

Conviction by Consent? Vulnerability, Autonomy, and Conviction by Guilty Plea

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Abstract

A criminal conviction resulting from a guilty plea rather than a full trial is typically justified on the basis that the defendant had the ability to go to trial, but instead chose to admit guilt in exchange for a small sentence reduction. In other words, the conviction, and associated waiver of rights, occurred by consent. In this article, I challenge that notion by drawing on psycho-legal research on vulnerability and consent and research on guilty pleas in the United States. I suggest that whilst plea procedure in England and Wales has largely escaped criticism due to modest sentence reductions compared to the United States 'plea bargaining' system, aspects of the system are highly problematic and are likely to be leading to non-consensual guilty pleas, in which innocent defendants are pleading guilty.

Keywords: guilty pleas, criminal procedure, consent, vulnerability

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INTRODUCTION

Whilst extensive research has examined the problem of wrongful conviction in the United States ‘plea bargaining’ system, guilty pleas in England and Wales have not received the same consideration. This is despite research dating back to the 1970s showing that ‘false’ guilty pleas (guilty pleas from defendants who are factually innocent) are likely to be occurring.¹ More recently, where guilty pleas and associated sentence reductions have been considered, they have largely escaped criticism, with researchers concluding sentence reductions are modest and reasonable.² Thus even though it is known that innocent defendants are likely to be pleading guilty, the choice to do so is still seen as largely rational, autonomous, and consensual.³ However, psycho-legal research and a more thorough examination of the literature on the United States system suggest that this conclusion is at least partially incorrect. It overlooks the context in which guilty pleas are being made, in which vulnerable defendants can face incentives to plead (in addition to relatively minor sentence length reductions) that call into question the voluntariness of plea decisions and undermine their consensual nature. This means some defendants are left with no practical choice but to plead guilty, and undermines the status of conviction by guilty plea as consensual.

¹ J. Baldwin and M. McConville, *Negotiated Justice: Pressures to Plead Guilty* (Martin Robertson, 1977); J. Baldwin and M. McConville, ‘Plea bargaining and plea negotiation in England’ (1978) 13 *Law & Society Rev.* 287; A. Ashworth and M. Redmayne, *The Criminal Process*, 4th edition (Oxford University Press, 2010) 310-20.

² See N. Vamos, ‘Please don’t call it ‘plea bargaining’’ (2009) 9 *Criminal Law Rev.* 617; J. V. Roberts and B. Bradford, ‘Sentence reductions for a guilty plea in England and Wales’ (2015) 12(2) *J. Empirical Legal Studies* 187.

³ *Ibid.*

Convictions that occur as the result of plea and not trial have been referred to as ‘convictions by consent.’⁴ This is because the defendant being found guilty without the protections of a full criminal trial is justified by the fact that this was the result of the defendant’s own choice – they could have contested their guilt at trial but chose instead to admit guilt. The soundness of convictions that occur in this way is dependent on the reasons why the defendant decided to plead guilty. Traditionally, plea decisions have been seen as the defendant being able to freely admit to something that (s)he has done, save the system time and money, and receive a reduced sentence in recognition of this.⁵ However, increasingly research suggests that in the right conditions plea decisions are not always or even typically consensual admissions of guilt, but are rather tactical decisions based on forecasting the probability of conviction at trial and the likely outcomes of trial, and evaluating potential discounts in exchange for pleading guilty.⁶ This is particularly true since defendants can often be fairly sure of the sentencing outcome should they plead guilty, through a *Goodyear* hearing in which a defendant can ask a judge for an advance indication of sentence based on a plea of guilty.⁷

As plea decisions are recognized as tactical decisions rather than just admissions of guilt, research into how these decisions are made and whether they are truly autonomous and consensual is, it is suggested, vital to the integrity of a criminal justice system.⁸ Rather than

⁴ J. Baldwin and M. McConville, ‘Conviction by consent: A study of plea bargaining and inducements to plead guilty in England’ (1978) 7(3) *Anglo-Am. Law Rev.* 271.

⁵ See S. C. Thaman, ‘Plea-bargaining, negotiating confessions and consensual resolution of criminal cases’ (2007) 11(3) *Electronic J. Comparative Law*, <<https://www.ejcl.org/113/article113-34.pdf>>

⁶ S. Bibas, ‘Plea bargaining outside the shadow of trial’ (2004) 117 *Harvard Law Rev.* 2464

⁷ *R v Goodyear* [2005] 3 All ER 117.

⁸ A defendant who enters a plea non-voluntarily or non-consensually cannot be said to have had a fair trial, and as stated by Lord Steyn in *Brown*, ‘if the defendant had not received the

relying on such research, plea systems typically presume that defendants are rational and autonomous agents despite increasing recognition that this is not the reality.⁹ In fact, many defendants are likely to be vulnerable, subject to external pressures, and in need of protection from the justice system. In the context of guilty pleas, defendants require protection from coercive deals and external pressures that may lead them to plead guilty for the wrong reasons, particularly when innocent. However, such protection has not been provided despite empirical research demonstrating external pressures faced by defendants.¹⁰ In fact, rather than providing protections for defendants, criminal justice systems, including the system in England and Wales, are increasingly adding to pressures that may lead defendants to plead guilty – for example by allowing a guilty plea to make the difference between a community and custodial sentence, or allowing a guilty plea to result in immediate release from custody where contesting guilt would result in a longer period on remand. These incentives are based on the premise that even where pressures are placed on the defendant, their decision to plead guilty is still consensual.

In this article, I highlight vulnerabilities of defendants when considering whether to plead guilty in England and Wales and explore how these vulnerabilities can interact with current procedure to undermine the autonomy and consent of defendants facing plea decisions, and ultimately to lead innocent defendants to plead guilty. I begin by examining the notion of vulnerability as a foundation for evaluating infrastructure in the criminal justice system, and draw on research from

substance of a fair trial, the administration of justice had entirely failed.’ R v. Brown [2003] 1 AC 681 at 708.

⁹ In fact, this is part of a wider phenomenon in the criminal justice system where defendant rights are being balanced against community interests, expediency, and other utilitarian-based concerns, see L. Hoyano, ‘What is balanced on the scales of justice? In search of the essence of the right to a fair trial.’ (2014) 1 *Criminal Law Rev.* 4.

¹⁰ See J. Baldwin and M. McConville, above n. 1.

psychology to analyze vulnerability's connection to psycho-legal concepts of consent, autonomy, and voluntariness. I then relate these concepts to the regulations surrounding guilty pleas, highlighting the delicate relationship between guilty pleas, the presumption of innocence, and access to justice. I then briefly explore the United States 'plea bargaining' system to illustrate how plea procedure can undermine defendant choice and lead to innocent defendants pleading guilty. This context is used to analyze the current plea system in England and Wales.

I consider situations in which the autonomy of defendants may be undermined when making plea decisions, meaning that decisions to plead guilty may not truly be voluntary or consensual. First, defendants may feel forced to plead guilty where this provides an immediate way to get out of custody, they have an urgent need to get out of custody, and they will remain remanded in custody if they want to exercise their right to a full trial. Second, defendants may feel forced to plead guilty where a guilty plea will likely make the difference between a custodial sentence and a community sentence and they cannot afford economically or socially to risk a custodial sentence. Finally, defendants, particularly those who cannot afford to take time away from work or child-care, may feel forced to plead guilty since this is likely to provide a significantly quicker and cheaper resolution than contesting guilt at trial.¹¹ Whilst mindful of the utilitarian benefits that are gained through processing criminal cases efficiently, quickly, and without the need for a full trial, I argue that legal infrastructure needs to recognize the vulnerability of potential defendants and provide additional protection to ensure guilty pleas are being entered for the right reasons. I suggest that changes are needed in the current system. Specifically, we need to move

¹¹ Note that commentaries have also suggested other reasons that innocent defendants may feel pressured to plead guilty. For example, implicit pressure from some defence council who may be influenced by the belief that most clients are guilty, *see* J. Baldwin and M. McConville, above n. 1.

away from a system that presumes defendants are able to exercise autonomy and towards a system which asks, how can we facilitate consensual, voluntary, choices for defendants accused of a criminal offence and thus ensure true access to justice.

THE VULNERABLE DEFENDANT

1. Vulnerability in the Criminal Justice Context

Vulnerability theory has recently been gaining traction in legal research. The theory challenges traditional conceptions of citizens as autonomous and independent and instead understands human beings as being vulnerable and embedded in social relationships and institutions.¹² This is in contrast with equal protection models, whereby the obligation of the state is to treat everyone the same way.¹³ According to vulnerability theory, as citizens we are reliant on institutions which can exploit or mitigate human vulnerability and in this context, the role of the state is to monitor and reorient institutions that are not functioning in a fair way.¹⁴ This is particularly true in the criminal justice system in England and Wales (similarly to many other criminal justice systems), for two reasons. First, the state has the power to restrict liberty upon conviction of certain offences at criminal trial or (in some cases) while awaiting criminal trial. This marks a powerful (and legally permitted) intrusion into the fundamental right to liberty granted by Article 5 of the European Convention on Human Rights.¹⁵ This gives the state great power over and places the

¹² Martha Albertson Fineman, 'The vulnerable subject: Anchoring equality in the human condition' (2008) 20(1) *Yale J. of Law & Feminism*, 1.

¹³ *Ibid* at 9.

¹⁴ *Ibid*.

¹⁵ Human Rights Act 1998 (Sch. 1).

individual in a vulnerable position.¹⁶ The second reason that defendants are particularly vulnerable in the criminal justice system is the demographics of the typical ‘defendant,’ which overlap in many ways with the demographics of the most vulnerable groups in British society.¹⁷ For example, an analysis conducted as part of a Home Office White Paper examined persistent offenders in the criminal justice system and suggested that the 100,000 people found to be the ‘most persistent offenders’ share a common profile – nearly two thirds are hard drug users, more than a third were in care as children, half have no qualifications at all, nearly half have been excluded from school and three-quarters have no work and little to no legal income.¹⁸ Similarly, forty five percent of male offenders in prisons were found to have no qualifications (compared with less than ten percent of the general population aged between twenty and thirty).¹⁹ This is representative of a wider link between social class and crime, whereby those of lower socio-economic class are more likely to be arrested, convicted, and incarcerated for crimes.²⁰

Currently, our justice system is not based on the idea of vulnerable citizens, but on the idea of citizens as autonomous actors who are able to exercise their autonomy, assess relevant options,

¹⁶ This is particularly true since research suggests that custody officers and police officers may actively try to find sufficient grounds for detention, depriving people of their liberty before any criminal conviction. See R. Dehaghani, ‘Automatic authorization: An exploration of the decision to detain in police custody’ (2017) 3 *Criminal Law Rev.* 187.

¹⁷ Note that the situation may be different in the relatively small number of prosecutions involving wealthy businesses or business owners who may have access to more resources than the Crown Prosecution Service.

¹⁸ Ministry of Justice, *Criminal Justice: The Way Ahead* (White Paper, Cm 5074, 2001) Annex B.

¹⁹ *Ibid*, Ch. 2.

²⁰ Bryan Lee Miller, ‘Social class and crime’ (2015) *The Encyclopedia of Crime and Punishment*.

and make consensual choices.²¹ This is particularly true when considering guilty pleas. In this context, we presume that individual defendants are autonomous actors capable of making a free and informed decision. However, this is not the reality for many defendants, who are vulnerable due to actual or potential restrictions on their freedom and influenced by social and economic pressures. In this context, defendants must decide whether to plead guilty or go to trial. These defendants are in a hugely vulnerable position, and reliant on the criminal justice system to provide necessary protections to ensure that the presumption of innocence is sufficiently respected in practice.

2. *Vulnerability, Voluntariness, and Conviction by Plea*

The fact that individuals accused of crimes are vulnerable has implications for their consent and autonomy. This is particularly important in the guilty plea context, in which the system relies almost entirely on defendants making voluntary and informed decisions as consenting agents. In fact, the system specifically requires guilty pleas to be unequivocal,²² *voluntary*,²³ and personal to the defendant.²⁴ Typically it has been assumed that ensuring legal representation for defendants will protect them from feeling coerced into making non-consensual decisions and ensure access to justice.²⁵ However, even where defendants do have legal representation, if there

²¹ For example, see *R v Turner* [1970] 2 QB 321, where the Court of Appeal found that defence lawyer having told the defendant that he had free choice and emphasizing that he must not plead guilty unless guilty was sufficient to ensure free and accurate plea decisions.

²² *Durham Quarter Sessions, ex parte Virgo* [1952] 2 QB 1.

²³ See *R v Turner*, above n. 21.

²⁴ *R v Williams* [1978] QB 373.

²⁵ See *R v Turner*, above n. 21. In this case, the appellant contended that his guilty plea resulted from his barrister suggesting that this would make the difference between a custodial and non-custodial sentence. The Court of Appeal affirmed the guilty plea as the defendant's choice and emphasized the role of the defence lawyer as the protector of the defendant, stating that the defence lawyer should advise the defendant not to plead guilty if they are not guilty.

are cases in which a guilty plea may be the only practical choice for a defendant given their vulnerabilities, as will be suggested below, the defendant will be making the only choice really open to them, and the cautions of a lawyer cannot help.²⁶ In addition, research has suggested that lawyers can sometimes be part of the problem through pressuring defendants to enter pleas.²⁷ Therefore, it is important to consider whether defendants are really making consensual decisions, even where they are represented by a lawyer.

From a psychological perspective, consent is typically thought of as a combination of understanding and freedom from coercion.²⁸ If an individual is coerced into doing something that would ordinarily signify consent (for example entering a guilty plea in court), then (s)he does not act voluntarily and what (s)he does, does not constitute consent.²⁹ In other words, although a person gives his assent, this does not amount to consent unless the assent is given voluntarily (that is, absent coercion). Although coercion is most often thought of as being through physical threats, social, moral, and economic pressures may also be coercive in this way where they undermine the ability of a person to make a voluntary decision. Circumstances can also subvert the voluntary nature of a decision, particularly for those who are vulnerable and therefore lack choice in a meaningful way. Here, vulnerability takes away the practical choice of the actor. For example, imagine that a group of prisoners and a group of non-incarcerated adults are both

²⁶ For a discussion of this dilemma for defence lawyers in the context of the United States plea system, see R. K. Helm, V. F. Reyna, A. A. Franz, R. Z. Novick, S. Dincin and A. E. Cort, 'Limitations on the Ability to Negotiate Justice: Attorney Perspectives on Guilt, Innocence, and Legal Advice in the Current Plea System' (in press), *Psychology, Crime, & Law*.

²⁷ See, for example, J. Baldwin and M. McConville, above n. 1 at 62.

²⁸ B. H. Bix, 'Contracts', in *The Ethics of Consent: Theory and Practice*, eds. Miller and Werthheimer (2009), Ch. 10, 251.

²⁹ J. Kleinig, 'The Nature of Consent' in *The Ethics of Consent: Theory and Practice*, eds. Miller and Werthheimer (2009), Ch. 1, 14.

making a decision about whether to enroll in a potentially dangerous clinical trial in exchange for compensation. Prisoners are unlikely to be able to access this compensation in other ways, whereas the non-incarcerated adults are likely to be able to. This means the compensation may be coercive for prisoners but not for the non-incarcerated adults. The vulnerability of the prisoners in terms of their lack of access to funds in alternative ways may make compensation coercive to them and thus subvert the voluntariness of their agreement to participate in the trials. For this reason, there are more stringent ethical rules on prisoner consent to participation in research to recognize their heightened vulnerability, and potential lack of meaningful consent.³⁰

The notion of vulnerability undermining consent has been given consideration in other areas of the criminal law. For example, current law dictates that where actual bodily harm or greater to a victim is intended, the consent of the ‘victim’ is no longer a defence to criminal liability (subject to exceptions).³¹ One rationale for this is based on the vulnerability of the victim and / or the exploitative nature of underlying circumstances that may undermine the autonomy or freedom of choice of the victim.³² So, where a woman gives ‘consent’ to be hurt by a partner who has a history of exercising coercive control over her, her ‘consent’ must be understood in this context.³³ In the context of guilty pleas, the state typically has control over the defendant’s freedom and liberty, and consent must be understood in this context. If the defendant has been

³⁰ See, for example, Office for Human Research Protections, ‘Prisoner Involvement in Research’ (2003) <<https://www.hhs.gov/ohrp/regulations-and-policy/guidance/prisoner-research-ohrp-guidance-2003/index.html>>; Office for Human Research Protections ‘The Belmont Report’ (1979) <<https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/read-the-belmont-report/index.html>>

³¹ Brown [1994] 1 AC 212 HL at 234, per Lord Templeman.

³² J. Tolmie, ‘Consent to harmful assaults: The case for moving away from category based decision making.’ (2012). 9 *Criminal Law Rev.* 656, at 660.

³³ *Ibid.*

placed in a position in which they have no practical choice but to plead guilty, the guilty plea entered and the associated waiver of the right to trial cannot be said to be consensual.

In fact, the House of Lords seems to have at least implicitly recognized that incentives to plead guilty could be considered to undermine consent.³⁴ Specifically, in the context of an extradition case where a plea deal from the United States was considered, the House of Lords rejected the contention that the plea deal, resulting in a three to four year sentence as a result of a guilty plea compared to an eight to ten year sentence if convicted at trial, amounted to impermissible pressure to surrender legal rights. However, Lord Brown, delivering the judgment of the House of Lords, implied that a significant enough discrepancy between plea and trial could amount to unlawful pressure.³⁵ This suggests that courts in England and Wales would be reluctant to allow some of the more significant reductions in sentence in exchange for a guilty plea seen in the United States.³⁶ In the next section of this article I will argue that despite differences between the plea systems in England and Wales in the United States, there are commonalities underlying the two systems. Importantly, in both systems there are incentives to plead guilty that create a discrepancy between plea and trial that are likely to undermine the consent of defendants.

³⁴ *McKinnon v United States* [2008] UKHL 59; [2008] 1 WLR 1739.

³⁵ Lord Brown, delivering the judgment of the court stated: ‘In one sense all discounts for pleas of guilty could be said to subject the defendant to pressure, and the greater the discount the greater the pressure. But the discount would have to be very substantially more generous than anything promised here (as to the way the case would be put and the likely outcome) before it constituted unlawful pressure such as to vitiate the process (of extradition).’ *McKinnon v United States*, above n. 34, at para. 38.

³⁶ See N. Vamos, above n. 2.

‘PLEA BARGAINING’ IN THE UNITED STATES

In the United States, guilty pleas account for over 97 per cent of criminal convictions at a federal level.³⁷ Guilty pleas are typically entered into as a result of a practice known as ‘plea bargaining.’ This is a process where a person accused of a crime pleads guilty to a lesser crime in order to receive a lesser punishment.³⁸ When a defendant is accused of a crime, the prosecutor will typically make a plea offer to the defence lawyer who will then convey this offer to the defendant who must decide whether to accept the offer, or try to prove their innocence at trial.³⁹ Such offers are often coercive, partly because there are sometimes large discrepancies between the outcome of pleading guilty and the possible outcome at trial.⁴⁰ This practice is relatively free from regulation or judicial intervention, and while judges can reject plea deals or alter sentences agreed upon by the parties this rarely happens in practice.⁴¹

Empirical research provides strong evidence to suggest that this system operates in a coercive way that encourages innocent as well as guilty defendants to plead guilty,⁴² and in fact this is even acknowledged by the system in many states by the so called ‘Alford’ plea, where a

³⁷ *United States Sentencing Commission, 2015 Sourcebook of Federal Sentencing Statistics, Figure C* (2015) <<https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/FigureC.pdf>>

³⁸ R. K. Helm and V. F. Reyna, ‘Logical but incompetent plea decisions: A new approach to plea bargaining grounded in cognitive theory,’ (2017) 23(3) *Psychology, Public Policy, and Law* 367.

³⁹ See H. M. Caldwell, ‘Coercive plea bargaining: The unrecognized scourge of the justice system.’ (2011). 61 *Catholic University Law Rev.* 63.

⁴⁰ *Ibid.*

⁴¹ J. H. Blume and R. K. Helm, ‘The unexonerated’ (2014) 100 *Cornell Law Rev.* 157

⁴² *Ibid.*; H. M. Caldwell, above n. 39; T. M. Zottoli, T. Daftary-Kapur, G. M. Winters, and C. Hogan, ‘Plea discounts, time pressures, and false-guilty pleas in youth and adults who pleaded guilty to felonies in New York City’ (2016) 22(3) *Psychology, Public Policy, and Law* 250; L. E. Dervan and V. A. Edkins, ‘The innocent defendant’s dilemma: An innovative empirical study of plea bargaining’s innocence problem’ (2013) 103(1) *J. of Criminal Law and Criminology*, 1.

defendant can plead guilty while maintaining innocence.⁴³ The fact that innocent defendants are feeling coerced into pleading guilty is partly because of excessive sentence and charge discounts. For example, one study reported anecdotal evidence of a defendant charged with a felony (serious offence) where loss of life was involved who was offered the opportunity to plead guilty to a misdemeanor (a minor offence) and be released from jail, and of a defendant charged with sexual assaults and threatened with a 40-year sentence at trial but offered the opportunity to plead guilty to disorderly conduct and be sentenced only to pay court costs.⁴⁴ However, this may not be the only, or even predominant reason why innocent defendants are pleading guilty in the United States. Research has also suggested that innocent defendants feel coerced into pleading guilty when pleading guilty can allow them to get out of the justice system faster, and specifically when it can allow them to get out of jail where going to trial would involve further remand in custody.⁴⁵ This problem can be illustrated by the case of Erma Faye Stewart. Erma Faye Stewart was an African-American mother of two who was arrested as part of a drug sweep prompted by a confidential informant and remanded in custody. She claimed that she was innocent, but became increasingly panicked as while she was in jail there was no one to care for her two young children. As a result, she agreed to plead guilty to delivery of a controlled substance in order to get out of jail and back to her family, and was sentenced to ten years of probation. During the trial of others arrested as part of the drugs sweep, it was discovered that the informant had lied and all cases were dismissed – however this did not help Erma since she

⁴³ *North Carolina v. Alford*, 400 U.S. 25 (1970); for more information see J. H. Blume and R. K. Helm, above n. 38, at 171-172.

⁴⁴ R. K. Helm, V. F. Reyna, A. A. Franz, R. Z. Novick, S. Dincin and A. E. Cort, above n. 26.

⁴⁵ A. Natapoff, 'Misdemeanors' (2012) 85 *Southern California Law Rev.* 1313 at 1346 - 1347; J. H. Blume and R. K. Helm, above n. 38.

had already pleaded guilty.⁴⁶ This type of situation, and not huge sentence and charge discounts, is the root of many wrongful convictions in the United States.⁴⁷ So, the system in the United States is more complex than just being about large sentence and charge discounts. This means that we cannot assume the system in England and Wales does not operate in a coercive way just because these sentence and charge discounts are not present. In fact, insight into how the need to avoid or get out of jail can pressure defendants can highlight problems that are likely to be present in England and Wales.

GUILTY PLEAS IN ENGLAND AND WALES

England and Wales differs in important respects from the United States system, but although the proportion of cases resolved by plea is lower than in the United States, it is still high. In 2016-2017, 76.9 per cent of defendants (78.1 per cent of defendants in the magistrates' court, and 70.1 per cent of defendants in the Crown Court) in England and Wales pleaded guilty rather than opting to go to trial.⁴⁸ Procedure in England and Wales does differ from that in the United States in important respects. Most importantly, sentencing power is primarily with the Judge (or magistrate) and not the prosecutor (although prosecutors are able to allow defendants to plead guilty to a lesser charge than the one they are accused of, subject to compliance with ethical guidelines).⁴⁹ When a Judge is sentencing a defendant, they will take into account whether the defendant pleaded guilty and if so when, under the Criminal Justice Act 2003 and sentencing

⁴⁶ *Ibid* at 174-175.

⁴⁷ A. Natapoff, 'Misdemeanors' (2012) 85 *Southern California Law Rev.* 1313 at 1346 - 1347.

⁴⁸ *Crown Prosecution Service, Annual Report and Accounts 2016-2017*, <https://www.cps.gov.uk/sites/default/files/documents/publications/annual_report_2016_17.pdf>

⁴⁹ *Ibid* at 626.

guidelines written by the Sentencing Council.⁵⁰ Under the current guidelines, a sentence reduction of one-third should be made (subject to exceptions) where the defendant enters a guilty plea at the first stage of proceedings. This reduction is then reduced the further along proceedings progress prior to the plea being entered, to a maximum of a one-tenth reduction on the first day of trial. This reduction can result in imposing a different ‘type’ of sentence than would be received if convicted at trial, for example by reducing a custodial sentence to a community sentence, or by reducing a community sentence to a fine. These reductions appear modest compared to those offered in the United States.

However, an understanding of the vulnerable position in which defendants in the criminal justice system are in, coupled with insight into reasons that innocent defendants feel coerced into pleading guilty in the United States, reveals incentives to plead that may be operating coercively even in the absence of large charge and sentence length discounts – getting out of custody, avoiding custody, and getting out of the criminal justice system more quickly and easily. Importantly, these incentives can lead to defendants pleading guilty when it is not likely that they would be convicted at trial.

1. Getting out of custody

As in the United States, some defendants in England and Wales can get out of jail by pleading guilty when otherwise they would have to remain in custody. This is so despite the fact that a defendant should not be remanded in custody where ‘there is no real prospect that the person will

⁵⁰ Sentencing Council, ‘Reduction in Sentence for a Guilty Plea Definitive Guideline’ (2017), <https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-plea-Definitive-Guide_FINAL_WEB.pdf>

be sentenced to a custodial sentence in the proceedings.⁵¹ This is because, as discussed below, a defendant with a prospect of a custodial sentence if convicted at trial may be unlikely to receive a custodial sentence when pleading guilty. In addition, even defendants who would have qualified for a custodial sentence but have been held on remand may be able to get out of custody immediately by pleading guilty through arguing that the time they have spent on remand in prison is enough. This is particularly important where a defendant knows that they are highly unlikely to receive a custodial sentence if they plead guilty, due to indications given as the result of a *Goodyear* hearing (where an indication of the likely maximum sentence should the defendant plead guilty is given).

The potential for defendants to be coerced into pleading guilty to get out of jail immediately, or at least more quickly, is exacerbated by long waiting times to contest guilt at trial and relatively short waiting times to enter a guilty plea. In 2009, 53,400 defendants proceeded against at the Magistrates Court (three percent of the total number of defendants) and 39,848 percent of defendants tried at the Crown Court (thirty-four percent of the total number of defendants) were remanded to custody awaiting trial.⁵² In 2016, the average waiting time for defendants committed for trial to the Crown Court was significantly longer for those who pleaded not guilty than those who pleaded guilty (32.3 weeks compared to 15.1 weeks).⁵³ This is further

⁵¹ Sch. 1 of the Bail Act 1976, as amended by Sch.11 of the Legal Aid, Sentencing, and Punishment of Offenders Act 2012.

⁵² Ministry of Justice, ‘Criminal Statistics England and Wales 2009’ (2009), <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217947/criminal-statistics-annual.pdf>

⁵³ Ministry of Justice, ‘Criminal court statistics quarterly, England and Wales, January to March 2017’ (2017), <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/623096/ccsq-bulletin-jan-mar-2017.pdf>

exacerbated by the fact that conditions in remand prisons are often severe, which can add to the stress and frustration of defendants awaiting trial and sentence.⁵⁴ When faced with the opportunity to get out of jail to care for dependents, resume employment or education, and repair damage to relationships and reputation even innocent defendants may feel coerced into pleading guilty. This can be very important for any defendant, but particularly so for defendants who cannot afford to remain in custody. As discussed above, this fact that the opportunity to get out of custody may be coercive even for innocent defendants has already been illustrated in the context of the United States system.

2. Avoiding Custody

Relatedly, if defendants may feel coercion to plead guilty to get out of jail when on remand, it is likely that they may also feel coercion to plead guilty where this provides a sure opportunity to avoid custody all together. Although sentence length reductions in England and Wales seem modest, sentence reductions may be problematic due to the potential for pleading guilty to result in imposing a different ‘type’ of sentence than that which would be received if convicted at trial. This means that a defendant who would be likely to receive a custodial sentence if convicted at trial could receive a non-custodial sentence by pleading guilty, at least in cases where a non-custodial sentence is permitted by sentencing guidelines.⁵⁵

⁵⁴ See HM Inspectorate of Prisons, ‘Remand prisoners: A thematic review’ (2012), <<https://www.justiceinspectrates.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2012/08/remand-thematic.pdf>>, noting that 29 per cent of remand prisoners said they had spent less than two hours out of their cells each day, only 42 per cent had spent more than four hours out of their cell, and only 41 per cent of remand prisoners said they had access to outside exercise three or more times a week.

⁵⁵ This issue was raised in relatively early plea jurisprudence in the case of *R v Turner*, above n. 21. In this case Turner claimed that his guilty plea was entered purely because he was led to believe that it would make the difference between a custodial and non-custodial sentence. The

The opportunity to be certain of avoiding custody is likely to be both practically and psychologically persuasive to defendants. For some defendants, the potential downsides of threatened custody may be so severe that they cannot risk going to trial, and are left with no practical choice but to plead guilty. These include defendants in similar situations to Erma Faye Stewart, who are single parents. Defendants may also have insecure employment that could be lost due to any time in custody, or they may have an insecure financial or housing situation and may be unsure how they would cope were they to receive a custodial sentence. Even where innocent, these defendants are not able to risk losing their jobs, homes, financial-security, or even child custody by exercising their right to trial, when a guilty plea can safeguard these, at least in the short-term. Having a certain (or almost certain) way to avoid custody through the guilty plea and a possible custodial sentence at trial means that these defendants are left with no practical choice but to plead guilty.

Psycho-legal research also suggests that offering a sentence-type if a plea is entered that is different from the sentence-type if convicted at trial, is likely to be psychologically persuasive and could even operate in a coercive way, altering the way defendants perceive their options and their ability to maintain their innocence. Research in cognitive psychology suggests that at least in adults, decision-making is driven by categorical, meaning-based differences rather than more superficial and fine-grained distinctions.⁵⁶ This means that where plea decisions involve

judgment of the Court of Appeal, supporting the guilty plea in the case, stated that the guilty plea should be a statement of remorse and was a free choice of the defendant.

⁵⁶ R. K. Helm and V. F. Reyna, above n. 38. In this article, the authors apply a psychological theory of memory and decision-making (Fuzzy-Trace Theory) to plea deals to suggest that neuro-typical adults are likely to be driven by categorical distinctions in plea offers where these

considerations of guilt or innocence (primarily a meaning-based categorical distinction) and relatively short sentence reductions (primarily more superficial and fine-grained distinctions) decision making is likely to be driven more by guilt or innocence. This means that innocent defendants are more likely to go to trial, and guilty defendants are more likely to plead guilty, as is desirable. However, where the decision to plead guilty includes consideration of another categorical meaning-based variable (such as the distinction between a custodial and non-custodial sentence) this is likely to interfere with consideration of factual guilt or innocence. Defendants are left not just deciding whether they want to admit guilt in exchange for a small reduction in sentence, but are left having to decide whether it is worth them risking a custodial sentence when they can be fairly sure they will not get a custodial sentence if they plead guilty.

In addition, decision-making research shows that options are often viewed comparatively and can be influenced by heuristics (mental shortcuts) known as ‘contrast effects.’ Contrast effects occur when exposure to a previous piece of information influences a subsequent evaluation through providing a contrast to it. For example, in one experiment it was shown that judicial assessments of the credibility of a psychiatrist were influenced by having previously seen information about a more poorly qualified psychiatrist.⁵⁷ Specifically, judges who read about a poorly qualified psychiatrist first found a well-qualified psychiatrist to be more credible than those who had not also evaluated the poorly qualified psychiatrist. In this example, although previous exposure to the poorly qualified psychiatrist did not influence the credentials of the

are present. This is due to a developmentally advanced cognitive processing style known as ‘gist’ processing. For more information see V. Reyna, ‘A new intuitionism: Meaning, memory, and development in Fuzzy-Trace Theory,’ 7(3) *Judgment and Decision Making*, 332.

⁵⁷ J. J. Rachlinski, A. J. Wistrich, and C. Guthrie, ‘Altering attention in adjudication,’ (2013) 60(6) *UCLA Law Rev.* 1586.

well-qualified psychiatrist, it did make the well-qualified psychiatrist look better by providing a contrast. In the context of decisions to plead guilty, knowledge of a possible custodial sentence if convicted at trial may make a definite non-custodial sentence as a result of a guilty plea look less bad even for an innocent defendant. In this situation, innocent defendants will be cognitively disposed to display the downsides of receiving a conviction provided that the sentence for that conviction is non-custodial in nature (since this is, at least, much better than a conviction with a custodial sentence). This may lead innocent defendants to be willing to accept a conviction and non-custodial sentence for a crime that they did not commit. In these situations, defendants in a vulnerable position in the criminal justice system are not being protected from being offered deals that can essentially be coercive.

3. Getting out of the criminal justice system more quickly and easily

Finally, although custody is perhaps the most important incentive, getting out of the criminal justice system more quickly and easily in general may also be a powerful incentive for some defendants in England and Wales. Going to trial involves significant expenditure that not all defendants are able to incur. First, limitations to the legal aid system mean that some defendants may not be able to afford the cost of going to trial, including the cost of legal representation.⁵⁸ Only those with an adjusted income of £12,475 or less are likely to have their legal

⁵⁸ The rules about who qualifies for legal aid are set out in the Legal Aid Sentencing and Punishment of Offenders Act 2012 and accompanying regulations (primarily the Criminal Legal Aid (Financial Resources) Regulations 2013). To qualify for legal aid, a defendant must meet the interests of justice test (a merits-based test) and be financially eligible (a means-based test). In the magistrate's courts, anyone with an adjusted household income of £22,325 or more is not eligible for any legal aid. In the Crown Court, anyone with a household disposable income of £37,500 or more is not eligible for legal aid.

representation fully funded.⁵⁹ This means that many defendants have to pay at least a significant contribution towards their legal costs. If defendants have to pay privately, they may not be able to afford the fee for trial representation, and so are left with no choice but to plead guilty or to represent themselves and thus enter into a trial process they are unlikely to fully understand. In addition, even defendants representing themselves are likely to incur costs in certain types of case, for example in cases in which expert evidence must be obtained this will need to be paid for. Essentially, the decision regarding whether to plead guilty stops being a decision about a certain reduced punishment or the possibility of a more severe punishment, and starts to be a decision about a certain reduced punishment or the possibility of a more severe punishment plus the significant expenditure necessary as part of a trial process.

In addition, going to trial involves significantly more time than deciding to plead guilty. Pleading guilty may end up being a better option due to the relative speed and ease with which a matter can be closed. In 2016, the average hearing time was 13.8 hours when a defendant plead not guilty compared to 1.6 hours when a defendant plead guilty.⁶⁰ This is in addition to the preliminary hearings that are typically involved in a case, and periods of adjournment. Recent initiatives have made entering guilty pleas even easier, specifically for traffic offences, by putting them online.⁶¹ Thus, while pleading not guilty and going to trial will cause a defendant to have to take time off work, and likely cause them to incur significant expenses (for example, the cost of representation, the cost of travel, the cost of child care), pleading guilty can be as easy as

⁵⁹ s. 31 of the Legal Aid Sentencing and Punishment of Offenders Act 2012, and s.18 of the Criminal Legal Aid (Financial Resources) Regulations 2013.

⁶⁰ Ministry of Justice, above n. 53.

⁶¹ See BBC News 'Online motoring offences plea service launched' (2015) <<http://www.bbc.co.uk/news/uk-31653760>>.

going online and clicking through a guilty plea system. This provides a powerful incentive to plead guilty among defendants who are under financial strain or who have insecure employment who may view a guilty plea as their only realistic option, even independently of the risk of custody. This may well result in defendants who are financially insecure pleading guilty when innocent and getting swept in to the criminal justice system, while defendants who are financially secure and can afford to go to trial will go to trial and be found not guilty.

ENSURING CONSENT IN PLEA DECISIONS

Understanding the unique vulnerabilities of defendants in the criminal justice system and incentives present in the system that may lead them with no practical choice but to plead guilty, can, it is suggested here, help us to design reforms to ensure guilty pleas are entered freely and truly consensually. Importantly such reforms do not need to involve eliminating guilty pleas, or sentence length reductions, and so can retain many of the utilitarian benefits of the current system.⁶²

So, what can be done in this regard? First, although a one-third reduction in sentence may appear reasonable and relatively modest, the decision to plead guilty should not make the difference between a custodial sentence and a community sentence. According to the Sentencing Council ‘Imposition of Community and Custodial Sentences Definitive Guideline,’ *‘a custodial sentence must not be imposed unless the offence or the combination of the offence and one or more*

⁶² For a summary of some of the benefits to the system of allowing guilty pleas, see Sentencing Council, ‘Reduction in Sentence for a Guilty Plea Definitive Guideline’ (2017), <https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-plea-Definitive-Guide_FINAL_WEB.pdf>

*offences associated with it was so serious that neither a fine alone nor a community sentence can be justified for the offence.*⁶³ If a community sentence can be justified for an offence, this community sentence should be the penalty given regardless of whether conviction for the offence occurs via guilty plea or via trial. If a community sentence cannot be justified for an offence, custody should be the sentence regardless of whether the conviction for the offence occurs via guilty plea or trial. When deciding whether to impose a custodial sentence, the key consideration should be the nature of the offence not the means through which conviction for the offence has occurred. By ensuring that the sentence type given is consistent regardless of the means through which conviction occurs, the system can protect innocent defendants from feeling they have no practical choice but to plead guilty to avoid even a small risk of a custodial sentence.

Second, and perhaps more ambitiously, the discrepancy in time and expense between trial and plea needs to be reduced. The current system is likely putting some defendants in an impossible position where they are faced with a financially and logistically impossible task of mounting a trial defence, or an easy way out which *only* requires them to accept guilt. Initiatives aimed at making it easier to plead guilty only increase this discrepancy between plea and trial and only make mounting a defence at trial seem a more impossible task. Making contesting guilt significantly more difficult, expensive, and time-consuming than pleading guilty disadvantages innocent defendants who are left wanting to contest their guilt at trial but knowing that in reality this may not be a good or even realistic option for them given external pressures. Relatedly, the system must ensure that defendants are not remanded in custody where they are likely to be able

⁶³ Sentencing Council, ‘Definitive Guideline on the Imposition of Community and Custodial Sentences’ (2016), <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive-Guideline-Imposition-of-CCS-final-web.pdf>>

to receive a non-custodial sentence if they plead guilty. Although the Legal Aid, Sentencing and Punishment of Offenders Act 2012 means that a defendant should not be remanded in custody where there is no real prospect of being sentenced to a custodial sentence in legal proceedings, this is subject to a number of exceptions, and does not necessarily prevent defendants being remanded in custody where they would receive a non-custodial sentence by pleading guilty (as opposed to at trial).⁶⁴ Defendants should not be faced with having to remain in poor conditions away from family and employment in remand prisons if they want to contest guilt where they can be released if they no longer want to contest guilt. This circumstance, when it arises, is highly likely to coerce innocent defendants into pleading guilty to get out of jail. Making conditional bail options such as electronic monitoring or tagging more widely available may help here, since such options can ensure attendance at trial while also recognizing that a particular defendant may not need to be kept in custody for other reasons (for example, dangerousness).⁶⁵

CONCLUSION

Defendants in the criminal justice system are in an inherently vulnerable position, typically with limited resources and with liberty, freedom, and reputation at stake. The need for the criminal justice system to provide protections to defendants (who may be innocent) in this context is overwhelming. However, the current criminal justice system offers insufficient safeguards to protect defendants deciding whether to plead guilty or go to trial, and psycho-legal research,

⁶⁴ Bail Act 1976 Sch. 1, as amended by Legal Aid, Sentencing, and Punishment of Offenders Act 2012 Sch. 11.

⁶⁵ For a discussion of electronically monitored punishment and its current implementation in different jurisdictions including England and Wales, see M. Nellis, K. Beyens, and D. Kaminski, *Electronically monitored punishment: International and critical perspectives* (2013).

research on the psychology of decision-making, and empirical evidence from the United States system, suggest such deals may operate coercively. This results in a system in which defendants may be placed in situations in which they feel that they really have no choice but to plead guilty to a criminal offence. Particularly for defendants who are single parents, who have low income, insecure employment and housing, or self-run businesses, pleading guilty can be the only sure way to avoid outcomes that they are not able to cope with – such as custody, significant financial expense, or impossible time commitment. Perhaps most worryingly, the defendants who are most likely to be left with no practical choice but to plead guilty in these situations are those from low socio-economic status backgrounds. This means that while those with access to greater resources may be able to accept these risks and mount an effective defence at trial, those with fewer resources will be disproportionately and wrongly swept up into the criminal justice system through pleas. The system must do more to protect these defendants, and must reduce what could be coercive discrepancies between plea and trial as part of a broader effort to protect vulnerable defendants.

Ultimately, at least in the case of defendants choosing to plead guilty, the criminal justice system is neglecting the fact that these defendants are in an inherently vulnerable position and need access to institutional support to truly exercise their own freedom. We need to move away from the view of defendants as agents who automatically have free choice when deciding whether to plead guilty, and towards a system which asks how can we facilitate consensual, voluntary, choices for defendants accused of a criminal offence? This article provides the starting point for such a discussion, raising issues regarding the integrity of the criminal justice system in England and Wales that it is critical to address.