WHY SHOULD GUILTY PLEAS MATTER?

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Abstract. Most offenders plead guilty without a trial. Their guilty plea typically earns a reduced punishment. It raises the issue of why should guilty pleas matter. This chapter considers the use of plea bargaining in the United States and guilty plea discounts in England and Wales. While the former is found deeply problematic, a limited defence of the latter is made. Offenders should normally receive discounted punishment and for more than instrumental reasons. However, there must be more robust safeguards in place to ensure greater consistency and fairness for the use of guilty plea reductions to be justified more substantially.

I. Introduction

Punishments are mostly agreed through defendants pleading guilty rather than post-conviction after a trial by judge or jury.[1] This is normally accompanied with a reduced sentence.[2] The making of guilty pleas is becoming so commonplace that we are said to live in a 'guilty-plea culture' (McConville 1998: 572-576). This is borne out by the US Supreme Court's remark in *Lafler v Cooper* that 'criminal justice today is for the most part a system of pleas, not a system of trials'.[3] The related sentence reduction for guilty pleas has been described as 'one of the most important principles in sentencing . . . and of the greatest practical importance' given its widespread, entrenched use (Wasik 2014: 71).

The prevalence of guilty pleas and sentence reductions for them raise the issue of *why* pleading guilt should matter in sentencing. For example, firstly, it might be argued that two individuals who commit the same offence should receive the same sentence, but the making of guilty plea could lead one to receive less punishment than the other raising issues about desert. Secondly, it might also be argued that making a guilty plea is not proof of guilt as it avoids safeguards such as scrutiny of evidence and the jury trial with many examples of individuals confessing to crimes they did not commit. This raises issues about whether the use of pleas undermines the duty to avoid punishing the innocent and evidentiary standards more generally. Thirdly, it might be claimed that the use of guilty pleas for sentence

[1] I will refer to the individuals charged with crimes as 'defendants' throughout rather than offenders. This is to highlight the categorical difference between them – not all defendants are offenders, including not all defendants who plead guilt as discussed below.

[2] Guilty pleas 'can' lead to reduced sentences, but might not always do so such in cases where there is a mandatory sentence like life imprisonment for murder in several jurisdictions. I will refer to 'punishment' and 'sentencing' interchangeably to cover all penal outcomes, including fines, community sentences and hard treatment.

[3] *Lafler v Cooper*, 566 US 156, 170 (2012).

reductions is purely instrumental and damaging to other factors, such as supporting the victims of crimes.

This chapter examines each of these issues. It will focus specifically on the use of plea bargaining in the United States and the use of guilty plea discounts in England and Wales, as each presents us with different ways of thinking about how and why a guilty plea can matter for sentencing reductions (see Baldwin and McConville 1979). The chapter will raise serious objections to the way plea bargaining is done in the United States and rejects its use. However, the chapter will provide a qualified defence of sentence reductions for guilty pleas as used in England and Wales. This qualified defence rests on the need for more robust safeguards to be put in place in order to ensure greater consistency and fairness for the use of guilty plea reductions to be justified more substantially. So, this is not a defence of how the system is, but rather for a reformed system in future.

II. The problem with plea bargaining

This section will examine American the model for sentencing discounts for guilty pleas. In the United States, only three percent of defendants stand trial – the others agree to a plea bargain and avoid trial (Rakoff 2021: 23). Plea bargaining is where a defendant admits guilt usually for a lesser charge in return for the prosecutor dismissing more serious charges. Both sides are thought to benefit from the bargaining over the charge: the defendant receives a reduced sentence, often avoiding prison time, and the prosecution is able to resolve criminal cases without the need for a time-consuming and costly trial (Rakoff 2021: 21). These bargains *usually* lead to lesser charges, but there can be constraints relating to mandatory minimum sentences among other factors.

American plea bargaining is problematic on several grounds. The first is plea bargaining fails to respect desert (Lippke 2011). This objection can be portrayed as creating a justice gap between the sentence a defendant should have received and the lesser punishment that was, in fact, received. For example, a defendant might have committed a crime punishable by five years imprisonment; but, in return for making a guilty plea and avoiding the need for a trial, the defendant accepts a conviction for a less serious offence with a less serious sentence. The concern is that the defendant receives a sentence that is less than deserved.[4]

It is undoubtedly difficult to know with precision exactly how many days, nothing more or less is required for most desert-based accounts. As Aristotle (1984: 1730) has argued, we should only 'look for precision in each class of things just so far as the nature of the subject admits' – and there may be limits to how precise we can distinguish punishments for every crime.[5]

Nonetheless, the issue here is not only that a defendant is sentenced less than they would be without agreeing a plea bargain, but that the defendant is usually sentenced for a lesser charge than otherwise. In other words, plea bargaining is more than about receiving a lesser punishment for a crime, but rather it is about receiving a lesser punishment for a

[4] If the existing legal system overpunishes crimes, it might be said that a reduced sentence for a guilty plea might better fit the crime.
[5] The full reference to the Greek text is *Nicomachean Ethics*, Book 1, 1094 lines 24-25.

different kind of crime, namely, a typically lesser charge. Plea bargaining is about changing both the *amount* of punishment and the *kind* of crime that is punished.[6]

This sharpens the objection from desert. Plea bargaining fails to respect desert because even if defendants could be said to deserve less punishment for a crime because they admit guilt – which will be discussed separately below – they cannot be said to deserve any amount of punishment for a different crime because this is not the act or omission they are being held responsible for. In short, the bargains lead to defendants admitting to crimes they did not commit in return for lesser sentencing. Defendants do not categorically receive their just deserts on any account.

This problem is exacerbated by common prosecutorial practices. For example, some, such as Douglas Husak (2011: 216), claim that defendants who are found guilty at trial pay a 'trial tax' in failing to benefit from a sentencing reduction if they had pleaded guilty before trial. But, again, the primary issue is about the *kind*, not merely the *amount*, of punishment involved. Rachel Barkow (2019: 52) has exposed the practice of many prosecutors bringing *additional charges* for defendants who refuse to plea bargain (see McConkie 2015: 68). This is a further affront to any desert-based considerations. The difference between a plea bargain and trial is not only the possibility of receiving more punishment, but the prosecutor attempting to convict for different, and sometimes additional, crimes. The plea bargain arrangement can be of an entirely different character from what crimes actually took place.

A second problem for plea bargaining is its patented unfairness. As senior judge of the US District Court for the Southern District of New York Jed Rakoff (2021: 20) argues, American plea bargaining takes place almost exclusively 'behind closed doors and with no judicial oversight'. How prosecutors present and agree a deal in one case can vary considerably with another.

While there is a pressing need for more empirical studies of how prosecutorial discretion is used, the outcomes speak for themselves. Racial discrimination is endemic in the American criminal justice system with wide disparities in the rate of conviction and length of sentences for convicted defendants by race – and plea bargaining does not appear to reduce these injustices (Kutateladze 2014, Berdejo 2018).

Some of these issues arise from the decisions to charge for offences with required minimum sentences or capital crimes. For example, there are racial disparities in decisions to prosecute where capital punishment is considered. This is impacted further by the fact that most accused of capital crimes choose to go to trial and avoid possible execution exacerbating known disparities (Tsai 2019: 83).Without judicial oversight and a lack of empirical information, there are insufficiently robust safeguards to counter any implicit bias and discrimination in plea bargaining.

To conclude this section, American defendants can receive a lesser sentence by plea bargaining. This practice faces two problems. The first is that defendants can be offered lesser, but also different, charges than what actually happened leading to lesser punishment. But if they refuse, they could also face additional charges beyond what is discussed in plea

[6] While he does not discuss plea bargaining, this desert-based objection to different *kinds* of crime arising from a plea bargain has its roots in Hegel's discussions about retributivist punishment (Hegel 1991: 127 [§101 Addition]; see Brooks 2001, Brooks 2004a, Brooks 2012, Brooks 2013, Brooks 2017a, Brooks 2017b).

bargaining. The second problem is the use of prosecutorial discretion seems so wide as to be unfair lacking robust safeguards to protect against bias and discrimination. Unsurprisingly, various disparities are sadly a commonplace in the US criminal justice system. This is not a unique feature, but its size and scale is alarming.

III. A plea for an alternative: the English discount

This section examines an alternative to the American model of plea bargaining found in England and Wales.[7] Whereas the US process is prosecutor-led and conducted beyond the gaze of the judiciary, the English process is very different – and, I will claim, more compelling.

Instead of plea bargaining before trial, the English system grants sentencing discounts for charged offences on an early guilty plea to that charge.[8] As a result, defendants that plead guilty are accepting their responsibility for this charge – and not for some different offence(s) like in the United States.

Whereas American plea bargaining can reduce sentences by charging for a lesser and different offence, the English system provides a sentencing discount of one-third if a defendant pleads guilt at the first opportunity (Sentencing Council 2017a). The first opportunity is considered to be the earliest time a defendant appears in court to enter a plea – and so takes place in open court, not behind closed doors.[9] The sentencing discount is applied to all English courts and forms of sentence, not only any time in custody (see Ashworth and Kelly 2021: 172).

The key factors for determining this 'English discount' for reduced sentencing are the stage in the proceedings for an offence that a defendant pleaded guilt and the circumstances this indication were given.[10] A defendant may receive a discount on a declining scale after a first appearance in court where a one-third reduction is possible. A guilty plea at a second hearing could lead to a one-quarter reduction in sentence followed by a one-tenth reduction if a defendant pleads guilty on the day of a trial. If the circumstances prevented a defendant from reasonably indicating a guilty plea sooner, then exceptions can be made to award a more generous sentence discount but not by more than one-third (Leveson 2015, Sentencing Council 2020).

The English discount is taken into consideration after the appropriate sentence for the crime(s) is determined using any available sentencing guidelines accounting for harm and culpability. The sentencing reduction is then considered in light of its timing and circumstances as per above – the amount of the reduction is stated and applied (Sentencing Council 2017b). As a result, the English discount is explicitly a discount subject to a common procedure relevant for most offences that is explicit and transparent.

This discount is subject to limits, such as mandatory minimum tariffs that can constrain sentence discounts and mandatory sentencing. For example, murder is subject to

[7] For ease of reference, I will speak of the 'English' discount when referring to the plea discount in the legal system of England and Wales.
[8] See s144(1) of the Criminal Justice Act 2003 and s73 of the Sentencing Act 2000.
[9] See *Caley* [2013] 2 Cr App R (S) 305.
[10] See s73(2) and (3) of the Sentencing Act 2000.

imprisonment for life. If the court determines a whole life minimum tariff is mandated, then an early guilty plea will receive no discount (Sentencing Council 2017b).

Moreover, English judges are not required to grant a one-third discount in every instance. The context matters. In *Simpson*, an offender pleaded guilty to aggravated vehicle taking which had a maximum sentence of two years.[11] Despite pleading guilty at the first opportunity, the judge gave the defendant a twenty-three month sentence discounting only one month because it was noted that a much higher sentence than two years could have been warranted in that case.

To conclude this section, the English discount has advantages over American plea bargaining. Whereas US plea bargaining can lead to a defendant being charged with a lesser offence than was committed (and receiving a lesser sentence depending on the bargain agreed), the English discount is only for the offence charged. While US plea bargaining takes place behind closed doors, lacks consistency and appears to contribute to alarming levels of disparities, the English discount is acknowledged in open court and follows sentencing guidelines providing consistency in application linked to the time a plea is made.

But this is not to say the English discount is unproblematic. Similarly high numbers of defendants plead guilt as in the United States and yet there are serious problems of bias and discrimination in the UK's criminal justice system, too (Lammy Review 2017). In this volume, Mike Hough and Jessica Jacobson (2023) point out that the offences for which a defendant is charged can be a product of pre-trial, 'largely hidden' negotiation. They are right. There is much effort pre-trial in the Crown Prosecution Service ascertaining the likelihood of defendants pleading guilt to probable charges. So, the English system is not immune from US-like negotiations over charge and pleas albeit in a more limited context.

The criminal justice system does not operate in a vacuum nor ivory tower. Issues about discrimination require a solution beyond the means of the criminal justice system alone. Nonetheless, however less problematic the English discount is in comparison with American plea bargains, four important questions remaining that I will address. The first is: do guilty plea discounts bargain away innocence and contribute to punishing the innocent? The second is: does accepting guilty pleas lower evidentiary standards? The third is: how much of a discount is too much? The remaining sections focus on these questions in light of the two models for guilty plea-related sentencing discounts from the US and England considered here.

IV. Do guilty plea discounts bargain away innocence?

The previous sections considered two different approaches – American and English – to determining how sentence reductions should work for pleading guilty. In this section, I want to turn our attention to an important set of issues for both regarding evidentiary standards and the risk that the use of offering sentencing discounts for guilty pleas could perversely incentivise defendants in some circumstances to plead guilty to crimes they did not commit.

[11] See *Simpson* [2009] 2 Cr App R (S) 492.

Both the legal systems in the United States and England champion the importance of a fair trial. The UK recognises 'fundamental British values' including democracy, the rule of law and tolerance with a centuries' old tradition of using jury trials for serious offences, with early roots in the Magna Carta of 1215.[12] The Fifth Amendment of the US Constitution guarantees 'no one can be compelled to be a witness against himself' and its Sixth Amendment guarantees 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury'. The right to a fair trial has an important role in safeguarding individual rights through the law of evidence, judicial oversight and other measures (Brooks 2004b). Yet, the trial is increasingly rare with most avoiding trial through pleading guilt.

This begs the question of whether the use of guilty plea sentence reductions undermines safeguards found at trial. After all, making a guilty plea can stop other events from happening that would normally be a part of any trial process. For example, evidence is not subjected to the full scrutiny it would receive at trial, no witnesses are cross-examined and issues relating to whether any evidence should be downgraded, if not excluded, becomes moot (Sanders and Young 2000: 397). In cutting the time to conclude a criminal case, it might appear that corners are being cut relating to evidentiary and procedural safeguards. Some go further and claim these plea bargains are merely 'transactional' with a focus on concluding a deal, not doing justice (Zaibert 2023).

Pleading guilt by itself is insufficient for establishing guilt. Some scholars have argued that innocent defendants have pleaded guilty to crimes they did not commit due to some degree of coercion, especially impacting more vulnerable persons (Helm 2019). Jed Rakoff (2021: 28, 31) observes that as many as ten percent of guilty pleas are made by innocent people.[13] Sometimes this is because someone is accused of a capital crime facing the possibility of execution if wrongly convicted (where pleading guilt avoids that possibility), but others are thought to lack confidence in the system and so cut their losses by making a guilty plea. However, there is no comparative data to test whether a similar or different number of innocent defendants pleaded guilty to crimes they did not commit before plea bargaining became the norm.

There is undoubtedly pressure on defendants to plead guilty. Some of this pressure is overt, such as with plea bargaining. In this US approach, there is a strong power imbalance created whereby often elected prosecutors are incentivised to push for long sentences to score points for future election campaigns (Berkow 2019: 51). Prosecutors hold most of the cards threatening more severe punishment to compel defendants into pleading. Moreover, prosecutors will be richly experienced given the prevalence of plea bargaining, whereby the defendant may be a relative novice inexperienced and anxious about the impact of failing to strike a bargain. According to George Fisher (2000: 859), the dominance of plea bargaining owes much to its having 'served the interests of the powerful' making easier work of concluding cases for prosecutors and judges (see Balbus 1973). Thus, 'there is no glory in plea bargaining' within the shadows behind closed doors (Fisher 2000: 859).

[12] On fundamental British values, see Department for Education (2014). On Magna Carta and trial by jury, see Library of Congress (2014). On fair trials and the right to trial by jury, see Brooks (2004b, 2004c, 2009).
[13] See *US v Quinones*, 205 F. Supp. 2d. 256, 264 (2002) and, in relation to *Quinones*, Brooks (2004d, 2011).

Some of the pressure on defendants to plead guilty is less emphatic. One such example is the possible benefit of receiving a sufficiently enticing sentencing discount. For instance, Ashworth and Kelly (2021: 174) claim that 'a substantial reduction of up to one-third of the sentence . . . amounts to a very powerful incentive to plead guilty'. Some argue that such benefits should be much reduced to a ten percent reduction so that it does not exercise unsatisfactory pressure on the decisions of defendants to plead guilt when they are innocent (see Lippke 2008: 241). While I will turn to the issue of how much of a discount is too much in Section VI below, suffice to say that most of these concerns about the influence of the discount amount in compelling innocent defendants to plead guilty requires much more empirical work.

The state must not deliberately punish the innocent – nor create conditions where the punishment of the innocent is made more likely, such as through unjustified inducements (see Helm 2021; Hoskins 2023). No one should be egged on to admit guilt for a crime they did not commit. US-styled plea bargaining seems deeply flawed on this issue given the deep power imbalances between the state and the individual and the lack of sufficiently robust safeguards, such as through judicial oversight. While judges could challenge pleas, this almost never happens. McConkie (2015: 63) observes trial judges only rarely challenge guilty pleas as 'they often have little information about the case beyond what is stated in the indictment'. Turner (2006: 202) claims judges are 'passive verifiers of plea bargains'. So, guilty pleas are mostly accepted when received.

English-styled plea discounts work differently. The defendant has more control over what sentencing discount they are likely to receive. This is because – as noted in the previous section – sentencing discount possibilities are known in advance and consistently applied. If the defendant wishes to receive an indication of a likely sentence, they may ask the judge who will advise but only if requested by the defendant.[14] These factors create a better balance than with America plea bargaining. Interestingly, Sentencing Council research found that 'the main factor determining whether or not offenders plead guilty was the likelihood of being found guilty at trial' (Dawes et al 2011: 32). This suggests that, in the English model, the likelihood of conviction, not the potentially enticing magnitude of any sentence reduction, 'was the primary determinant in the decision to plead guilty' (Gormley et al 2020: 15).

A judge is unable to accept a defendant's guilty plea if it is based on 'an unreal and untrue set of facts'.[15] If a plea is based on a statement found to be untrue, then any credit for making a guilty plea would be withheld.[16] The relevant guidance notes correctly that 'illogical or unsupportable' bases for a plea will lead to 'inappropriate' sentences with the potential to damage 'public confidence in the criminal justice system' and so must be avoided (Attorney General 2012). Moreover, if the judge is unconvinced of the accused's plea of guilt, the accused can be challenged – so it is not the case that the accused can make any guilty plea they wish and have it accepted automatically with a guaranteed sentencing discount for doing so.[17] In the English system, a guilty plea should not be taken at face value and it may, where appropriate, be refused.

[14] See *Goodyear* [2005] 1 WLR 2532 and limits on indications *per Kulah* [2008] 1 WLR 2517.
[15] *Beswick* [1996] 1 Cr App R (S) 343, 346.
[16] See *Elicin and Moore* [2009] 1 Cr App R (S) 561.
[17] See *Tolera* [1999] 1 Cr App R (S) 25.

The above highlights the necessary role of judicial oversight of the acceptance of guilty pleas for the purposes, in part, of reducing sentences. Subjecting pleas to such scrutiny and challenge is necessary to help protect defendants from pleading guilty to offences they did not commit – and it is necessary that this is an active aspect of confirming any plea deal.

The trial standard is proving a guilt 'beyond a reasonable doubt' (CPS 2022). This standard is imperfect – and reasonable doubt is different than absolute certainty (Laudan 2006: 12-13). Understandably, juries frequently request judges explain this standard to them at trial (Laudan 2006: 49). Nevertheless, the English (and American) legal systems are adversarial in nature. Where the state via the prosecutor charges a defendant and that defendant pleads guilty, there is at least a *prima facie* lack of reasonable doubt when both sides are in agreement.

Crucial to this agreement being understood as beyond reasonable doubt more substantively, not merely at face value, is whether the defendant makes a plea without coercion. Most legal systems recognise that a defendant is responsible for their plea and free to choose whether to plead guilty or not guilty, irrespective of how relatively strong or weak others might find the case against the defendant (Wasik 2014: 11).[18] Robust judicial oversight – and, where appropriate, challenge – is necessary to help ensure the reasonable doubt standard is sound. So, while guilty pleas might avoid trial and some of the checks in place at trial to ensure safe convictions, we can maintain the standard if robust measures were in place.

Furthermore, it is right that there are additional checks to ensure any accepted plea leads to a safe conviction. A defendant who pleads guilt could challenge their conviction and claim innocence, although this requires a high standard being met such as establishing that the original guilty plea entered into was not 'knowing, voluntary or intelligent'.[19] It might also be possible to overturn a conviction if new evidence came to light sufficiently casting doubt on the a defendant's guilt, such as can transpire via innocent projects (Brooks 2004d, Brooks 2011). Pleading guilt does not end the matter. Safeguards are in place to continue the possibility of appropriate challenge to ensure outcomes are sound.

In conclusion, this section considered evidentiary standards for guilty plea sentencing reductions, including the concern that this practice might lead innocent defendants to plead guilty to offences they did not commit. American-style plea bargaining is problematic. There is evidence that a number of innocent defendants are pleading guilt in a system dominated by prosecutorial discretion exercised behind closed doors.

In contrast, the English-style plea discounts provide for greater control by defendants and, therefore, improved balance. There is not clear evidence this system is contributing to innocent defendants pleading guilt, or at least not close to what is observed in the United States.[20] The process of making a plea is more transparent, systematic and consistently

[18] See *Nightingale* [2013] EWCA Crim 405.
[19] See *Boykin v Alabama*, 395 US 238, 243 (1969).
[20] A possible reason for this difference is the prevalence of innocence projects challenging convictions for individuals sentenced for a capital offence.

applied. Pleas can more regularly be subjected to challenge to help ensure convictions are beyond a reasonable doubt. So, while trial is avoided, scrutiny is not.[21]

While the English plea discount handles this issue better, it is imperfect. Judicial oversight must be more robust and it should be more commonplace for any guilty pleas to be subjected to greater scrutiny to ensure the safety of convictions, and promote public confidence in the criminal justice system overall. We can achieve beyond reasonable doubt without a trial. More robust judicial oversight will help enable this.[22]

V. Are sentencing discounts justified *only* instrumentally?

This section considers the objection that sentencing discounts – whether plea bargained or through guilty pleas reductions – are justified primarily, if not solely, instrumentally. Agreeing less punishment for a guilty plea is a means of concluding criminal cases more quickly and cheaply – and this is why the practice has become endemic. Whatever else might be said about these discounts, they have facilitated a more efficient system able to handle more cases more quickly and it would make the system exponentially more expensive, and prohibitively so, to require full trials in every case. So, is this a problem and, if so, why?

This objection is usually made from the assumption that an instrumental, or otherwise consequentialist justification, is somehow deficient and a substandard foundation for criminal justice. Unsurprisingly, the practice has come under fire from various retributivists (see Lippke 2011, Zaibert 2023; see also Brooks 2021: 30, 168-169, 283). Of course, not all philosophers of punishment are retributivists or share this concern with many other penal theories defended on consequentialist grounds, including most theories of deterrence.[23] While some be unpersuaded by instrumental justifications, it is important to note that they are justifications nonetheless whatever their further merits – although I will bracket this issue here.

The instrumental objection is also stated in terms of efficiency. For example, some argue that 'the only plausible justification for sentencing discounting is that of efficiency' (Leverick 2004: 384). This view is spelled out by Lord Taylor CJ in *Buffrey*:

> 'Some reduction must be made, as frauds of this kind were so complex and took such a long time to unravel, that they became a burden to the criminal justice system. They were costly in time and money, and caused stress to jurors who had to try them, judges who had to try them, and to witnesses and defendants themselves'.[24]

The use of sentencing discounts in return for guilty pleas is about saving time and money. Curiously, there is no argument here that sentencing discounts is an *ideal* practice that we

[21] Scrutiny and challenge may be far less rigorous in a guilty plea than at trial, but a crucial difference is that the guilty plea is normally accepted – and so the parties to the adversarial dispute are in broad agreement so not in dispute over the facts as they might be if not in agreement and at trial.
[22] It is a noteworthy problem that not all defendants can afford legal representation raising additional questions about the role of the judge in such cases. Ideally, all defendants would have access to a lawyer in court.
[23] For a critical survey of all major penal theories, see Brooks (2021).
[24] *Buffrey* [1992] 14 Cr App Rep (S) 511, 515.

should accept or even encourage if time and resources were not an issue. The ends of efficiency justify the means.

It is far from clear how much time or money is saved through sentencing discounts. It has been called the stuff of 'lore' to claim that the criminal justice system would grind quickly to a halt if these discounts were halted, in light of the unbearably greater workload, but there is insufficient evidence to certify these claims (Ashworth and Kelly 2021: 176-177). But it is clear that cases would take longer to resolve and greater resources would be required without sentencing discounts. So, while the full effects are uncertain, there is no dispute that guilty pleas make the system run more quickly and cheaply.

The Sentencing Council (2016: 15) has claimed that 'the guilty plea reduction is in place to provide an incentive . . . not a reward'. The offering of incentives is the very definition of an instrumental usage, of course. However, we should not see anyone being rewarded for admitting their guilt. Sentence discounts are never intended to be a prize or special achievement. Instead, the sentence reduction primarily acts as a form of *recognition*, at least in the English system. There the plea is publicly stated and then acknowledged through a transparent, systematic and consistently applied procedure. Defendants are not rewarded for admitting guilt, but publicly recognised. And note that, in the English system, minimum sentencing or required outcomes could mean that no discount may be available, or at a much reduced rate.

Pleading guilt does not automatically mean that a defendant must receive a sentence reduction to a certain degree for any offence. But there is always a public recognition of their plea – and it is this recognition that is central. There is non-instrumental value in having, and encouraging, citizens to admit and take responsibility for their crimes. It is better for a guilty defendant to make an early plea of guilt than for them to know their guilt, but hope a trial would find them innocent. This is because it is critical for the criminal justice system to detect and acknowledge breaches of the criminal law. If no one was permitted, let alone encouraged, to admit wrongdoing outside of a completed trial, this would likely undermine social solidarity and the trust required for a healthy democracy (Brooks 2022). This is because a failure for the state to take seriously such admissions of guilt fails to fully respect persons in disregarding their claims. The issue is not whether guilty pleas can ever be accepted, but whether they are sufficiently sincere and accurate (see Dennis 1995).

Sometimes guilty plea reductions are justified for the non-instrumental reason of acknowledging repentance (see McConville 1998: 563). The idea is that when a defendant admits guilt they accept that they should not have broken the criminal law. Pleading guilt benefits deterrence aims – at least in its specific formulation tailored to the individual – as these persons come to accept their conviction and punishment for it.[25] Rehabilitative aims are met as well where defendant's acknowledge their wrongdoing so they can avoid it in future (see Brooks 2021: 62-75).

Moreover, there are desert-related benefits as well of accepting the use of guilty plea discounts. There is a difference between the defendant who publicly acknowledges their crime and someone who did commit a crime, but does not admit it when asked. Rights against self-incrimination and the need for the state to prove guilt beyond reasonable doubt

[25] On specific deterrence (or 'microdeterrence'), see Brooks (2021: 43, 49, 58).

are honoured where we do not systematically increase sentences for those who are only convicted at trial. At the same time, probable, but qualified, reductions for making an early guilty plea that take account of each individual charge and circumstance beforehand can be consistent with desert-based accounts. This is, in part, because addressing someone's moral responsibility and their public acceptance of this responsibility has non-instrumental value. The different and lesser punishment as a result of this acceptance is a way to acknowledge this fact. It must be emphasised that this discount is qualified and may not be granted in every instance.[26] This addresses the possible objection that accepting guilt before trial should never lead to a change in sentence from what might be confirmed post-trial, as exceptions are made.[27]

The Sentencing Council (2017) also justifies guilty plea discounts for more than instrumental reasons linked to efficiency. Noting its purpose of encouraging 'those who are going to plead guilty to do so as early in the court process as possible', the Council says – in addition to promoting 'the public interest' as the discounts 'save public time and money on investigations and trials' – that it aims to reduce the impact of crime on victims and to save victims and witnesses from the need to testify.

These additional reasons are non-instrumental. They speak to the anxiety and distress that victims and witnesses can experience in attending trials and being called on to testify (see Manikis 2023). Not all such individuals wish to engage in those ways and accepting a guilty plea, subject to satisfactorily robust safeguards, could facilitate this. It has been argued that 'guilty pleas are good not just for the system's accounting, but for victims and other witnesses who need not take the time, the trauma or the physical risk of giving evidence' (Dripps 2011: 427). In research conducted for the Sentencing Council, it found victims to be more supportive of guilty plea sentencing than the general public (Dawes et al, 2011). Victims are a key stakeholder and their broad support matters – and has non-instrumental value (Brooks 2014, Brooks 2016).

Of course, not all victims (or witnesses) wish to avoid such interaction. The increasing interest in and use of restorative justice speaks to this need for victims and communities to have a say in matters of justice (see Brooks 2021: 76-101; Brooks 2017c). A possible concern with plea arrangements is that those victims who would like to have a voice could lack a means, if they wanted that opportunity. As the criminal justice system has become increasingly reformed to bring the victim back in, it would seem contrary to such reforms to shut victims completely out (see Gardner 1998).

[26] It might be objected that any discount undermines the presumption of innocence stated in Article 6.2 of the European Convention on Human Rights. The concern is that pleading innocence, if a protected right, should not lead to someone always being punished more when exercising that right in relation to someone who pleads guilt before trial. In reply, it could be said that there is no systematic maltreatment as early guilty pleas do not always lead to any reduction taking into account individual context and circumstances. Someone who pleads guilty or someone else found guilty for the same crimes can receive the same punishment in some circumstances.

[27] For lack of space, I leave open the question of when exceptions should be made whereby a guilty plea reduction should not be allowed. I note these exceptions are already listed in practice. Their existence is important for highlighting the principled point made above that making a guilty plea can matter for sentencing discounts, but that it is right that this is qualified allowing for exceptions where appropriate. I do not argue that simply admitting guilt should always, and in an unqualified way, lead to sentence reductions. Context matters when making any such determinations.

The use of victim impact statements is helpful. Victims need not take up this opportunity if they do not want to. But, if they did, this information about their experiences might not make much, if any, difference to a judge's decision about sentencing but it can be suitably meaningful for victims to express publicly the impact they felt and for offenders to better understand the consequences of their wrongful actions (Brooks 2021: 84; see Jackson 2003). So, the voice of victims need not be lost if trials are averted – and victims are generally favourable to the guilty plea discount system overall.

In conclusion, some object to the use of sentencing discounts because they are instrumentally justified only. It is true that these discounts save significant time and resources, even if the exact amounts are difficult to pin down. Nor is it obvious, at least to me, that instrumental justifications cannot be valid although I do not explore this point for want of space. The concerns about discounts as only instrumental is a criticism mostly voiced by scholars supportive of desert-based accounts.

In response, it is argued that sentencing discounts should be seen more as forms of acknowledgement than purely incentives. This is partly because the incentives are not available in every case, whereas the recognition of a public acknowledge of guilt is available always. Moreover, such acknowledgements is positive for social trust, supports various penal aims not least deterrence and rehabilitation and can be consistent with a desert-based approach as well as defendants accept responsibility in public for their actions. Guilty plea discounts save time and resources, but have a value we should retain even if society could afford a full trial for every charge.

Finally, guilty plea discounts have support from victims. As stakeholders in a trial, their voices matter, too. However, it is important for their to be some opportunity, should witnesses want it, to express publicly the impact a crime had on them which can be permitted through the use of victim impact statements and the like.

In these ways, guilty plea sentencing discounts have non-instrumental value that we should promote – and even if we could afford to hold trials only. This requires that there are robust safeguards in place to ensure guilty pleas made are made sufficiently sincere and accurate. It is already argued that this could be more robustly enforced and so it is not claimed that the guilty plea procedures as they are found are ideal or should be uncritically accepted, but rather that discounts can be justified – and that not only instrumentally.

VI. How much of a discount is too much?

Thus far, this chapter has focused on the justification of having a guilty plea discount. I have favoured the English guilty plea over American plea bargaining and argued that it can be justified, subject to more robust safeguards like greater judicial oversight and challenge, in place.

A third and final issue to be considered here concerns the amount of discounts. It is already noted above that not every plea necessitates a reduction, as a minimum sentence requirement might forbid it. But if a discount can be justified, what price should be paid?

There is a wide array of different practices ranging from modest discounts to no limit (see Roberts and Dagan 2023). In response, academic commentary about plea discounts claim

reductions ranges from ‘may appear reasonable and modest’ to ‘too great’ (Helm 2019: 171; Campbell et al 2019: 343). As Julian Roberts (2013: 119) observes, with ‘no clear statutory yardstick for determining departures from the Guilty Plea guideline . . . conclusions about the acceptable degree of judicial compliance with this guidelines are likely to be subjective’. This situation calls out for more – and better – empirical evidence from different plea discounting jurisdictions about the uses of discounts for different offences, noting impacts on individuals with varying protected characteristics. This would help provide a more definitive snapshot of the practice of discounts and its distribution to different groupings of people. It would also support clearer comparative studies across jurisdictions than at present.

Nevertheless, we can still address the principled issue even if more data is needed. One possible issue is defining what relative discount amount would count as excessive. Gormley et al (2020: 14) notes that ‘it is unclear what form of evidence would resolve the question of whether current levels of reduction are excessive’. For example, someone pleading guilty at the first opportunity could have a sentence of eight months reduced to six. Given half this amount would normally be served in prison, the difference a plea might make is spending three months in custody rather than four (Gormley et al 2020: 14). As Hegel (1991: 245 [§214 Remark]) has noted before, while one day or one dollar fine too much may be an injustice, there is a limit to the precision a theoretical approach can make to determining the exact quantity of punishment in every case – it is instead a project of setting ‘a general limit within which variations are also possible’.

Therefore, it is challenging to state categorically that a discount of, say, one-third for pleading guilt at the first opportunity is too excessive in comparison with a one-quarter or one-fifth discount beyond relying on subjective intuitions in the absence of clearer data. One issue raised above is where a discount is deemed excessive because a sentence reduction is so great that it can effectively compel an innocent defendant to plead guilty to a crime they did not commit. In addition to requiring more data to establish this claim, our aim should be to ensure that any plea entered is sound and compelling. It should not be taken at face value and left unchallenged which is why greater judicial oversight and robust scrutiny is required for our having confidence that a defendant’s guilty plea is sufficiently sincere and accurate.

A second issue is that a discount is deemed excessive because the sentence reduction justified by the discount might be reduced further by factors intrinsic to the discount’s justification. In short, discounts can count for more in reducing sentences than they should. For example, some, such as Hough and Jacobson (2023) in this volume, further claim that, in fact, defendants can gain much more than a one-third sentencing discount from receiving more favourable treatment of their personal mitigation linked to their having pleaded guilty early. So, a defendant pleading guilt receives a one-third discount and a further bonus discount for little more reason than a kind of reward for the early guilty plea. Arguments of this variety can often appeal to the place of remorse playing a role in justifying the original discount, but then also serving as a mitigating factor reducing sentences still further. Remorse is counted twice.

In response, it is not obvious that every guilty plea is intended to be, in fact, a sign of remorse rather than mostly a desire to avoid a more severe punishment (see Sanders and Young 2000: 401). This is another matter for further empirical investigation. However, as a formality, remorse is not assumed in pleading guilty. For example, the Sentencing Council

guidance emphasises that remorse is a separate issue from the guilty plea – and remorse has a separate value, too (see Maslen and Roberts 2013: 127).

Perhaps some academics would wish to argue that remorse should be bound up with the making of a plea agreement. Restorative justice proponents have long argued for the importance of the offender's admission of guilt and apology as a critically important feature of any restorative framework with the benefits it brings to improved victim and offender satisfaction, for fostering a sense of closure and reducing future offending (see Brooks 2021: 76-101). While remorse can bring many positives, it is unclear the state should be in the business of requiring remorse it would impact on individual conscience, even if remorse might be encouraged and promoted.

Perhaps a guilty plea renders a defendant more likeable by judges or magistrates. The main issue is whether the appropriate sentencing guidelines are followed faithfully likeability or not. Remorse or other appropriate factors, including dangerousness, may appear more than once in the process. What matters is that each stage is appropriate, not that factors might reappear *per se*. Unless quantified, it is difficult to discern how possibly excessive, or even different, a conveyance of remorse is supposed to bear in making a plea in these circumstances.[28]

In conclusion, this section has considered the issue of, if a guilty plea reduction can be justified, how we can guard against its being excessive. When examining various claims about excessiveness, each are non-compelling. It is unclear what, if any, discount will not compel defendants, especially vulnerable persons, to plead guilt to crimes they did not commit. This is especially true if more robust judicial oversight was taken into account. It is further unclear that making a guilty plea and receiving a sentence reduction (which itself might be justifiable) leads to excessive reductions as a result of favourability with judges or magistrates. Again, perhaps a defendant is more likeable, but the only problem is not that but rather whether other steps in confirming a sentence are determined in a way that breaches relevant guidance – and this is unproven.

Furthermore, the claim that remorse can be counted twice as a necessary factor in making a plea is, at least formally, untrue as remorse is considered separately, it may be in fact untrue as it should not be assumed every defendant only pleads guilt to express remorse and, again, there seems no prohibition in any factor having some bearing on different stages in determining a sentence provided each stage is handled appropriately. Without evidence this is breached, the excessiveness of guilty plea discounts is not established – even though it is a difficult, complex matter trying to discern where a line should be drawn.

This is not to say that no discount is or can be excessive. If we had improved data, this would help facilitate clearer thinking around the impact of different quantitative measures. What is required is an English-styled guilty plea discount subject to more robust judicial oversight and challenge. This reform of the current system would appear to address concerns about the use of guilty plea discounts in a satisfactory way – and without any clear use of excessive discounts.

[28] It is acknowledged that expressing remorse can play some role in the sentencing part of a capital trial (Eisenberg et al 1998).

VII. Conclusion

The overwhelming majority of defendants plead guilt to the charges brought before them. Their guilty pleas normally lead to lesser punishment. This chapter has considered two different forms of sentencing reductions for guilty pleas: the American plea bargaining and the English sentencing discount. The latter was found more compelling as only it better ensured that defendants were convicted for the crimes they did (rather than for lesser offences they did not commit), the sentencing discount used is more transparent and consistently applied and there is greater judicial oversight.

The chapter then considered several specific issues. The first was whether the use of sentencing deductions led to innocent defendants pleading guilty to crimes that they did not commit, which these deductions have been associated with. It was proposed that guilty pleas cannot be accepted at face value and, where appropriate, they should be refused. More robust judicial oversight and challenge can help ensure guilty pleas are sufficiently sincere and accurate.

The second issue was whether the sentencing discounts are justified primarily, if not solely, instrumentally as a means of concluding criminal cases more quickly and cheaply. It was argued that there is substantial non-instrumental value in accepting guilty pleas and granting sentencing reductions, but only if following more stringent judicial safeguards.

The third and final issue was about the amount of a discount for making a guilty plea. This is a complex matter to unpack given the limited data available. Claims of excessiveness appear to be based more on subjective intuition than empirical findings nor claims that sentencing guidelines have been misapplied. This is not to argue that the current discount system is perfect within a criminal justice system very far from perfection. But it is to say that the case for discounts being excessive is unproven and, with the lack of compelling evidence, the current descending scale of guilty plea discounts in England is satisfactory even if procedural safeguards are not – these must be more robust if the use of guilty plea discounts is to be justified.

Guilty pleas matter. This chapter has attempted to explain why and how.[29]

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