justice* 179.

[35] W. J. Stuntz, 'Plea Bargaining and Criminal Law's Disappearing Shadow' (2004) 117 *Harvard Law Rev.* 2548; S. Bibas, 'Plea Bargaining outside the Shadow of Trial' (2004) 117 *Harvard Law Rev.* 2463.

[36] M. Heumann, 'A Note on Plea Bargaining and Case Pressure' (1975) 9 *Law & Society Review* 515, at 527.

[37] Kohler-Hausmann, op. cit., n. 2, p. 153. See also Carlen, op. cit., n. 2; Langer, op. cit., n. 2.

incentives to plead guilty. These 'process costs'[38] or 'procedural hassles'[39] mean that in some cases the least painful path would be to plead guilty, regardless of guilt/innocence and plea bargaining.

The ordeals of maintaining a not guilty plea and defending oneself in criminal proceedings mean that it cannot be assumed that all (or even most) guilty pleas are due to plea bargaining – particularly in low-/mid-level cases where the sentences are often comparatively small. In fact, legal professionals in Braw Sheriff Court attributed their efficiency to professional social dynamics and norms. These social dynamics were not thought to have been aided by policy attempts to induce plea bargaining (some of which are noted above). Indeed, the introduction of Section 196 sentence discounts for guilty pleas was thought to have had negligible impact.

Accordingly, at best, policy actions intended to align defendants' and lawyers' interests with 'efficiency' might neglect the true drivers of (early) guilty pleas. At worst, they might inadvertently undermine the social norms that can make courts truly efficient. It is these social norms that the article explores in Part 4 to show how plea bargaining can be inefficient.

4 | THE INEFFICIENCY OF PLEA BARGAINING

When policy is implemented in practice, complications and unintentional consequences can become apparent.[40] This applies to the policy intention behind plea bargaining. When the efficiency goal is translated into the real world, via professional sensibilities and working practices, such as it is in Auld Sheriff Court, inefficiency can emerge. The Scottish research demonstrates how plea bargaining can operate in perfectly legitimate ways that are, at times, antithetical to efficiency. Inefficiency begins with a (perception) of routinized prosecutorial overcharging. This perceived overcharging elicits a not guilty plea from the defence. There is then a protracted period of bargaining leading to delay (known as 'churn'). Finally, not infrequently on the court's doorstep, right before the trial is due to commence, there is a late guilty plea, leading to what are called 'cracked trials'.

4.1 | Does plea bargaining incentivize overcharging?

In summary criminal cases, the initial criminal charges are usually decided upon by a remote prosecutor (in what is commonly called a 'marking hub') before the case reaches a court prosecutor. In setting charges, COPFS (the prosecution service) has wide discretion. COPFS also decides in what court a defendant should be prosecuted, what pre-trial restrictions (such as remand) should be requested, and if an alternative to court is to be used. In this way, COPFS plays a significant role in the ultimate criminal sanctions dispensed and the 'procedural hassle' to which defendants are subjected. For example, COPFS continues to enact a policy to prosecute domestic housebreaking and attempted theft offences around the Christmas holidays at 'solemn level' (entailing jury

[38] See for example M. M. Feeley, *Crime, Law and Society* (2017) 139–188. See also K. K.-Y. Cheng, 'Pressures to Plead Guilty: Factors Affecting Plea Decisions in Hong Kong's Magistrates' Courts' (2012) 53 *Brit. J. of Criminology* 257; E. Euvrard and C. Leclerc, 'Pre-Trial Detention and Guilty Pleas: Inducement or Coercion?' (2017) 19 *Punishment & Society* 525; G. H. Gudjonsson, 'Psychological Vulnerabilities during Police Interviews: Why Are They Important?' (2010) 15 *Legal and Criminological Psychology* 161.

[39] Kohler-Hausmann, op. cit., n. 2, p. 20.

[40] M. M. Feeley, *Court Reform on Trial: Why Simple Solutions Fail* (2013).

trials), opening up the possibility for much more severe penalties.[41] Moreover, there is no rule of mandatory prosecution in Scotland. Accordingly, there is ample scope for COPFS to bargain.

The initial charges listed against a defendant are often more severe than those to which COPFS eventually accepts a guilty plea. This trend is not unique to Scotland, and some scholars argue that prosecutorial decisions are influenced by considerations such as 'moral judgment about who the defendant is and how much penal engagement he deserves' and that the aims of the process are not entirely based on an adjudicative model.[42] Unfortunately, the internal workings of COPFS can be problematically opaque for a criminal justice organization with such broad discretion. Even establishing the basic propriety of charging decisions is challenging: 'given that the guidelines contained in the Scottish Prosecution Code are so vague and generalised, proving procedural impropriety is going to be difficult'.[43]

Theoretically, COPFS prosecutes in the public interest. While this article does not suggest otherwise, 'public interest' is amenable to a wide range of interpretations. As COPFS declined to participate, I could not observe the remote COPFS offices or interview remote prosecutors. More generally, COPFS is not the most transparent of institutions and publishes surprisingly little about its internal workings. Indeed, COPFS does not publish basic details such as its case-marking guidelines, questionably asserting in freedom of information requests and circulars that 'Chapter 3 [of the *Book of Regulations*] (Case Marking Guidelines) is fully exempt from publication'.[44] While the (experienced) prosecutors interviewed here suggested that the guidance is only indicative, defence lawyers and judges interviewed felt that it strongly dictates the practice of more junior prosecutors, who more often manage summary cases and work in marking hubs. One sheriff noted:

> Yes, I agree with that [defence lawyer comments on the lack of fiscal discretion over guidance]. COPFS gives the Procurator Fiscal's guidelines. My experience over the years is that the more junior fiscals who are prosecuting in summary criminal work treat them as definitive three-line whips and not as guidelines.

Accordingly, it cannot be determined what motivates COPFS' charging decisions. Yet it cannot be said that the interviewees' claims of overcharging are unfounded. It may be that this perceived overcharging is a limitation of COPFS' first-instance decision making (possibly due to guidelines, poor use of discretion, or poor information) or a cultural practice intended to generate leverage in plea bargaining (defence lawyers have their theories). Regardless, the net consequence of all of this is that it is rare for defence lawyers to feel that they can plead guilty to a complaint as it initially comes in.

4.2 | The consequences of perceived overcharging for defence lawyers

Regardless of the reasons why COPFS charges as it does (a key question for another time), in practice many of the initial charges can fairly be termed overcharging in that they are seemingly

[41] COPFS, 'Prosecution on Indictment in Relation to Housebreaking (R009322)' *COPFS*, 18 December 2014, at <https://www.copfs.gov.uk/foi/responses-we-have-made-to-foi-requests/40-responses2014/977-prosecution-on-indictment-in-relation-to-housebreaking-r009322>.

[42] Kohler-Hausmann, op. cit., n. 2, p. 105.

[43] Leverick, op. cit., n. 19, p. 6.

[44] COPFS, *Crown Office Circular 3/2008* (2008) 3, at <https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/COC/Crown%20Office%20Circular%20-%203%202008%20-%20Book%20of%20Regulations%20-%20Updating%20and%20FOI%20considerations.PDF>.

superfluous to what COPFS ultimately determines is warranted when it accepts guilty pleas following plea bargaining.[45] Certainly, many defence lawyers and defendants in Auld Sheriff Court took the view that there is frequently overcharging and that this necessitates not guilty pleas to buy an opportunity to bargain.

To provide an example from the research, one defence lawyer noted a recent case in which they believed that the prosecution had overcharged. This belief meant that a simple guilty plea was not possible within the ethical obligations that the defence lawyer must fulfil:

> I've had a client walk through the door, and he was charged and offered a fixed penalty notice [FPN]: three points and a £100 fine for a Section 3.[46] He had forgotten to pay it and has now received a citation for a Section 2, which is a horrific Section 2.[47]
>
> Obviously, the police officers didn't think it was that horrific a Section 2 if they offered a FPN [for a less serious Section 3].
>
> I don't know if there is tunnel vision to say, 'We need to mark this as serious to justify going to the sheriff court'. Whereas realistically, I know – well, I'm pretty confident – that I'll get that back down to a Section 3 [by plea bargaining].
>
> And then I'll say to a [judge] I was offered a fixed penalty, so I know it'll be at the lower end of the scale in terms of points. But right now, we are looking at 12 months disqualification and a large fine, or a CPO [community payback order].
>
> I think they add stuff on because they know it's going to get negotiated down. I feel like they will absolutely fling on everything, knowing in the background that if the lawyer negotiates, they'll only get found guilty of what they might've actually done.

This is a powerful example. Despite the policy intention to promote expediency, plea bargaining can actually cause delay and create more work for legal professionals. Furthermore, this is not a uniquely Scottish phenomenon but one also seen in other systems where plea bargaining is the norm. As Hodgson observes in England and Wales,

> [overcharging] is built into the process; when advising the police on what to charge, Crown Prosecutors will note on the file from the outset the charges to which they are prepared to accept a plea of guilty. This, of course, runs the risk of even unconscious overcharging in order to build in space for later negotiations.[48]

The consequence of all of this is that many defence lawyers believe (early) guilty pleas to be unadvisable. Indeed, in the above example, even if a judge had taken a guilty plea into account under Section 196, it is likely that the defendant would have fared poorly compared to the result obtained after charge bargaining and fact bargaining.

Thus, in the eyes of many defence lawyers (and, as is noted below, defendants), a simple guilty plea to initial charges becomes practically impossible. As one Auld Sheriff Court defence lawyer

[45] This is a simplified definition of overcharging. See A. W. Alschuler, 'The Prosecutor's Role in Plea Bargaining' (1968) 36 *University of Chicago Law Rev*. 50.

[46] A Section 3 motoring offence refers to 'careless and inconsiderate driving'.

[47] A Section 2 motoring offence refers to 'dangerous driving', which is a more serious charge than careless driving.

[48] J. Hodgson, 'Plea Bargaining: A Comparative Analysis' in *International Encyclopedia of the Social & Behavioral Sciences*, ed. J. D. Wright (2015) 226, at 228.

summarized, 'it is very rare, *very rare*, that I will plead guilty as libelled [initially charged] to anything'. These defence lawyers described the process as one that always required work to 'whittle [the initial charges] down to the nuts and bolts'.

4.3 | The consequences of perceived overcharging for defendants

Whether influenced by their lawyers' advice or past experience, the perception that many defendants had was that plea bargaining results in such tactics as overcharging. Believing that the prosecution is overcharging, defendants feel that they have little choice but to allow their lawyer to bargain. Yet in many cases, to enable bargaining, the defendant must first plead not guilty and maintain this plea for some time.

During interviews, a key reason that defendants cited for not pleading guilty, or pleading guilty late, was the perceived culture of plea bargaining. Mike's case provides a good example of this. Mike felt that *not* negotiating before pleading guilty was a mistake only to be made by inexperienced defendants – which he was not; on the contrary, he was an experienced defendant who had been to court and convicted multiple times before. From his vast experience, Mike believed that wisdom demonstrated that it was necessary to delay pleading guilty to avoid being taken advantage of by the prosecutor. Indeed, the accounts presented by Mike and others suggest gamesmanship and portray prosecutors as (at best) self-interested, rather than principled, or (at worst) almost predatory and opportunistic.

Of course, this article does not seek to suggest that hard-working prosecutors (who often operate under difficult constraints) are anything less than consummate professionals. Yet critical perceptions such as those above framed much of how defendants in Scotland evaluated the process and appear to be a symptom of plea bargaining being systematically ingrained in Scotland. In Mike's case, what he *felt* to be the predacious nature of prosecution tactics meant that incentives to plead guilty are perceived as being part of a manipulative trick:

> You've got people with a multitude of experiences in court. You'll not be able to pressurize them. Other people, who have only had one or two experiences – they're the gullible ones, and they can be pressurized. It is very easy for them to be pressurized or intimidated by a court [into pleading guilty earlier].

Another experienced defendant, Kevin, noted:

> I've done it myself many times [plea bargained and pleaded guilty]. I've been through the system all ways. Pled guilty, so you get charges dropped. Or 'Right, you'll get remanded [held in pre-trial detention]. But if you plead guilty, you'll get bail.' … That shite, it's a game of cards. It's a game of cards, but they're playing with people's liberty. And that's what they forget.

Similarly, another experienced defendant in the Scottish study, William, viewed the reality of the criminal process as involving tactics and manipulations.[49] He cited plea bargaining as a key instance of the normative flaws of the legal system. This perception also led William to feel that it

[49] For a discussion of how this legal consciousness might be understood in terms of being with or against the law rather than before the law, see P. Ewick and S. S. Silbey, *The Common Place of Law: Stories from Everyday Life* (1998).

is necessary to delay pleading. This delay is not so much a form of resistance to justice but a belief that this is how the system works:

> William: They'll [the prosecution] put down things like breach of the peace, assault, drunk and disorderly, reckless behaviour in the street. Out of those charges, the PF [prosecutor] will say, 'The breach of the peace is nothing, reckless conduct is nothing. It is the assault that I'm after.'
>
> So he will base his evidence on the assault and run for the assault. And he will bring the rest of the charges in, like 'shouting and bawling', in the hope that it will enhance the guilty verdict for the assault. It's all to back up the assault.
>
> You might have a situation where you have an attempted murder, and somebody stabs somebody. There're charges of breach of the peace, reckless conduct in the street, reckless behaviour in the street. And then further down the road, there's another breach of the peace, concealed weapons, all those sort of things. I mean, a multitude of charges can come in.
>
> Interviewer: Do you feel that adds pressure when deciding how to plead?
>
> William: Of course – that's why they do it! That's what the Procurator Fiscal's job is. To put the accused under duress. You will hear them saying that: 'Put him under duress. He's got to crumble before you. And you cannot crumble before the accused. If you crumble, your days as a PF are over.'

The effect of this critical perception was that, contrary to views expressed by policymakers, defendants felt that they are not responsible for gamesmanship.[50] Instead, they characterized their experience as little more than doing what the system demands. This awareness of being a 'dummy player' (in other words, lacking agency in the process) causes its own profound issues – not the least of which is to discourage openness and frank admissions.[51]

4.4 | Other reasons to plead guilty

In the Scottish study, defendants reported that they were inclined to plead guilty for reasons quite apart from the incentives of plea bargaining. There were serious emotional/psychological pains stemming from being a defendant,[52] and many felt degraded by the criminal process – something that other research has identified.[53] Moreover, for many defendants, pre-trial remand is a key

[50] As Casper found, 'most did not expect to beat their cases'. J. D. Casper, *Criminal Courts: The Defendant's Perspective* (1978) 66.

[51] See J. M. Gormley and C. Tata, 'To Plead? Or Not to Plead? "Guilty" Is the Question: Re-Thinking Plea Decision-Making in Anglo-American Countries' in *Handbook on Sentencing Policies and Practices in the 21st Century*, eds C. Spohn and P. K. Brennan (2019) 208; J. Gormley and C. Tata, 'Remorse and Sentencing in a World of Plea Bargaining' in *Remorse and Criminal Justice: Multi-Disciplinary Perspectives*, eds S. Tudor et al. (2022) 40.

[52] See Gormley and Tata, id. (2019).

[53] H. Garfinkel, 'Conditions of Successful Degradation Ceremonies' (1956) 61 *Am. J. of Sociology* 420.

consideration. In this regard, it is worth noting research in Hong Kong. While there are differences, Hong Kong (as an Anglo-American system influenced by the English and Welsh model) is a useful comparator. Cheng and colleagues concluded that

> [o]verall, the findings do not support the claim that defendants enter late guilty pleas because they are playing the system. Rather, it was found that other factors, namely publicly-funded lawyers and pre-trial detention, played a more significant role that led to defendants cracking their trials.[54]

Defendant interviews in Scotland support this conclusion. Defendants do not freely elect to play games and reject the solemnity of the court. Indeed, as a result of COVID-19 delays, serious concerns have been raised that potentially innocent defendants held in pre-remand are pleading guilty.[55] These drivers towards a guilty plea are more potent where the idea of a trial is daunting, the probability of conviction seems (in the eyes of the defendant) high, or the resulting penalty is likely to be relatively slight.[56]

5 | RETHINKING PLEA BARGAINING

Policy thinking appears to be dominated by concerns over cracked trials and churn and a belief that defendants cause this through gamesmanship. For instance, in the English and Welsh-focused Auld Review, Lord Justice Auld noted:

> I can understand why, as a matter of tactics, a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing on the issues canvassed at the trial. A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles.[57]

[54] K. K.-Y. Cheng et al., 'Why Do Criminal Trials "Crack"? An Empirical Investigation of Late Guilty Pleas in Hong Kong' (2018) 13 *Asian J. of Comparative Law* 1, at 4.

[55] *Scottish Legal News*, 'Prisoners on Remand Pleading Guilty to Avoid COVID Custody' *Scottish Legal News*, 6 April 2021, at <https://www.scottishlegal.com/article/prisoners-on-remand-pleading-guilty-to-avoid-covid-custody>. However, this is not to say that trials are perfectly accurate in determining guilt or innocence.

[56] Relativity is a key aspect of the plea decision-making process. Most defendants have previous criminal convictions and there is something of a binary in this regard: clean record or unclean record. Once one has one criminal conviction, there is a stigma that does not scale linearly with more convictions (though criminal histories may influence sentencing). For those without previous convictions, the prospect of a criminal record itself was the main concern. In one case, the criminal record was felt to be worse than a custodial sentence in that the criminal record still haunted them and continued to label them as an offender, hindering reintegration into 'normal' society.

[57] Lord Chancellor's Department (UK), *Review of the Criminal Courts of England and Wales* (2001), ch. 10, para. 1, at <https://webarchive.nationalarchives.gov.uk/ukgwa/20090607141057/http://www.criminal-courts-review.org.uk/ccr-10.htm>.

However, for defendants, the reality of the justice process appears far removed from noble judicial dicta and policy rhetoric that posits the system as being 'primarily focused on ensuring that each case is dealt with in accordance with due process and that the fundamental principles of fairness and integrity are upheld'.[58] This begs the question of who or what is responsible for the tactics and inefficiencies that lead to cracked trials and churn.

5.1 | Charles' case

Charles' case provides a good example of these matters of tactics. It was one of the more serious cases in the sample and concerned drug offences. It was heard in Auld Sheriff Court. Also, somewhat unusually, Charles was a first-time offender. When deciding how to plead, he believed (based on his lawyer's advice) that a custodial sentence was a distinct possibility but not necessarily inevitable. As such, this was a case where plea bargaining could, in theory, have been the difference between a custodial sentence and a non-custodial sentence. However, Charles was also of the view that it was necessary to engage in negotiations and that this was built into the process.

Once the expectation of plea bargaining was in place, Charles had to decide how to go about this. The first thing to consider was the statutory encouragement for pleading guilty in Scotland. While this is vague, the research found widespread acceptance of the view that a guilty plea can reduce a custodial sentence to a non-custodial sentence. For example, when asked, one judge from Auld Sheriff Court answered: 'I think it does. If someone could well go to prison, but they plead guilty at an earlier stage, they may – "may" being underlined – escape custody in favour of a high-tariff community disposal.' Likewise, one judge from Braw Sheriff Court noted: 'Yeah, definitely. I will often say, "You are getting 300 hours of unpaid work, and the discount is that you are not going to prison today." Definitely.' Defence lawyers also supported this view. Yet this statutory provision had little effect in the shadow of other forms of plea bargaining and the incumbent negotiation norms. Consequently, a negotiation culture, of which the statutory provision is a part, can mean that defence lawyers (and hence defendants) are of the view that it is prudent to delay pleading guilty and to maintain a not guilty plea.

Importantly, Charles (even though looking at a likely custodial sentence) was not, as many might assume, looking to 'put off the evil day' or holding out hope that the case would be abandoned.[59] As with most defendants (whether experienced or inexperienced), Charles reported that he found the court process extremely stressful and unpleasant and wanted it to end. As a result, there is a strong foundation to surmise that a simple guilty plea would have been tendered if it were not for the complexities imported by plea bargaining. Despite the ordeal of criminal proceedings, Charles *delayed* pleading guilty because of the demand for plea bargaining (which policymakers have fostered in the presumed interests of efficiency). This delay allowed Charles' defence lawyer to go through the process of seeking out the prosecutor, setting up a meeting, discussing the case, presenting offers and counteroffers, and so on.

This bargaining process was protracted. Indeed, a delay of months is not atypical as both the defence and the prosecution manage their vast caseloads (another consequence of negotiation culture and policy efforts to promote efficiency through legal aid changes).[60] These delays

[58] Audit Scotland, *An Overview of Scotland's Criminal Justice System* (2011) para. 22, at <https://www.audit-scotland.gov.uk/docs/central/2011/nr_110906_justice_overview.pdf>.

[59] Tata, op. cit., n. 21.

[60] Id.

commonly lead to trials being postponed (while cases churn) and also to cracked trials. Indeed, one prosecutor noted:

> The first ten minutes in trials court is you triaging the business of the court, which involves plea negotiation. At summary level, that usually happens on the day of trial because that's usually the first time, other than the night before, you'll have seen your cases.

Likewise, the general uncertainty caused by the haphazard nature of plea bargaining further undercuts efficiency and creates a degree of chaos that is difficult to remedy. One defence lawyer noted:

> Some sheriffs want things to start at ten o'clock and all the rest of it. Certain sheriffs want every agent in the court waiting for their case to call. The commercial reality of that is nonsense … [L]awyers are not going to be waiting to get called. They are going to be bouncing around the courts like a ping-pong ball, taking care of their other business.

In the end, for Charles, the negotiation terminated on the eve of the trial when (as Charles' lawyer told him) due to misfortune, not principle, a light caseload meant that the prosecutor indicated that they no longer had an interest in negotiations. Upon the cessation of the negotiations, and despite having gone this far, Charles immediately pleaded guilty rather than go through the stress of a trial. This guilty plea was not prompted by any belief in a meaningful sentence discount, and Charles did not want to try for the chance of an acquittal at trial. As he put it,

> [w]hile I was happy at the time to draw [my guilty plea] out [because of the plea bargaining that was ongoing], I wish now that I'd just gotten it over with and moved on. Instead, I've wasted a lot of time … But at the time, it wouldn't have made sense for me to plead guilty.

Charles was not alone. Others, such as Mike, agreed that while early guilty pleas might be personally preferable, they can be imprudent.

5.2 | Is plea bargaining inherently problematic?

The widespread belief among policymakers when producing reforms is that it is defendants who engage in gamesmanship. For example, it is commonplace for official policy documentation to propose 'new procedures which get the case to trial quickly, with reduced chances of the accused "playing the system" and escaping justice'.[61] In this context, defendants' rational tactics are viewed negatively. Surely, it is argued, these people (who are presumed to be guilty) should accept the solemnity of the court and 'the system should not become a game where delay and obstruction can be used as a tactic to avoid a rightful conviction'.[62]

[61] Home Office (UK), *Justice for All* (2002) 14, 32, at <https://brdo.com.ua/wp-content/uploads/2016/01/Justice-for-All-WPUK.pdf>.

[62] Id., p. 16; see also p. 28.

However, there may be hypocrisy in condemning 'games'. It might be noted that court professionals also utilize tactics and stratagems and that this is the norm of negotiations in Anglo-American adversarial systems. Indeed, Section 196 (the most overt form of plea bargaining) is itself a tactical attempt to create (dis)incentives to pleading guilty or not guilty. Moreover, as noted, defendants often feel that it is the legal professionals who are playing games and that they have minimal agency regarding their participation in plea bargaining – even if they wanted to plead guilty.

The fact that plea bargaining itself prompts defendant practices (notably late guilty pleas) that policymakers bemoan has significant implications.[63] However, perhaps this should not be surprising. Despite stereotypical perceptions, other research in courts has found that defendants are often more compliant than might be assumed. In court, defendants' outward behaviour is characterized by a 'passive acceptance' of court norms.[64] For example, in Jacobson and colleagues' research (as in mine), defendants were docile in court, disruptions were rare, and the vast majority were inclined to follow the advice of their defence lawyers.[65] In Auld Sheriff Court, the advice of defence lawyers, more often than in Braw Sheriff Court, leaned towards delaying a guilty plea in part because negotiations routinely took longer. In this way, defendants' late guilty pleas were still passively accepting court norms and consistent with that system of plea bargaining. In other words, plea bargaining demands gamesmanship that requires extra time to play out.

In sum, policy demands plea bargaining. However, in a significant number of cases, plea bargaining demands delaying a guilty plea. Defence lawyers and prosecutors in most courts[66] struggle to negotiate guilty pleas early in court proceedings. Indeed, a case's trajectory seems to be largely determined by court norms for plea bargaining rather than defendants 'playing games' and attempting to evade justice. Instead, defendants can be, more or less, 'dummy players' and plea-bargaining norms the source of inefficiency.[67]

6 | CONCLUSION

By drawing on recent research in Scotland, this article has argued that we need to question plea bargaining's presumed efficiency in terms of cost effectiveness. First, plea bargaining's ability to induce guilty pleas is uncertain. We cannot know from existing data how many guilty pleas are attributable to it. In light of other factors that might lead to guilty pleas (such as process costs and procedural hassles), this lack of evidence is problematic. Second, the article has demonstrated that plea bargaining itself can entail key inefficiencies. In the Scottish research, it was found that expectations and perceptions of plea bargaining were commonly cited as a reason to delay a guilty plea. Thus, not only might plea bargaining fail to provide the expected degree of cost effectiveness, but it may actually *reduce* cost effectiveness in some situations. A key inefficiency of plea

[63] Gormley and Tata, op. cit. (2019), n. 51.

[64] J. Jacobson et al., *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (2015). See also A. E. Bottoms and J. D. McClean, *Defendants in the Criminal Process* (2013); M. McConville et al., *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (1994); T. Goriely et al., *The Public Defence Solicitors' Office in Edinburgh: An Independent Evaluation* (2001); P. Pleasence and H. S. Quirk, *Criminal Case Profiling Study: Final Report* (2001); V. Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (2010).

[65] Jacobson et al., id.

[66] Braw Sheriff Court is an outlier.

[67] Carlen, op. cit., n. 2; D. J. McBarnet, *Conviction: Law, the State and the Construction of Justice* (1983).

bargaining is that is it can hinder straightforward (early) guilty pleas. Even where a guilty plea would suit all concerned, negotiation norms and incumbent tactics can create impediments to simply admitting guilt. Prosecutors may expect the defence to demand concessions, and this *may* influence how they (over)charge. In turn, defence lawyers and defendants may perceive there to be overcharging and therefore delay pleading guilty until some concession is achieved. The result is that many guilty pleas take a long and inefficient path that leads to churn and cracked trials.

Ironically, the inefficiencies identified above stem from the same norms encouraged by policymakers in the pursuit of efficiency via plea bargaining. While the prevailing belief of policymakers is that plea bargaining is and will be expedient, in practice it is mediated through defendant perceptions and the actions of legal practitioners with ethical obligations and other imperatives that exist in notionally adversarial systems.[68] Indeed, it is perhaps to be expected that real-world plea bargaining is problematic:

> At an epistemological level, the adversary system encourages a strategic, rather than a moral or even instrumentalist approach … Two-party litigation and negotiation, when conducted strategically for individual client maximization, may prevent important and relevant information from being disclosed for fear the other side will use such disclosures 'against' the principal. In economic terms, this may leave 'waste'.[69]

Moreover, plea bargaining entails a complex range of practices that must serve various interests. While this article has focused on the policy rationale for plea bargaining, as noted, some scholars have suggested that it may exist for rather different reasons entirely.[70] In light of these other interests, limited cost effectiveness may also be less surprising.

In conclusion, plea bargaining has inefficiencies in terms of its cost effectiveness. However, whether it is overall net inefficient is unknown. At present, there is an unjustifiable paucity of data on plea bargaining's effects. There is a striking need for research on plea decision making and defendants' perceptions. Additionally, prosecutorial practices are disconcertingly opaque and require further scrutiny (especially considering perceived overcharging). Such data could inform how plea bargaining might be reformed to genuinely improve administrative efficiency while maintaining a principled justice system.

How to cite this article: Gormley J. The inefficiency of plea bargaining. *J Law Soc*. 2022; 1–17. https://doi.org/10.1111/jols.12360

[68] Tata, op. cit., n. 21.

[69] C. Menkel-Meadow, 'The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering' (1999) 72 *Temple Law Rev*. 785, at 789.

[70] For example, some argue that plea bargaining operates as a means of social control. See Vogel, op. cit., n. 2; Kohler-Hausmann, op. cit., n. 2; Carlen, op. cit., n. 2.