



A barrister's role in the plea decision: an analysis of drivers affecting advice in the crown court

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A Barrister's Role in the Plea Decision: An analysis of drivers affecting advice in the Crown Court

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I declare that the work presented in this thesis is my own

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Abstract: This thesis explores the reasons behind barristers' advice to defendants in the Crown Court on plea, primarily through interviews with criminal law practitioners themselves. Beginning with a critical overview of the current research, the thesis argues that the views of criminal barristers are a neglected significant source of information in developing an understanding of why particular advice is given. The thesis, in the context of other research, analyses the data from interviews conducted with current practitioners on the London and the Midlands Circuits, and discusses the various drivers that act upon barristers in deciding what advice to give. Starting with the actual advice given and the advising styles adopted, the thesis explores why guilty pleas might be advised and plea bargains sought with prosecutors. The research goes on to examine the impact of various influences, including legal, ethical, cultural, regional and financial to produce an overview of what factors impact upon a barrister's advice. The thesis argues that the current view of the Bar sustained in much of the literature is insufficiently nuanced and outdated, and that the reasons behind the advice given to defendants on plea are extraordinarily varied, occasionally contradictory, and highly complex. The thesis concludes that the data from the interviews warrants a rethink of why particular advice is given and that discovering what drives barristers' advice is critical to formulating law and government policy.

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Chapter 1: Introduction

This thesis explores the drivers behind the advice given by barristers to defendants on plea in the Crown Court in England and Wales. By drivers, this thesis means motivation, incentive, reason or influence. According to Bottomley, the plea is perhaps the most important decision in the criminal process.¹ The plea is entirely conclusive of fact-finding in a Crown Court case. In entering a plea of guilty, the matter of whether the defendant committed the offences charged is settled. The court, except in exceptional circumstances, will not reach behind the plea and explore the correctness of the facts that determine guilt.² In deciding what plea is to be entered, the advice given by the defence barrister is of crucial significance. It is the defence barrister, with his or her knowledge of the law and experience of procedure, who meets with the defendant, evaluates the prosecution and defence cases and advises on the potential sentence. On the basis of this advice, and that of the solicitor, the defendant makes his or her decision on whether to enter a plea of guilty or not guilty, and therefore whether the case proceeds to trial.

However, why, and to a lesser extent how, barristers give advice as they do is not entirely clear. As will be explored in Chapter 2, some of the critical scholarship alleges that barristers subscribe to a guilty plea culture in which cases are generally approached by lawyers with an expectation that the defendant will plead guilty. With that expectation, defendants are pressurised by their own lawyers into pleading to offences to which they may have had a suitable defence. Alternatively, barristers are said to be part of a courtroom community which emphasises the expedition of cases through guilty pleas, or, that barristers attempt to maximise their fees through high case turn over and guilty pleas. According to this view, the barrister in conforming to the overwhelming culture of criminal defence, or the expectations of his or her colleagues, or to generate as

¹ A. K. Bottomley, *Decisions in the Penal Process* (Martin Robertson, London 1973) 105.

² The defendant must have a free-choice of plea. The plea is a nullity if he or she is subject to such pressure that he or she does not have a free-choice: *Inns* (1974) 60 Cr App Rep 231. The court may hold a *Newton* (1982) 77 Cr App R 13 hearing if the prosecution and defence disagree on the factual basis of an offence. However, this is a hearing to determine the mitigating or aggravating features of the offence only. Questions regarding the defendant's fitness to enter a plea are determined by the judge, who must decide on the basis of medical evidence whether, amongst other things, the defendant understands the difference between a plea of guilty and not guilty and the course of the proceedings so as to make a proper defence: Criminal Procedure (Insanity) Act 1964 s 4(5) (as amended). *Pritchard* (1836) 7 C & P 303; *Berry* (1977) 66 Cr App Rep 156, CA; *Robertson* [1968] 3 All ER 557.

much money as possible, manipulates the defendant through a variety of psychological means and persuades them not to go to trial.

This thesis argues that there are two main limitations with the current literature. Firstly, the majority of research on how and why plea advice is given pre-dates a huge amount of significant change and development in the criminal law. The research presented here provides a more up to date study of criminal barristers in the context of contemporary law and procedure. Secondly, the literature is missing a key aspect of the empirical evidence needed to create a fuller and more accurate picture of the advice-giving process, namely research with barristers themselves regarding the motivation behind their advice on plea. This thesis has sought to fill that lacuna through qualitative interviews with 24 criminal law practitioners, and the data from those interviews forms the basis of the five substantive chapters that are presented below.

After a review of the current scholarship and law in Chapter 2 and a formal identification of the research question, the thesis briefly details the methods used in carrying out this research in Chapter 3. Chapters 4 to 8 constitute the main body of the study and attempt to explain the data from the qualitative research undertaken. In Chapter 4 the thesis explores a defence barrister's advice on the micro, case-by-case level. Without intending to be all encompassing, this chapter details how barristers deal with the various factors that affect the case at hand and translate those factors into advice. This involves a series of complex decisions which take into account a multitude of factors including such matters as evidence and sentence, as well as bad character applications and sentencing indications. This chapter shows that barristers are thoroughly engaged in their cases and sets out the detailed practical, as well as sometimes ethical considerations that face a barrister in deciding what advice to give and how that advice should be delivered.

Chapter 5 sets out a number of issues in relation to the practice of plea bargaining. This chapter presents the data gathered on why and how plea bargains are sought on behalf of the defendant, and attempts to answer some of the criticisms of the practice. Defendants are reframed as a barrister might see them; as those who face a prosecution case on a spectrum of evidence from very strong to very weak, rather than as the *de facto* innocent

or guilty. This chapter argues that bargained pleas are often sought because the barrister wishes to gain the optimal outcome for the defendant and are the result of a reasoned consideration by the defending barrister and defendant of risk and potential sentence.

Chapter 6 examines the context for and manner in which barristers are paid. As well as presenting the interviewees' views on whether the manipulation of fees for financial gain is possible or desirable, this chapter presents an alternative way of thinking about the role financial incentives play in professional decision-making. This chapter also models barrister pay according to the latest pay scheme and shows how financial incentives interrelate with other incentives to produce the advice given to defendants.

Chapter 7 explores the barrister-solicitor relationship, and discusses how the influence of a solicitor might affect barrister decision-making. This chapter argues that barristers are subject to subsequent incentives- those incentives that primarily affect the solicitor are passed on to the barrister and affect how he or she might behave. This chapter looks at the financial incentives affecting solicitors, revealing that under current fee arrangements solicitors may now strongly favour trials. This chapter sets out the potential problems that this fee structure might cause the barrister-solicitor relationship and speculates as to what future difficulties solicitor pay rates may create for defendants and the criminal bar.

Finally, Chapter 8 examines the potential impact on advice-giving of the court community. It develops a potential, partial explanation for the significant differences observed in the judicial statistics for the guilty plea and cracked trial rates between London and the Midlands. Using a theoretical model of repeat players and court communities, this chapter argues that the size and contact rate of the Bar in the Midlands has allowed a court community to develop which has a tangible effect on the advice given to defendants. Within a court community made up of lawyers who are often repeat players, relationships of trust emerge that assist the flow of information between the prosecution and defence, allowing negotiations to conclude more successfully. Furthermore, within that community, the participants' definitions of how defendants should be dealt with tend to converge, allowing cases to be resolved more regularly

without trials. This chapter will present data that supports this contention, including the interviewees' perceptions on their own working practices.

On the basis of the data gathered from barristers themselves, these chapters are intended to reveal the many and varied incentives that lie behind a barrister's advice to the defendant. This thesis is an attempt to show that the current view of guilty plea culture, or court communities, or simple fee-result explanations do not realise the extremely complicated and nuanced reasons why defendants are advised by barristers to plead guilty, accept guilt to a reduced charge or go to trial.³

³ All website addresses referred to were current when last accessed on 14 November 2009. The law has changed in some areas since the interviews took place. Where relevant to the discussion this change is noted in the text.

Chapter 2: Pleading guilty: historical and comparative developments

1. Introduction

The purpose of this chapter is to identify and critically evaluate the main strands of research and commentary on the role of barristers in the development and use of the guilty plea in the Crown Court of England and Wales. By discussing the literature and the law this chapter will identify the central research question (as well as ancillary questions), that this thesis has attempted to answer. Although the main discussion in this chapter will be on contemporary accounts and the law of plea bargaining or negotiated pleas, it will also briefly analyse historical studies in order to place the current developments in context. The literature in combination with the relevant law on plea is extensive, especially when the American research is taken into account. In an effort to manage the literature more effectively and concentrate on what is relevant to this research, this chapter focuses on research covering the Crown Court and the activities of barristers. Inevitably the literature explored includes the activities of the lower courts. Barristers regularly represent defendants in magistrates' courts and the bridge provided by either-way offences has an important impact on the activities of the Crown Court.

After a brief discussion of the origins of plea bargaining and the relatively new procedures of diversion from the criminal justice process, the main body of the chapter will be a critical examination of the research and approach of authors who have studied the guilty plea and plea bargaining in English courts in the last forty years. These authors have addressed the question of why, in a system based on the presumption of innocence, so many defendants decide to admit to criminal conduct without any kind of trial. Much of this body of research has been critical of lawyers, including barristers, and their alleged complicity with the courts in producing guilty pleas. To provide context there will also be a discussion of the current law and the approach of Parliament and the courts to guilty pleas.

2. The origins of plea bargaining in Anglo-American law

There remains a degree of dispute over the precise origins of plea bargaining in Anglo-American law. While researchers agree that the historical data indicates that guilty pleas began to rise dramatically in both common law jurisdictions in the mid-19th Century⁴, the reasons for the escalation is not necessarily so clear. Dividing broadly in to three groups, authors have attributed the rise of guilty pleas, and by inference plea bargaining, to either the “lawyerization” of trials⁵, the increased work load on courts⁶, or to the demands of the wider political economy.⁷

Malcolm Feeley and John Langbein have written widely on the development of the criminal courts of England in the 18th and 19th Centuries. The data produced by Feeley on the “lawyerization”, the development and domination of trials by lawyers, at the Old Bailey provides, however, a limited explanation for the rise of guilty pleas in England.⁸ The explanation that lawyers over-complicated the system of trial through developing methods of excluding unfairly gained evidence and confessions, and cross examination, and turned the courts to plea bargaining to cope, lacks the contextual evidence of other studies. As George Fisher shows in his analysis of Massachusetts in the same period, documents that explain the motives of individuals in pursuing guilty plea agreements are vital in interpreting changes in pleading practice. Fisher’s account attributes plea

⁴ For evidence of the rise of guilty pleas in the United States in the 19th Century: R. Moley, ‘The Vanishing Jury’ (1928) 2 S.Cal.L.Rev. 97; A. Alschuler, ‘Plea Bargaining and Its History’ (1979) 79 Colum.L.Rev. 1, 19. For guilty plea rates at the Old Bailey to 1912: M. Feeley, ‘Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining’ (1997) 31 Is.L.R. 18.

⁵ Feeley (n.4), M. Feeley, ‘Plea Bargaining and the Structure of the Criminal Process Journal of Justice Systems’ (1982) 73 Just.Sys.J. 338; J. Langbein, *The Origins of the Adversarial Criminal Trial* (OUP, Oxford 2003), ‘Understanding the Short History of Plea Bargaining’ (1979) 13 Law and Society Review 261, ‘The Criminal Trial Before Lawyers’ (1978) 45 U.Chi.L.Rev. 263.

⁶ G. Fisher, ‘Plea Bargaining’s Triumph’ (2000) 109 Yale L.J. 857; *Plea Bargaining’s Triumph: A History of Plea Bargaining in America* (Stanford University Press, Stanford CA 2003).

⁷ M. Vogel, *Coercion to Compromise: Plea Bargaining, the Courts and the Making of Political Authority* (OUP, Oxford 2007), ‘The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860’ (1999) 33 Law and Society Review 161; M. McConville and C. Mirsky, *Jury Trials and Plea Bargaining: A True History* (Hart Publishing, Oxford and Portland, Oregon 2005).

⁸ Feeley (n.4).

bargaining to an increased work load in the civil courts.⁹ These conclusions are enriched by a reliance on statistical measures, letters, newspapers and other contextual documents. Equally, McConville and Mirsky's assessment that plea bargaining was a phenomenon of the political economy of New York court rooms, where elected officials wished to aggregate justice rather than spend time and money on individuals, is based on a detailed analysis of contemporary documents.¹⁰ When compared, the research of Feeley on English courts lacks important evidence on the motivation of those engaged in criminal practice.

Unfortunately, neither the Fisher nor the McConville and Mirsky's explanations can be readily transplanted to England. Undoubtedly, England went through a similar process of industrialisation and population change during the 19th Century, however, similar documentary evidence (as well as evidence of attrition of charges and changes in prosecutions) would be needed to confirm Fisher's assertion that case load was the primary factor behind plea bargaining. McConville and Mirsky's reasoning is even more difficult to apply to England given the relative lack of direct political influence on the treatment of criminal cases. Unlike most United States jurisdictions, judicial and prosecutorial positions are not occupied in England by elected officials. The relative non-politicisation of English court actors might explain the lower incidence of guilty pleas (and possibly a reduced incidence of plea bargaining) in English courts compared to their American counterparts, however, much further study would be required before any firm link between the political economy and guilty pleas could be established.

3. Pleading guilty and admitting to offences in contemporary English criminal justice

It should be noted from the outset that the literature on guilty pleas and plea bargaining is set in the context of an overall governmental policy move in the past 20 years towards

⁹ Fisher (n.6) (2000) 996-1001.

¹⁰ McConville and Mirsky (n.7) 334.

implementing laws and incentives to increase the number of defendants who plead guilty. As Ashworth and Redmayne commented in 2005, ‘the present Government has reaffirmed its objective of getting more defendants to plead guilty and to do so earlier.’¹¹ Successive governments, and particularly the current Labour government, have sought to curb defendant access to trials, increase incentives to plead guilty, and remove legal protections previously given to defendants. This includes the more recent expansion of policies that seek to divert defendants from the criminal justice process.

a. Diversion

Diversion removes defendants from the criminal justice system without a formal process of charge, trial and sentence, but requires an admission to an offence. This way of dealing with defendants has reached new prominence since the introduction of conditional cautioning under section 22 of the Criminal Justice Act 2003. It is necessary to consider whether the pool of defendants who reach barristers in the Crown Court has changed. If a large number of defendants are now admitting to offences through a non-judicial system, this has important implications for the continued relevance of previous research.

i. Simple cautions

Simple cautions are within the discretion of individual police officers and are not statutorily defined, although National Standards do exist to try and establish consistency in their application.¹² Although not a criminal conviction, a caution is an admission to the offence. Once a caution is administered, a record of the caution is entered onto the Police National Database, and if the offence is listed under Schedule 3 to the Sexual

¹¹ A. Ashworth and M. Redmayne, *The Criminal Process* (3rd edn OUP, Oxford 2005) 286.

¹² Home Office, ‘Cautioning of Adult Offenders’ Home Office Circular 30/2005 (2005) <<http://www.homeoffice.gov.uk/about-us/publications/home-office-circulars/circulars-2005/030-2005>>. Simple cautions are not available for offenders under the age of 18. Offenders under the age of 18 are dealt with under a statutory scheme of reprimands and warnings under the Crime and Disorder Act 1998.

Offences Act 2003 the offender's name is entered onto the sexual offenders register. The caution can be used against the offender in court as part of evidence of bad character under the Criminal Justice Act 2003, section 101 in a future prosecution. If the offender works in a certain occupation (such as teaching, nursing, etc) their employer is informed.

ii. Statutory cautions

The new statutory scheme of conditional cautioning under section 23 of the Criminal Justice Act 2003 allows prosecutors to ask a police officer to administer a caution with certain conditions attached. According to section 23(3) of the Act, the conditions attached must have the objective of either rehabilitating the offender, or making reparations to the victim of the offence, or both. Under the Code of Practice, a conditional caution should not be mentioned until the offender has made a clear and reliable admission and the offender should be given access to legal advice before accepting the caution and the proposed conditions.¹³

For the purpose of this research it is not necessary to rehearse the arguments for and against the use of cautioning by the police.¹⁴ It is sufficient to say that cautioning removes from the criminal justice process many defendants who might previously have been prosecuted, and possibly pleaded to, or been found guilty of an offence. Although as some have argued, it would take a very strong person to reject a caution and risk prosecution¹⁵, an inevitable conclusion is that a significant number of those cautioned might have pleaded guilty to an offence in the courts. The Home Office produces statistics which examine the cautioning rate; that is the total number of those cautioned as a percentage of those either cautioned or convicted of an offence. In 2007 the

¹³ Home Office, 'Code of Practice on Conditional Cautioning' (2004) paragraph 4.1
<<http://www.homeoffice.gov.uk/documents/cond-caution-cop>>

¹⁴ For critical commentary on the use of police cautioning: *Ashworth and Redmayne* (n.11) chapter 6; A. Sanders and R. Young, *Criminal Justice* (3rd edn OUP, Oxford 2007) chapter 7; A. Sanders, 'What policies underlie criminal justice policy in the 1990s?' (1998) 18 OJLS 533; R. Evans, 'Evaluating Young Adult Diversion Schemes in the Metropolitan Police District' [1993] Crim LR 490; G. Dingwall and C. Harding, *Diversion in the Criminal Process* (Sweet and Maxwell, London 1998).

¹⁵ *Ashworth and Redmayne* (n.11) 156.

cautioning rate was 24% for summary offences (excluding motoring offences) or 157,800 people, and 40% for indictable only offences (excluding motoring offences) or 205,100 people.¹⁶ Although some might not have been prosecuted at all, this is a remarkable number of people who may have previously faced criminal prosecution in the Crown Court.

iii. Penalty Notices for Disorder

Another form of diversion brought into force by the Labour government has been Penalty Notices for Disorder (PND) issued by the police. Under the Criminal Justice and Police Act 2001 section 1, the police may issue a fine of between £50 and £80 for minor offences including retail theft (normally under £100), criminal damage (normally below £300) or other disorderly behaviour under section 5 of Public Order Act 1986.¹⁷ The issuance of a PND does not constitute a criminal conviction. Over 140,000 PNDs were issued between their introduction in late 2003 to November 2005.¹⁸

The removal of defendants who might otherwise have been prosecuted for criminal offences is significant in understanding the changing pool of defendants who might previously have been prosecuted. Offences that might previously have been tried in the Crown Court, such as theft, may now be dealt with via a PND. Those defendants who have committed minor forms of the offence may now be dealt with outside the judicial system and such cases may no longer be reaching the Crown Court in larger numbers.

In combination with cautioning it can be theorised that the number of defendants entering the Crown Court and those who would otherwise have looked to resolve their

¹⁶ Home Office, 'Criminal Statistics: England and Wales 2007' (Home Office Statistical Bulletin, 2008), Table 3.3.

¹⁷ Sentencing Policy and Penalties Unit, 'Criminal Justice and Police Act 2001 (sections 1-11) Penalty Notice for Disorder Operational Guidance Retail Theft and Criminal Damage' (Circular 2009/04, Ministry of Justice July 2009) <<http://www.justice.gov.uk/publications/criminal-justice-police-act-retail-pnd.htm>>.

¹⁸ Office for Criminal Justice Reform, 'Penalty Notices for Disorder: review of practice across police forces' (Ministry of Justice, 2006) <<http://www.crimereduction.homeoffice.gov.uk/policing20.htm>>

case via a plea of guilty has been reduced by both cautioning and PNDs. Therefore the pool of defendants encountered by barristers is almost certainly substantially different from those seen in court 20 years ago. Those who might previously have indicated a readiness to plead guilty to more minor versions of offences may now make admissions at a pre-judicial stage in order to avoid a court appearance. This has implications for the advice given by barristers on plea and the number of contested cases.

b. Guilty plea rates in England and Wales

Various historical figures exist for guilty plea rates in England and Wales, but the proportion of defendants pleading guilty between the 1950s and 1970s in the superior criminal court appears to have been 57-75% depending on the study.¹⁹ Gibson found a plea rate of 75.5% in 1956; the Association of Chief Police Officers 64% in 1965 (a countrywide sample); Rose a rate of 57% in 1967; Zander a rate of 63% in 1972 (a combined sample of defendant in the Inner London Crown Court and Old Bailey); and approximately 60% according to the Lord Chancellor's Department in 1972.²⁰

The guilty plea in English courts is entirely determinative of the process of guilt finding. Once a defendant has pleaded to the charge addressed to him or her, the court turns to sentencing and does not investigate the factual basis for the offence unless it is pertinent to sentence itself.²¹

The plea of guilty has become central to the English criminal justice process. The classic

¹⁹ The Crown Court was established by the Courts Act 1971, and replaced the courts of Assize and Quarter Sessions.

²⁰ E. Gibson, 'Time Spent Awaiting Trial' (Home Office Research Unit Report, HMSO, London 1960) 9; Association of Chief Police Officers, 'Trial by Jury' (1966) 116 NLJ 928; G. Rose, 'Royal Commission on Assizes and Quarter Sessions, 1966-69: Special Statistical Survey' (1971) 34, Table 22; M. Zander, 'Are too many professional criminals escaping conviction?: A study of Britain's two busiest courts' (1974) 37 MLR 28, 30; Lord Chancellor's Department, 'Statistics on Judicial Administration' (1973) Table 3.2 and 5.5.

²¹ A court may conduct a *Newton* ((1982) 77 Cr App R 13) hearing when the prosecution and defence do not agree on the factual basis of the offence.

image of a jury meticulously weighing the evidence after the testing of witnesses under cross examination does not reflect the reality of the English courts.²³ Of the 96,027 defendants dealt with in the Crown Court in 2008, 65,571 (68%) entered a guilty plea.²⁴ In the magistrates' courts, where 95% of all criminal cases are heard, over 92% of defendants pleaded guilty.²⁵ Therefore only 2% of defendants had their case heard in a jury trial and only 10% of defendants contested their case in some sort of trial hearing. Where the guilty plea deals with 90% of the cases in the system it is proper to give detailed consideration as to how those pleas are brought about. According to many commentators, guilty pleas are not merely a straight admission of the offence by the accused. Rather, pleading guilty is the result of a number of forms of plea bargaining. It is to those different forms within the English system to which this chapter now turns.

4. The form of plea bargaining in English courts

The form of plea bargaining in the English courts is perhaps not as obvious as that displayed in the United States where prosecutors can address the court on sentencing and make recommendations.²⁶ Furthermore, it seems that until the 1970s plea bargaining was an unrecognised issue in the English literature.²⁷ It was not until the studies of the courts by Dell²⁸, McCabe and Purves²⁹ and later those of Bottoms and McClean³⁰ and McConville and Baldwin³¹, that plea negotiation was observed to be common place.

²³ P. Darbyshire, 'The Mischief of Plea Bargaining and Sentencing Rewards' [2000] Crim LR 895, 896.

²⁴ Ministry of Justice, 'Judicial and Court Statistics 2008' (Cm 7697, 2009) Table 6.6. This is a percentage of all defendants disposed of, some of whom do not enter a plea. It should be noted that these figures hide wide disparities between types of offence and judicial circuit: Table 6.2.1.

²⁵ This statistic is calculated by the researcher based on the CPS Annual Report 2008 Annex B <http://www.cps.gov.uk/publications/reports/2008/annex_b.html>. The government does not publish a plea rate for the magistrates' court in the Judicial Statistics.

²⁶ English prosecutors cannot make recommendations to the court on length of sentence: *Atkinson* [1978] 2 All ER 460.

²⁷ For comments on a lack of literature on plea bargaining in English courts: P. Thomas, 'An Exploration of Plea Bargaining' [1969] Crim LR 68; and, A. Davis, 'Sentences for sale: A new look at plea bargaining in England and America' [1971] Crim LR 150.

²⁸ *Silent in Court* (Bell, London 1971).

²⁹ *By Passing the Jury* (Blackwell, Oxford 1972).

³⁰ *Defendants in the Criminal Process* (Routledge & K. Paul, London 1976).

³¹ *Negotiated Justice: Pressures on Defendants to Plead Guilty* (Martin Robertson, London 1977).

The current literature identifies four types of plea bargaining: discounting (where a defendant pleads guilty in return for a reduced sentence, commonly in the form of a reduction of the final sentence imposed); judicial indications (where the judge indicates to the defendant that a reduced sentence can be expected on a guilty plea); charge bargaining (where a defendant pleads guilty to a lesser offence in return for a reduced sentence); and fact bargains (where the prosecution bargains with the defendant over the what version of the circumstances of the offence is presented to the court on sentencing). This chapter will now consider the literature on each type of bargaining, together with the development of the law and the courts' regulation of plea bargaining practice.

a. Bargaining through the discount

It has long been held to be appropriate to give a defendant credit for his guilty plea by reducing the final sentence passed by the court.³² The discount is now a matter of statutory law and is subject to definitive guidelines released by the Sentencing Guidelines Council in their statutory role.³³ According to guidelines released by the Sentencing Guidelines Council it is:

...in everyone's interest that those who are guilty of an offence indicate willingness to plead guilty at the earliest opportunity. This avoids the guilty being acquitted. It also benefits those most closely affected by the crime by sparing them the tension of a trial and the requirement to give evidence. It reduces the time spent in bringing the case to a conclusion (with all the consequential savings in public money) and shortens the time that elapses between an offence being committed and sentence being passed.³⁴

The rationale behind the discount seems to be one primarily of cost. According to Home

³² See *Buffrey* (1993) 14 Cr App R(S) 511.

³³ The Council issues guidelines under the Criminal Justice Act 2003 section 170(9). All courts must sentence with regard to the guidelines released under s. 172 of the same Act.

³⁴ Sentencing Guidelines Council, 'Reduction in Sentence for A Guilty Plea Guideline' (Sentencing Guidelines Secretariat, 2005) Foreword.

Office statistics, the average cost of a contested case in the Crown Court in 1997- 98 was £17,750, compared with £2,600 for a case resolved via a guilty plea.³⁵

i. Statutory regulation

The statutory law that governs the discount is, in its current form, found under the provisions of the Criminal Justice Act 2003 sections 144 and 174 (2)(d). Section 144 provides that a court ‘in determining what sentence to pass on an offender who has pleaded guilty...must take into account- a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and b) the circumstances in which this indication was given.’ Section 174(2) provides further that ‘in complying with [s.144] subsection (1)(a), the court must-....(d) where as a result of taking into account any matter referred to in section 144(1), the court imposes a punishment on the offender which is less severe than the punishment it would have imposed, state that fact, and (e) in any case, mention any aggravating or mitigating factors which the court has regarded as being of particular importance.’ These sections replaced section 152 Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A) on 4th April 2005 and are a modifications of the original legislation that required the court take guilty pleas into account on sentence under Criminal Justice and Public Order Act 1991, section 48.

The wording of section 144 of the Criminal Justice Act 2003 has not changed from section 152 of PCC(S)A, with the exception of the word ‘shall’ being supplanted by the word ‘must’. Section 174 provides for a more thorough explanation of the factors taken into account by the court on sentencing, including those specified in section 144(1)(a).

³⁵ R. Harries, ‘The Cost of Criminal Justice’ (No. 103, Home Office Research, Development, and Statistics Directorate 1999) Table 2.

ii. The Sentencing Guidelines Council

The government has attempted to improve the consistency of sentencing law through the formation of the Sentencing Guidelines Council. The Council is advised by the Sentencing Advisory Panel and consults with Parliamentary bodies when drawing up guidance. The Council produces definitive, though non-binding, guidelines in accordance with section 170(9) of the Criminal Justice Act 2003. The current guidelines on the 'Reduction in Sentence for a Guilty Plea' are published on the Council's website.³⁶

Paragraph B 2.2 of the guidelines suggest that a reduction in sentence on a plea of guilty is appropriate because 'a guilty plea avoids the need for a trial, shortens the gap between charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concern about having to give evidence.' The discount on guilty plea is a separate issue from aggravation and mitigation. Paragraph B 2.4 indicates that mitigating factors, such as admissions to the police in interview, should be considered separately before calculating the reduction for the guilty plea. The court should also take into account other offences asked to be taken into consideration before applying the discount.³⁷ A discount is applicable only to the punitive elements of a penalty and does not apply to ancillary orders.³⁸ Where the sentence is lowered from a custodial sentence to a community sentence or a community sentence to a fine, the actual sentence imposed incorporates the reduction.³⁹

The level of discount is on a sliding scale ranging from a maximum of one third (where a guilty plea was entered at the first reasonable opportunity), reducing to a maximum of one quarter where trial date has been set, to a maximum of one tenth at 'the doors of the

³⁶ <<http://www.sentencing-guidelines.gov.uk/docs/Reduction%20in%20Sentence-final.pdf>>

³⁷ Ibid. Part B, para. 2.5.

³⁸ Ibid. Part B, para. 2.6.

³⁹ Ibid. Part B, para. 2.3.

court' or after trial has begun.⁴⁰ The discount reflects 'a willingness to admit guilt to the offence' and the maximum of one third only applies when the defendant indicated a willingness to admit guilt at the 'first reasonable opportunity'.⁴¹ Annex 1 of the guidelines illustrates the types of occasion that may be considered the first reasonable opportunity. A first appearance at court may be such an occasion; however, the court may consider it was reasonable for the defendant to indicate a willingness to admit to the offence during interview at the police station.⁴²

Discounts may not generally be withheld. Discounts still apply to the minimum sentences on dangerous offenders⁴³; and where the sentencer feels that maximum penalty is too low because of under charging.⁴⁴ It is worthy of note that a sentencing judge may depart from the Sentencing Guidelines as long as the court gives reasons for doing so.⁴⁵ Therefore a discount is not automatically given regardless of other factors that might affect a sentencer's discretion.

iii. Discounting outside the guidelines

Although the Sentencing Guidelines should now be considered definitive there may remain scope for the court to give extra discounts to defendants. In *A and B*⁴⁶ the Court of Appeal gave several examples in which defendants could receive discounts on top of the "normal" one third. Those who agreed to testify against their co-accused, helped in the suppression of crime, or those who provided information that put themselves or their family in danger were to be provided with further credit. Further credit may also be available under the Serious Organised Crime and Police Act 2005, section 73 for defendants who offer assistance to the investigator or prosecutor, although the Act does

⁴⁰ Ibid. Part D.

⁴¹ Ibid. Part D, para. 4.3.

⁴² Ibid. Annex 1, para. 3.

⁴³ Ibid. Part G.

⁴⁴ *Dalby and Berry* [2005] EWCA Crim 1292.

⁴⁵ *Last* [2005] EWCA Crim 106.

⁴⁶ [1998] Crim LR 757.

not specify to what extent a sentence may be reduced. According to recent cases the discount received for co-operation may be substantial. In *P and Blackburn*⁴⁷, the Court of Appeal held that the reduction given to the defendant under this section would normally be somewhere between one half and two thirds of the expected sentence, but no more than three-quarters. In *Jackson*⁴⁸ the defendant was given a two thirds discount. It would appear that enactments that provide minimum sentences or sentences fixed by law do not affect the sentence given under the section.

b. The judicial indication: the development of the law from *Turner* to *Goodyear*

The English courts have traditionally disapproved of any plea bargaining whatsoever. The Court of Appeal had previously overturned convictions where indications from the bench had been given as to the expected sentence on a guilty plea. In 1977, in *Turner*⁴⁹, the Court of Appeal attempted to regulate communications between the judge and counsel to prevent undue pressure being placed on the defendant in what are now known as the *Turner Rules*. In *Turner* the court felt that it was occasionally appropriate for defending counsel to speak with both the judge and prosecuting counsel to discuss matters which could not be discussed in open court. However, the *Turner* court emphatically rejected the idea that a judge could indicate a sentence that he or she might be minded to give on a plea of guilty. That would place ‘undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential.’⁵⁰ Only the likely form that the sentence was likely to take, regardless of plea, could be discussed with counsel.

Throughout the late 1970s, the Court of Appeal issued several opinions forthrightly rejecting the availability of plea bargaining in English law- opinions which seemed to be

⁴⁷ [2007] EWCA Crim 2290.

⁴⁸ [2009] EWCA Crim 1695.

⁴⁹ [1970] 2 All ER 281.

⁵⁰ *Ibid.*, 285.

being ignored or misunderstood in the lower courts.⁵¹ Several studies from the 1970s and early 1990s reported an open disregard for *Turner* by counsel and judges.⁵² As recently as the *Consolidated Criminal Practice Direction*⁵³ issued in 2002, and cases such as *Bargery*⁵⁴, *Attorney General's Reference No 44 of 2000 (Peeverett)*⁵⁵, and *Attorney General's Reference No 88 of 2002*⁵⁶, the Court of Appeal has consistently upheld and attempted to disseminate the principles of *Turner*, despite the apparent disregard of the rules by both barristers and judges.

In what appears to be recognition of the futility of continuing to insist on the *Turner Rules*, and the general changing climate of attitude towards defendants, the Court of Appeal has changed its guidance.⁵⁷ In the 2005 judgment of *Goodyear*⁵⁸, a five judge court declined to follow Lord Chief Justice Parker's dictum in *Turner* and outlined a modified procedure to be followed in the event that a defendant wished to seek a trial judge's thoughts on sentence. Under *Goodyear*, a judge may, if asked by the defence, indicate the maximum sentence he or she would be minded to impose if the defendant were to plead guilty at that stage of proceedings. Such an indication is binding on the judge and remains binding on any judge who takes control of the case until a reasonable

⁵¹ For example: *Grice* [1977] 66 Cr App R 167; *Atkinson* [1978] 2 All ER 460; and *Llewellyn* (1978) 67 Cr. App. R. 149. For discussion of the judgments of the Court of Appeal post-*Turner* see J. Baldwin and M. McConville, 'Plea Bargaining and the Court of Appeal' (1979) 6(2) Brit.J.Law & Soc 200.

⁵² *Ibid.* Baldwin and McConville; J. Morison and P. Leith, *The Barrister's World* (Open University Press, Milton Keynes 1992) 135; M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon, Oxford 1994) 253; J. Plotnikoff and R. Woolfson, *From Committal to Trial: Delay in the Crown Court* (Law Society, London 1993) 67-68.

⁵³ [2002] 3 All ER 904, 935-936.

⁵⁴ [2004] EWCA Crim 816.

⁵⁵ [2001] 1 Cr App R 416.

⁵⁶ [2003] EWCA Crim 3010.

⁵⁷ See criticism of *Turner* in 'Report of the Royal Commission on Criminal Justice' ("The Runciman Commission") (Cm 2263, HMSO, London 1993) 110-14; Lord Justice Auld, 'Review of the Criminal Courts of England and Wales' ("The Auld Review") (TSO, London 2001) 434-444; Secretary of State for the Home Department, the Lord Chancellor and the Attorney General, 'Justice for All' White Paper (Cm 5563, TSO, London 2002) Chapter 4.43. Furthermore see changes to law in Schedule 3 to the Criminal Justice Act 2003 (permitting magistrates to give an advanced indication of sentence in either-way cases at mode of trial hearing); and, Criminal Procedure Rules 2005, SI 2005/384. At the plea and case management hearing the judge is required to inquire whether the defendant has in fact been advised about the credit to be obtained for a guilty plea and what steps had been taken to see whether the case might be resolved without a trial.

⁵⁸ [2005] EWCA Crim 888, [2005] 3 All ER 117.

time for acceptance has passed. The prosecution may not initiate the process although the judge may remind a represented defendant that an indication may be sought. While it should be normal for a basis of plea to be agreed, the court will hold a *Newton* hearing⁵⁹ if there is disagreement between the defence and prosecution. Although the court expressly disowns the idea of plea bargaining in *Goodyear*⁶⁰, the implications of the judgment are clear. Defendants in combination with their defence counsel and the Sentencing Guidelines now have a calculable and accurate estimate of the difference between sentence at trial, and sentence at first appearance.⁶¹

c. The discount in operation

The availability of the discount, despite being reported as inconsistently applied⁶², is now universally available to all offences.⁶³ Ashworth and Redmayne's research on the Criminal Justice Statistics 2002 revealed that there was a significant discount for pleading guilty.⁶⁴ Some 76% of those convicted after pleading not guilty to indictable offences were given custodial sentences compared with 62% of those pleading guilty.⁶⁵ As Ashworth and Redmayne note, the plea can be crucial on whether the custody threshold is crossed.⁶⁶ Of those given terms of imprisonment, an average of 44 months was given to those who contested their trial, whereas guilty pleaders were given an average 27 months.⁶⁷ Research by Roger Hood on Crown Court sentencing and race discovered that guilty pleaders were being given reduced sentences and often that meant

⁵⁹ *Newton* (1982) 77 Cr App R 13

⁶⁰ [2005] 3 All ER 117, 131

⁶¹ This is not always the case. For practical purposes, *Goodyear* is difficult to apply to cases where the defendant may be classified as 'dangerous' under the Criminal Justice Act 2003, sections 224-229: *Kulah* [2007] EWCA Crim 1701.

⁶² For discussion of application of discount: R. Henham, 'Bargain Justice or Justice Denied? Sentence Discounts and the Criminal Process' (1999) 63 MLR 515. Furthermore for disparity between offences: C. Flood-Page and A. Mackie, 'Sentencing Practice: An Examination of Decisions in the Crown Court in the mid-1990' (Home Office Research Study 180, HMSO, London 1998) 90-92. This research however is older than the Sentencing Guidelines which may have introduced greater uniformity.

⁶³ *Sentencing Guidelines Council* (n.34).

⁶⁴ *Ashworth and Redmayne* (n.11) 276.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

that the custody threshold was not crossed.⁶⁸ This important practice was also examined by McConville and Baldwin and David Moxon in their respective studies.⁶⁹ However, these findings might no longer reflect court practice which has become much more regulated since the Criminal Justice Act 2003.

With the new law in effect, the discount should now be applied consistently and there should be similar rates of discount applied to all offences.⁷⁰ A bare analysis of the figures provides a rough guide to the application of the discount from 1996-2006. Table 2-1 provides statistics relating to guilty plea rates; the custody rate (the percentage of those placed in immediate custody) by plea; the difference in the custody rate between guilty and not guilty pleas; the average sentence given in months depending on plea; and, the percentage size of the average discount given per defendant. Table 2-2 provides a more detailed break down by category of offence for 2006 of plea rates; custody rates by plea; the difference in the custody rate between guilty and not guilty pleas; the average sentence given in months depending on plea; and, the percentage size of the average discount given for each category of offence. The data in Tables 2-1 and 2-2 is taken from the Sentencing Statistics 2006.⁷¹ Calculations in both tables relating to the difference in custody rate and the percentage size of the average discount have been made by the researcher.

⁶⁸ R. Hood, *Race and Sentencing: a study in the Crown Court* (Clarendon, Oxford 1992) 87. Not guilty pleaders were 1.7 times more likely to receive a custodial sentence. Hood found that this was particularly significant as those from Afro-Caribbean backgrounds were more likely to plead not guilty.

⁶⁹ D. Moxon, 'Sentencing Practice in the Crown Court' (Home Office Research Study 103, HMSO, London 1988) 18, 32; M. McConville and J. Baldwin, 'The Influence of the Sentencing Discount in Inducing Guilty Pleas' in J. Baldwin and A.K. Bottomley (eds), *Criminal Justice: Selected Readings* (Martin Robertson, London 1978) 121. Moxon and McConville and Baldwin also found late plea changers received more of a discount than those who changed plea early in the proceedings.

⁷⁰ Other than murder which attracts only a maximum of one sixth or five years which ever is less, applied to the minimum term. *Sentencing Guidelines Council* (n.34) Part F, para. 6.6.2(a)

⁷¹ 'Sentencing Statistics 2006' (Ministry of Justice, 2007) Table 2.20
<<http://www.justice.gov.uk/publications/statistics.htm>>.

Table 2-1 Persons sentenced for indictable offences at the Crown Court: Plea rate, custody rate, average sentence length, and average discount applied to a sentence of imprisonment per defendant, 2006

	Pleaded guilty (%)	Custody rate (%)		Difference in custody rate for guilty plea	Average sentence (mths)		% size of average custody discount
Year		Guilty	Not guilty		Guilty	Not guilty	
1996	82.2	59.3	68.8	-9.5	20.6	34.1	39.6
1997	83.6	58.7	70.4	-11.7	21.1	36.6	42.3
1998	81.8	57.2	70.1	-12.9	21.6	36.8	41.3
1999	81.3	59.3	71.0	-11.7	22.5	38.1	40.9
2000	81.7	60.3	73.2	-12.9	22.9	37.1	38.3
2001	81.8	60.1	72.0	-11.9	24.4	38.9	37.3
2002	82.5	59.4	72.8	-13.4	25.9	41.6	37.7
2003	83.7	56.7	70.5	-13.8	26.2	44.4	41.0
2004	83.8	57.5	72.7	-15.2	26.3	44.9	41.4
2005	84.3	56.7	71.0	-14.3	26.0	43.3	40.0
2006	84.4	54.5	69.5	-15.0	25.4	42.7	40.5
Mean Average	82.8	58.2	71.1	-12.9	23.9	39.9	40.0

Table 2-2 Persons sentenced for indictable offences at the Crown Court: Plea rate, immediate custody rate, average sentence length, and average discount applied to categories of offences, 2006

2006							
Offence	Pleaded guilty (%)	Custody rate		Difference in custody rate for guilty plea	Average sentence (mths)		% size of average custody discount
		Guilty	Not guilty		Guilty	Not guilty	
Violence against the person	79.8	47.4	68.0	-20.6	22.8	35.5	35.8
Sexual Offences	63.2	67.7	84.4	-16.7	37.4	57.4	34.8
Burglary	91.4	69.1	70.9	-1.8	26.7	33.9	21.2
Robbery	84.2	81.4	85.5	-4.1	34.2	45.6	25.0
Theft and handling	87.9	42.0	40.0	2.0	14.4	20.6	30.1
Fraud and forgery	87.9	52.7	54.3	-1.6	14.6	24.6	40.7
Criminal Damage	90.0	39.0	54.1	-15.1	27.3	38.4	28.9
Drug Offences	86.4	61.6	82.7	-21.1	36.1	64.6	44.1
Other (excluding motor offences)	89.1	42.8	61.9	-19.1	15.7	28.3	44.5
Motor offences	85.6	46.9	35.8	11.1	10.4	12.3	15.4
Average discount among offences	84.6	55.1	63.8	-8.7	24.0	36.1	33.7

Several caveats must be born in mind before concluding that the discount is applied uniformly to early pleaders. Firstly, the yearly figures hide discrepancies between offences as to what extent and whether the discount is given at all. In some years a small number of offences have borne a higher penalty for a guilty plea than a conviction after a not guilty plea. As can be seen in Table 2-2, in 2006, 2% more guilty pleaders were given custodial sentences for theft and handling offences compared with not guilty pleaders. The consistency of how the discount is applied was indirectly considered by Ralph Henham.⁷² In his study of 310 guilty pleas from six Crown Court Centres, Henham explored the effect of section 48 of the Criminal Justice and Public Order Act 1994 (the pre-cursor of Criminal Justice Act 2003, section 144) which required the court to take into account the stage in the proceedings at which the defendant indicated his intention to plead guilty, and state in open court if it had done so. Henham found a widespread failure, identifying 145 cases or 46.8% of his sample where judges had not explained their sentencing decision under the Act and whether a discount had been given.⁷³ Henham interpreted that this failure only translated into six cases of the discount being withheld.⁷⁴ In those six cases the judge explicitly said that no discount had been given. Sanders and Young correctly point out a failure to mention whether discount had been given might mean no discount had been given at all, increasing the potential number of defendants in the sample who did not receive a discount. However, their extrapolation that the system is ‘playing dirty’ with the defendant’s right to a discount is not fully supportable on this evidence.⁷⁵ What is uncontroversial is that, with some discrepancies, the sentencing discount is regularly being given for guilty pleas. Subject to the limitations described below the statistics show a reduction in sentence on guilty plea, both in the rate at which custody is imposed and in the average length of time for which defendants are imprisoned. Sanders and Young’s second conclusion that even when discounts are announced by the judge they may be being secretly withheld is again not necessarily supportable on this evidence.⁷⁶ While conceivable, one would expect to find large numbers of defendants who complained that the sentence they had received

⁷² Henham (n.62).

⁷³ Ibid. 526.

⁷⁴ Ibid. 527.

⁷⁵ Sanders and Young (n.14) 395.

⁷⁶ Ibid.

was much higher than they had been lead to expect by their barrister, who should be able to make an estimate well within a one third margin of error.⁷⁷ Without such data it is not possible to confirm the Sanders and Young thesis.

Secondly, the yearly figures in Table 2-1 are for all defendants. Because the court deals with many more defendants involved in violent offences, the discount given to those defendants is disproportionately represented, as compared to, for example, the discount for fraud. If offences are compared equally weighted (ignoring the number of defendants convicted) as in Table 2-2, the average discount is much lower: 33.7% compared with 40.5% in 2006.

Thirdly, as Ashworth and Redmayne point out in relation to their analysis of the 2002 statistics, the figures hide the seriousness within offences, and the mitigation that may be presented on behalf of each individual defendant.⁷⁸ Some research has suggested that those charged with more serious offences with highly aggravating features, such as violent rape, are much less likely to plead guilty.⁷⁹ This inevitably distorts the average sentence length and the size of the discount between those pleading guilty and not guilty, as those not guilty pleaders are likely to receive much longer sentences because of the gravity of their offence. If defendants pleading not guilty are in cases with greater aggravating features, this might partially explain why no discount seems to be given for some offences in some years. Other factors may also influence sentencing such as race and possibly gender. Roger Hood, found in his 1989 sample that the discount for guilty plea was diminished when all other factors (mitigation, previous convictions, etc) had been taken into account.⁸⁰

Fourthly, this data does not reveal when the plea was entered and the extent of the

⁷⁷ A barrister may overestimate sentence to make their advocacy on the plea in mitigation appear more successful. However, whether this occurs or not, and to what extent, has not been studied.

⁷⁸ *Ashworth and Redmayne* (n.11) 276-277.

⁷⁹ *Flood-Page and Mackie* (n.62) 89.

⁸⁰ *Hood* (n.68) 87.

discount given. It is not possible to tell whether the new law has affected the extent of greater discounts being given for earlier guilty pleas as found by Flood-Page and Mackie⁸¹, or whether judges are preserving greater credit for late pleaders as found by Baldwin and McConville, and to a lesser extent by Moxon in the 1970s and 1980s.⁸² Although the Sentencing Guidelines and sections 144 and 177 of the Criminal Justice Act 2003 appear, on the face of these statistics, to have had little effect on the average pattern of discounting, to say definitively whether the discount is being applied more precisely according to the new law would require further quantitative study.

d. Commentary and research on the effect of the discount on defendants

In Dell's study of the legal representation of women sent to Holloway prison in the early 1970s, she recorded that of the 527 women tried at the magistrates' court that she interviewed, 106 denied having committed any offence.⁸³ Of those 106, 56 (53%) pleaded guilty. Dell labelled these women as 'inconsistent pleaders'. Investigating the reasons for their inconsistent pleas, Dell discovered that ten of the women who had pleaded guilty had done so to try and avoid a remand or out of a fear that to plead not guilty would result in a harsher sentence.⁸⁴ Dell's observations are clearly indicative of the discount system at work. Dell did not believe inconsistent pleading was a problem in the higher courts and attributed this to independent legal representation.⁸⁵

In McCabe and Purves' study of a small number of Assize and Quarter Session courts, again in the early 1970s, they specifically looked at defendants who pleaded guilty at 'the doors to the court' or were saved from jury trial following a directed acquittal from

⁸¹ Flood-Page and Mackie (n.62) 91-92.

⁸² J. Baldwin and M. McConville, 'The Influence of the Sentencing Discount in Inducing Guilty Pleas' in J. Baldwin and A Bottomley (eds), *Criminal Justice Selected Readings* (Martin Robertson, Oxford 1978); D. Moxon, 'Sentencing Practice in The Crown Court' (Home Office Research Study No 103, HMSO, London 1988).

⁸³ Dell (n.28)

⁸⁴ Ibid. 31.

⁸⁵ Ibid. 36-37

the judge, but had been expected to go to trial.⁸⁶ McCabe and Purves identified 112 (24%) defendants who changed their plea at a late stage and pleaded guilty to all, some or alternative charges. During their research McCabe and Purves were able to attribute these changes in plea to the defendants' legal representatives, who conducted negotiations with the defendant and prosecution in final consultation with the judge. However, after the recent approval of the *Turner Rules* in the Court of Appeal, McCabe and Purves did not feel that plea bargaining was conducted by judicial pressure on the accused. While observing that the defendant is advised as to credit on a guilty plea by their representative, they felt that in England 'there seems little justification for unease at the nature of judicial involvement and the issues associated with it.'⁸⁷ The discount, according to McCabe and Purves, 'is a well known and respectable sentencing practice, hallowed by precedents, and justified by reference to the propriety of giving credit to a defendant who pleads guilty on the grounds that allowance must be made for contrition, repentance and co-operation with the authorities.'⁸⁸ McCabe and Purves did not therefore see any danger in offering the defendant some benefit from pleading guilty.

Bottoms and McClean's 1976 study of the Crown Court and magistrates' courts of Sheffield, was a far more comprehensive effort to follow a defendant through the criminal justice system.⁸⁹ Whereas McCabe and Purves concentrated only on defendants who were removed from trial in the latter stages, Bottoms and McClean began with defendants' first contact with the courts and considered plea from the defendants' perspective. This was the first attempt in the English literature to evaluate defendant decision-making overall, viewing the system as a whole rather than in constituent parts.

Bottoms and McClean's research revealed high guilty plea rates of 95% in all courts.⁹⁰ Around two-thirds of those pleading guilty said that they had done so because they were guilty of the offence charged. In respect of plea bargaining, Bottoms and McClean

⁸⁶ *McCabe and Purves* (n.29)

⁸⁷ *Ibid.* 12-13

⁸⁸ *Ibid.* 13 footnote 6.

⁸⁹ *Bottoms and McClean* (n.30).

⁹⁰ *Ibid.* 105

sought to identify defendants who changed plea because of an intimation of sentence from the judge (a possibility thought to be of extremely limited effect since *Turner*); or defendants who altered their plea because of a deal struck with the prosecutor by their representative (plea bargaining); or those who changed their plea on legal advice from their representative (plea changing).⁹¹ In their sample Bottoms and McClean identified only three cases of possible 'real plea bargaining', where a defendant's plea of guilty was in response to an offer from the prosecutor.⁹² Bottoms and McClean also identified 'plea changers' - those who changed plea late in the day before trial. High proportions of those pleading guilty in the Crown Court did so at a late hour (37%) and on the advice of the legal representative (82% of plea changers).⁹³

Bottoms and McClean sought to draw out from their entire interview sample defendants who pleaded guilty, but in their interview with the researchers raised a credible possibility of a not guilty plea. On this analysis they discovered that 18% of guilty plea defendants were 'possibly innocent.'⁹⁴ Of those possible innocent defendants, 34% pleaded guilty on their lawyer's advice.⁹⁵

McConville and Baldwin's study of the Birmingham Crown Court in a 15 month period between 1975 and 1976 is perhaps the most controversial of the studies conducted.⁹⁶ In their research of 121 defendants who originally intended to plead not guilty but changed their plea, McConville and Baldwin found four types of defendants: those who pleaded guilty because they were factually guilty of the offence charged; those who claimed to have been subject to a bargained plea; those who were not aware of a plea bargain, but felt that something was going on behind the scenes; and those who were not aware of any bargaining, but acquiesced to pressure or advice from their barrister.

⁹¹ Ibid. 125-126.

⁹² Bottom and McClean's sample size was 293 interviews from a total of 1,344 cases. Their analysis of plea bargaining was confined to guilty pleas in the Crown Courts (63 cases).

⁹³ Ibid. 128.

⁹⁴ Ibid. 119-120

⁹⁵ Ibid. 121.

⁹⁶ *McConville and Baldwin* (n.31). The then President of the Law Society and Chairman of the Bar campaigned to prevent *Negotiated Justice* from being published: *ibid.* Introductory Note viii.

Of the 121 defendants sampled, 18.2% reported being subject to an explicit bargain. McConville and Baldwin found that, subject to the defendant giving an accurate account, nearly half of those involved in explicit bargains were offered precise indications of sentence or came under pressure to plead guilty from the judge contrary to the *Turner Rules*.⁹⁷ The other half were offered explicit bargains within the rules of *Turner*. These defendants were told by their barrister the form of sentence on a guilty plea (i.e. whether the sentence would be custodial or non-custodial) as indicated by the judge, although often not that they would receive the same form of sentence on a not guilty plea.⁹⁸ Of the 121 defendants a further 13% were subject to tacit bargaining where the defence barrister indicated that some kind of deal was being agreed behind the scenes without being definite as to its form.⁹⁹

McConville and Baldwin draw on this data to argue that whether defendants' pleas are voluntary when subject to such pressure is open to question.¹⁰⁰ Although McConville and Baldwin agreed that there was a lower incidence of plea bargaining in English justice than in the United States, they found little to support the statement that plea bargaining does not exist in England to any significant degree.¹⁰¹ McConville and Baldwin found clear evidence of bargains (implicit or explicit) being struck in over 30% of their sample. The researchers comment that when defendants believe that the judge is involved in an indication of sentence, it is difficult to maintain that defendants' pleas are entered voluntarily.¹⁰²

McConville and Baldwin conclude by pointing out that English criminal justice has selected administrative efficiency over accuracy- a process brought about with the collusion of defence counsel. In their view the operation of the discount system has little

⁹⁷ Ibid. 32.

⁹⁸ Ibid.

⁹⁹ Ibid. 34.

¹⁰⁰ Ibid. 45.

¹⁰¹ Ibid. 35.

¹⁰² Ibid. 36.

to do with justice, rather, 'it exists primarily because of administrative expediency.'¹⁰³ The combination of plea bargaining, sentence discount, and pressure from counsel result in defendants having little real choice over plea with the accompanying possibility of miscarriages of justice in significant numbers of cases. The research indicates such problems are symptomatic of a guilty plea system and argues for the abolition of the discount as the only way to eliminate the pressures brought to bear on defendants.¹⁰⁴ That the discount continued to be instrumental in defendants' choice of plea was revealed by further research in the courts in the 1990s. Hedderman and Moxon found that 65% of defendants who pleaded guilty to either-way offences cited a lighter sentence as a reason for doing so.¹⁰⁵

The system incentives provided by the criminal justice process are therefore framed by some commentators as undermining the principle of defendant autonomy- the ability of defendants to make free choices about plea. Ashworth and Blake believe that the discount 'militates against the "free choice" of the defendant' and that committed defence lawyers should strive to maximise client choice.¹⁰⁶ In providing large discounts to guilty pleaders, the criminal justice system, it is argued, runs contrary to fundamental rights of the accused under the European Human Convention on Human Rights.¹⁰⁷ Ashworth and Redmayne believe that the magnitude of the discount in English courts induces 'those who are not guilty to change their plea.'¹⁰⁸ In providing a third or more reduction on a sentence after trial, and thus providing a large inducement to defendants to plead guilty, they argue that the presumption of innocence, the privilege against self-incrimination, the right not to be discriminated against in exercising article 6 rights, and the right to a fair and public hearing are sacrificed to expediency.¹⁰⁹

¹⁰³ Ibid. 109

¹⁰⁴ Ibid. 115

¹⁰⁵ C. Hedderman and D. Moxon, 'Magistrates' Court or Crown Court? Mode of Trial Decisions and Sentencing' (Home Office Research Study 125, HMSO, London 1992) 24.

¹⁰⁶ A. Ashworth and M. Blake, 'Some ethical issues in prosecuting and defending criminal cases' [1998] Crim LR 16, 26. See also: L. Bridges, 'The Ethics of Representation on Guilty Pleas' (2006) 9 Legal Ethics 80, 94.

¹⁰⁷ *Ashworth and Redmayne* (n.11) 287-92.

¹⁰⁸ Ibid. 288.

¹⁰⁹ These rights are either explicitly given to defendants or have been found to be implied by Article 6 and Article 14 of the European Convention on Human Rights. The issue arising from Article 14 is based on

e. Charge bargaining

Charge bargaining is the practice whereby, on negotiation initiated by either side, the parties agree to a reduction in the charge facing the defendant in return for a guilty plea. Charge bargaining has been criticised as placing enormous pressure on the defendant who by pleading guilty to the lesser charge can avoid custody or reduce the available sentence. The availability of charge bargaining has been confirmed by the courts and such agreements have long been negotiated between the prosecution and defence. Although in *Grafton*¹¹⁰, in 1993, the Court of Appeal confirmed that a prosecutor was free to drop or reduce charges without the need to refer the matter to the trial judge, the judge may now adjourn proceedings until the prosecutor has consulted with the Chief Crown Prosecutor, the Director of Public Prosecutions, or, in unusual circumstances, the Attorney-General regarding the change in charge.¹¹¹ The focus here is on charge bargaining as a practice in itself, rather than as a device used by unscrupulous lawyers to extract a guilty plea. The literature that examines lawyers and their attitudes to defendants is dealt with below.

i. The magistrates' court

Although this research is primarily focused on the practices of the Crown Court, the lower courts' activities do have a significant impact on what occurs in Crown Court proceedings via the committal of either-way offences for trial or sentencing. Therefore, it is important to review the practices of the magistrates' courts, particularly with reference to either-way offences and mode of trial hearings.

the findings of Roger Hood's study of Afro-Caribbean defendants and their increased preference for trials compared to those of a white ethnic background: *Hood* (n.68)

¹¹⁰ [1993] QB 101.

¹¹¹ *Amendment No. 22 to the Consolidated Criminal Practice Direction* [2009] EWHC 1072, IV.45.8.

The magistrates' courts are peculiarly neglected in the literature given that an overwhelming majority of defendants in the criminal justice system are dealt with by summary procedure.¹¹² Until recently, there were a number of differences in the approach of the two tiers of courts, particularly to the sentence discount on guilty plea.¹¹³ Despite the tendency of researchers to concentrate on the Crown Courts, several commentators have identified a practice of plea bargaining in the magistrates' courts which has a vital impact on Crown Court proceedings.

The magistrates' courts are limited in sentencing powers to either 6 months imprisonment for one offence¹¹⁴ and/or a fine of £5,000.¹¹⁵ On aggregate of two or more offences, where one of the offences is triable either-way, the court is limited to imposing a sentence of 12 months imprisonment.¹¹⁶ Magistrates' courts also have the power to commit triable either-way cases for trial¹¹⁷, or commit the case to the Crown Court for sentence when the court feels that its powers are inappropriate.¹¹⁸ After committal the Crown Court is not restricted to the powers of the magistrates.¹¹⁹ Comparatively, the sentencing powers of the Crown Court for the same either-way offences are radically different. According to Hedderman and Moxon's study of either-way offences and mode of trial hearings, they found that custody was used almost three times as often and around two and half times longer sentences of custody were imposed than in comparable cases in the magistrates' court.¹²⁰

¹¹² In 2007, 1.74 million defendants appeared in the magistrates' court: *Ministry of Justice* (n.24) 135.

¹¹³ In one study, two thirds of magistrates regarded a guilty plea as of minor or no significance in mitigation: R. Henham, *Sentencing Principles and Magistrates' Sentencing Behaviour* (Avebury, Aldershot 1990) 181. However, as noted above, the Reduction in Sentence for A Guilty Plea Guideline now applies the principle of discounting to all courts and is definitive.

¹¹⁴ Magistrates' Court Act 1980, section 32.

¹¹⁵ Criminal Justice Act 1991, section 17(1).

¹¹⁶ Magistrates' Court Act 1980, section 133. The 12 month limit was increased to 65 weeks under the Criminal Justice Act 2003, section 155(1) and (2) for all offences tried summarily and sentenced consecutively, but this part of the Act has not been implemented.

¹¹⁷ Magistrates' Court Act 1980, section 19.

¹¹⁸ Powers of Criminal Courts (Sentencing) Act 2000, section 3.

¹¹⁹ *Ibid.*

¹²⁰ *Hedderman and Moxon* (n.105) 37.

According to the literature, the high proportion of defendants pleading guilty in the magistrates' court is produced by two factors: the dramatic discount between Crown Court and magistrates' courts; and, the discretion available to Crown Prosecutors brought about by overcharging defendants at the police station. Although a Crown Prosecutor must 'never accept a guilty plea just because it is convenient'¹²¹, Crown Prosecutors under the Prosecution of Offences Act 1985 have little constraints placed upon them in making additions, deletions or alterations to the information laid against the defendant.¹²² In McConville, Sanders and Leng's study of the effect of the creation of the CPS in 1985, evidence was found of overcharging by both police and prosecutors who were unwilling to reduce charges to allow bargaining to take place at court.¹²³ Even though prosecutors knew cases to be weak on any charge, maintaining charges until pre-trial hearings meant that defence lawyers could be brought into negotiations.¹²⁴

Prosecutors are, according to Sanders and Young, willing and able to offer defendants charges to plead to which will not lead to a committal to the Crown Court.¹²⁵ By dropping either-way offences, demoting them to lesser, summary only charges, or by making recommendations to the magistrates on the suitable mode of trial, prosecutors wield an enormous bargaining power. In Riley and Vennard's study of triable either-way offences, the preference of the Crown was matched by the magistrates' decision in 96% of cases.¹²⁶

Since the plea before venue hearing was introduced in 1997, the number of defendants committed to the Crown Court for trial has steadily fallen.¹²⁷ In 1997 some 64,000

¹²¹ Crown Prosecution Service, Crown Prosecutor's Code of Conduct (2004) para. 10.1 <<http://www.cps.gov.uk/publications/docs/code2004english.pdf>>.

¹²² As noted in *Sanders and Young* (n.14) 409.

¹²³ M. McConville, A. Sanders and R. Leng, *The Case For The Prosecution* (Routledge, London 1991) 146.

¹²⁴ The currency of this research is, however, extremely limited given the criminal justice reforms of the past 20 years.

¹²⁵ *Sanders and Young* (n.14) 408.

¹²⁶ D. Riley and J. Vennard, 'Triable Either-way Offences: Crown Court or Magistrates' Court?' (Home Office Research Study 98, HMSO, 1988).

¹²⁷ The plea before venue hearing requires all defendants charged with an either-way offence to indicate a plea in the magistrates' court. If they indicate a not guilty plea they may elect to be tried in the Crown

defendants were committed for trial.¹²⁸ By 2007, approximately 53,100 were committed for trial¹²⁹, while committals for sentence had increased from 5,000 to 17,800 a year.¹³⁰ Ashworth and Redmayne believe this is attributable to the discount created by the differential between the sentencing powers of the two tiers of the court.¹³¹ Defendants placed under pressure by the sentencing rates observed by Hedderman and Moxon reduce their risk of a heavy sentence by either choosing summary trial, or by indicating a plea of guilty at the mode of trial hearing in an attempt to avoid the Crown Court.¹³² Therefore, the process in the magistrates' court of plea before venue, selection of charges and sentencing strongly encourages the entry of a guilty plea by the defendant. As with diversion, it is likely that the plea before venue for either way offences has removed from the pool of defendants in the Crown Court those who would accept advice to plead guilty at an early stage. Those reaching the Crown Court have already indicated a plea of not guilty, are potentially more determined to go to trial, and may have a better defence on the basis of the legal advice already received.

ii. The Crown Court

Research on charge bargaining in the Crown Court has produced similar results to that in the magistrates' court. Although committal to a higher court no longer presents a risk to the defendant, prosecutors can similarly vary the charges faced by the defendant. As with the magistrates' court, the critics of the incentives created by the system contend that defendants are placed under pressure by charge bargains.

Court, or, if the magistrates accept jurisdiction, be tried there. If the defendant indicates a guilty plea the magistrates decide whether they have sufficient sentencing powers to deal with the offences. If not they may commit the case for sentence.

¹²⁸ Home Office, 'Criminal Statistics 2002' (Cm 6054, 2003) Figure 3.2.

¹²⁹ Ministry of Justice, 'Criminal Statistics: England and Wales 2007' (Ministry of Justice, 2008) Table 2.11.

¹³⁰ Ibid.; and paragraph 2.17.

¹³¹ Ashworth and Redmayne (n.11) 278.

¹³² The extent of the difference between sentences in the Crown Court and magistrates' court remains disputed: *Sanders and Young* (n.14) 407 citing C. Hedderman and D. Moxon, 'Magistrates' Court or Crown Court? Mode of Trial Decisions and Sentencing (Home Office Research Study 125, HMSO, London 1992) 37; L. Bridges, 'False Starts and Unrealistic Expectations' (1999) *Legal Action*; and *Flood-Page and Mackie* (n.62).

In the earliest research from the 1970s, McCabe and Purves found no support to suggest overcharging by the police. Essentially relabelling the term as ‘full charging’, they argued current practices allowed plea bargaining by the prosecutor to take place.¹³³ Commenting on prosecutorial tactics, McCabe and Purves felt that an experienced prosecutor was generally inclined to avoid the hazards of trial, however strong the case.¹³⁴ This bargaining was to give effect to the ‘advantages attendant upon the rapid disposal of cases in the administration of justice.’¹³⁵ Accordingly, McCabe and Purves found that ‘it is difficult to see how the practice of plea bargaining as it exists in England operates to deny the defendant his ‘right to put the prosecution to its proof.’¹³⁶ In fact, the defendant was placed in a position to exploit the obstacles inherent in the discharge of the burden of proof by the prosecution, giving him or her a powerful bargaining position.¹³⁷ McCabe and Purves felt that plea bargaining, at least in its English form, was a realistic and pragmatic way of dealing with defendants, avoiding the ‘rhetoric, innuendo, suggestion, intimidation, and manipulation of the rules of evidence’¹³⁸ that a jury trial presented as an alternative. Concluding, McCabe and Purves wonder at the scale of ‘wastage of time, effort and money’ last minute pleaders cost the public purse as well as those involved in the trial.¹³⁹ McConville and Baldwin found no evidence of overcharging in Birmingham Crown Court in their study.¹⁴⁰

Whether caused by overcharging or not, the use of charge bargaining in the Crown Court appears to be extensive. In Hedderman and Moxon’s 1992 study, 82% of defendants who elected jury trial subsequently pleaded guilty.¹⁴¹ Of those who changed their plea, 51% reported that they expected some charges would be dropped or reduced, resulting in

¹³³ *McCabe and Purves* (n.29) 19.

¹³⁴ *Ibid.* 20.

¹³⁵ *Ibid.* 20.

¹³⁶ *Ibid.* 23.

¹³⁷ *Ibid.* 24.

¹³⁸ *Ibid.* 27.

¹³⁹ *Ibid.* 30-32.

¹⁴⁰ *McConville and Baldwin* (n.31) 112.

¹⁴¹ *Hedderman and Moxon* (n.105) 22.

a lighter sentence.¹⁴² Hedderman and Moxon found that 29% of the defendants in their sample had pleaded guilty in accordance with charge bargains.¹⁴³ The so-called charge attrition rate (where a defendant pleads to a lesser offence than the original indictment) appears to be high in contemporary courts. According to Henham's 2002 sample of six Crown Court centres, 61.7% of defendants originally indicted for causing grievous bodily harm with intent pleaded guilty to a lesser offence.¹⁴⁴

As with the magistrates' court, the critics of charge bargaining maintain that prosecutors keep charges artificially high in order to convince the defendant to plead guilty to a lesser offence. Baldwin found evidence that:

[M]ost barristers see it as their primary responsibility to prosecute the case in the Crown Court in accordance with the instructions they are given by the CPS. While almost all the barristers interviewed said that they would point out manifest weaknesses in the case to the CPS at an early stage, this is not something that many would do on a regular or a frequent basis.¹⁴⁵

Baldwin's research suggests that prosecuting counsel are unwilling to drop weak cases, or change the indictment to a lesser offence until they are later discovered by the judge. Prosecutors, according to Baldwin, continued with weak cases because they shared the same view of cases as the police, particularly in respect to more serious offences. Baldwin found prosecutors and police believed that the defendant deserved to be prosecuted, despite a lack of evidence, because of the nature of the offence.¹⁴⁶ According to Sanders and Young's interpretation of Baldwin's research, prosecuting counsel are potentially placed in a bargaining position by virtue of an inaccurate indictment that they are unwilling to correct.¹⁴⁷ Baldwin's research, however, only

¹⁴² Ibid. 24.

¹⁴³ Ibid. 10.

¹⁴⁴ R. Henham, 'Further evidence on the significance of plea in the Crown Court' (2002) 41 *Howard Journal* 151, 153

¹⁴⁵ J. Baldwin, 'Understanding Judge Ordered and Acquittals in the Crown Court' [1997] *Crim LR* 548, 552.

¹⁴⁶ Ibid. 551.

¹⁴⁷ *Sanders and Young* (n.14) 421-422.

looked at cases where the judge ordered or directed an acquittal. Sanders and Young believe that ‘if one took a sample of all weak cases one would no doubt find that prosecuting counsel prefer a last minute charge bargain to a discontinuance...’¹⁴⁸ However, there is no evidence that prosecution counsel press ahead with weak cases as charge bargains if they are not discovered by the judge. It does not necessarily follow that large numbers of weak cases are not spotted and left to be bargained over by an unscrupulous prosecutor and defence barrister. Another view is put forward by Jeremy who argues that charge is often determined ‘at a time when emotions are high, the investigation is in its infancy, and when every instinct channels him towards charging “high” rather than “low.”’¹⁴⁹ As he points out, prosecutors are placed in a difficult position where they must strive to ‘resist pressures from victims and from the police, to show respect for due process, to be fair and act as a “minister of justice.”’¹⁵⁰ Overcharging is not necessarily a product of looking ahead to a charge bargain at court. Indeed there may be a number of complex reasons as to why charges are reduced later, caused by a range of factors including societal or institutional attitudes towards different types of offences. Lea, Lanvers and Shaw found high attrition rates in contemporary rape cases¹⁵¹, but these reductions in charge were highly specific to sexual offences where lack of evidence, attitudes of police officers to rape complainants and the vulnerability of the complainant were found to be extremely important.¹⁵²

This conclusion is reinforced by Elaine Genders’ research on the downgrading of assault charges.¹⁵³ She argues that the overcharging observed is the result of an imperfect system of available charges, which do not match the real life offending faced by the police and prosecutors. Genders believed that defendants charged under the Offences Against the Person Act 1861 are often charged according to normative standards of intent rather than those strictly laid out in the statute. Genders’ research provides strong evidence that section 18 offences ‘relabelled’ section 20 were frequently mid-way

¹⁴⁸ Ibid. 422.

¹⁴⁹ D. Jeremy, ‘The prosecutor’s rock and hard place’ [2008] Crim LR 925, 934

¹⁵⁰ Ibid. 936.

¹⁵¹ S. Lea, U. Lanvers and S. Shaw, ‘Attrition in Rape Cases’ (2003) 43 Brit.J.Criminol. 583, 592.

¹⁵² Ibid. 595-98

¹⁵³ E. Genders, ‘Reform of the Offences Against the Person Act: lessons from the law in action’ [1999] Crim. LR 689.

offences that had aggravating features that ‘original’ s.20 charges did not. This suggests an alternative explanation as to why some defendants appear to have been overcharged and why defendants are willing to accept demoted charges. It also suggests that prosecutors and defence lawyers do not necessarily conspire to produce a plea, but rather find a charge more suitable to the statute and evidence. If Genders’ analysis of charging according to normative standards is correct, the determination of charge by Crown Prosecutors at the police station, who are legally trained (as opposed to the police), should provide a more accurate charge or rather more importantly, help prevent charges from being relabelled. On the basis of Genders’ research, it would appear that the process of charge, bargain and subsequent downgrading is highly complex and not necessarily the result of purposeful action by police, prosecutor and defence lawyer to produce a guilty plea.

Sanders and Young argued in their 2007 textbook that recent changes to the law under the Criminal Justice Act 2003 have not assisted defendants, who remain faced with inflated charges which are used to place pressure upon them.¹⁵⁴ Since the introduction of section 28 of the Act (amending the Police and Criminal Evidence Act 1984 section 37), the CPS is:

...responsible for the decision to charge and the specifying or drafting of the charges in all indictable only, either-way or summary offences...except for those offences specified in this Guidance which may be charged or cautioned by the police without reference to a Crown Prosecutor.¹⁵⁵

In choosing the charges the CPS should select the right charges from the outset and stick to them.¹⁵⁶ Giving the CPS control over charge was intended to remove any bias that might attach itself to a police decision and allow an independent, legally trained eye to scrutinise the prosecution case. Sanders and Young note, however, that the CPS is

¹⁵⁴ *Sanders and Young* (n.14) 409.

¹⁵⁵ Director of Public Prosecutions, ‘Guidance to Police Officers and Crown Prosecutors under section 37A of the Police and Criminal Evidence Act 1984’ (3rd edn, 2007) paragraph 3.1 <http://www.cps.gov.uk/publications/directors_guidance/dpp_guidance.html#03>

¹⁵⁶ Her Majesty’s Crown Prosecution Inspectorate, ‘Thematic Review of Attrition in the Prosecution Process (The Justice Gap)’ (2003) para. 5.25, 9.19-9.24.

subject to managerial targets to reduce unsuccessful outcomes in the courts, increase the guilty plea rate and increase the number crimes for which an offender is convicted.¹⁵⁷ The pressure of convicting defendants and increasing guilty pleas, they maintain, looks like ‘a recipe for disaster.’¹⁵⁸ According to the Code for Crown Prosecutors, prosecutors should also ‘ensure that the interests of the victim and, where possible, any views expressed by the victim or victim’s family, are taken into account when deciding whether it is in the public interest to accept the plea.’¹⁵⁹ Rather than demote charges, the Code clearly gives a strong indication that Crown Prosecutors should follow through on charges, particularly when the victim has a good reason to want a prosecution of the original charge.¹⁶⁰

The involvement of prosecutors at the charging stage seems to answer some of the criticisms previously made of the pre-court stage. Crown Prosecutors are not as involved in criminal cases as the police who have investigated the offence, and therefore can be more objective about the appropriate charge. The provisions of the Criminal Justice Act 2003 were enacted because it was perceived that Crown Prosecutors would reduce the incidence of overcharging.¹⁶¹ The provisions should help ameliorate the tendency, as observed by McConville et al and Baldwin, of Crown Prosecutors failing to review charges properly or support weak cases. It would be logical to expect that the rate of early guilty pleas would increase as a result of more accurate charging. A more accurate charge would also remove much of the leverage available to the prosecutor who cannot bargain with the defendant if he or she has nothing to give. Research produced by the CPS suggests that the conviction rate has increased and that the changes have ensured that ‘the right person is charged with the right offence at the right time.’¹⁶²

¹⁵⁷ *Sanders and Young* (n.14) 410 citing Crown Prosecution Service, ‘Annual Report, 2004-5’ (2005) 6-13.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Director of Public Prosecutions* (n.121) para. 10.2.

¹⁶⁰ The Code for Crown Prosecutors is currently under consultation and review: <http://www.cps.gov.uk/consultations/rccp_index.html#a06>

¹⁶¹ *The Auld Review* (n.57) para. 35.

¹⁶² Crown Prosecution Service, ‘DPP’s Journal: Conviction Rate Increases’ (29 June 2009) <http://www.cps.gov.uk/news/journals/dpps_journal/conviction_rate_increases/>

f. Fact bargaining

Since the Court of Appeal's ruling in *Beswick*¹⁶³ an agreement between the Crown and defence on the factual basis of plea is partially regulated. The Crown must not accept a basis which is an unreal or untrue set of facts. Since the decision of *Goodyear*¹⁶⁴, such fact bargains may become much more important as, according to the court in that case, the prosecution and defence should normally agree a factual basis for the offence before seeking the judge's indication on sentence. There is therefore a clear opportunity for mitigating or aggravating features to be bargained over by the prosecution and defence in return for a guilty plea. The extent to which fact bargaining occurs is yet to be the subject of extensive research.

5. Pressure from defence barristers

In addition to the system of sentencing and charging, some commentators have scrutinised the role of defence lawyers in the production of guilty pleas. Overwhelmingly this research has placed responsibility for the high guilty plea rate on the defence lawyer. This criticism is supported by a number of studies that have found defendants to be passive in the conduct of their case and unwilling to question their lawyer's advice. Defendants are described as 'dummy players', unable to take control their own case.¹⁶⁵ Ericson and Baranek describe defendants as 'dependants' in the criminal process.¹⁶⁶ Most criminal defendants because of socio-economic factors, combined with the stress of the proceedings, and lack of legal knowledge are in a particularly poor position to take control of their own defence.¹⁶⁷ Goriely et al found that

¹⁶³ [1996] 1 Cr App Rep (S) 343.

¹⁶⁴ [2005] EWCA Crim 888.

¹⁶⁵ P. Carlen, *Magistrates' Justice* (Martin Robertson, London 1976); A. Blumberg, *Criminal Justice* (Quadrangle Books, Chicago 1967); *McConville et al* (n.52); D. Rosenthal, *Lawyers and Clients Who's in Charge?* (Russell Sage Foundation, New York 1974)

¹⁶⁶ R. Ericson and P. Baranek, *The Ordering of Justice: a Study of Accused Persons as Dependents in the Criminal Justice Process* (University of Toronto Press, Toronto 1982)

¹⁶⁷ P. Pleasence and H. Quirk, 'The Criminal Case Profiling Study' (Legal Service Research Centre, LSC, 2001); A. Currie, 'The Nature and Extent of Unmet Need in Criminal Aid in Canada' (2004) 11 I.J.L.P.

defendants accepted that they were not able to assess the quality of the legal advice they received or the command of the law demonstrated by their solicitor.¹⁶⁸ The majority of criminal defendants are therefore unable to critically assess their lawyer's performance and often follow their advice directly. This makes them susceptible to accept poor advice given by an unscrupulous or incompetent lawyer.

The potential for defendants to be overwhelmed by the advice of their defence barrister is exacerbated by the manner in which advice on plea may be given. According to the Code of Conduct, barristers may advise defendants on plea 'in strong terms' if necessary.¹⁶⁹ However, as Peter Tague has noted, how 'strong' advice may be is left undefined.¹⁷⁰ This allows barristers to adopt various approaches that may, in some cases, place considerable pressure on the defendant to plead.

Three main strands of criticism have been directed at the criminal bar. Firstly, barristers have been described as being part of a guilty plea culture. This phrase describes the general presumption of guilt displayed by criminal lawyers in their attitudes towards defendants. Secondly, some commentators believe that the court community of the Bar demands great loyalty from its members than does a fidelity to the ideals of due process and the fearless defence of the accused. Thirdly, some critics argue that barristers manipulate defendants to maximise their fees through guilty pleas and late resolution of cases before trial. This chapter will now consider those criticisms in detail.

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¹⁶⁸ C. Tata, T. Goriely, P. Duff, A. Henry, P. McCrone, B. Lancaster, A. Sherr and M. Knapp, 'Does Mode of Delivery Make a Difference to Criminal Case Outcomes and Client Satisfaction? The Public Defence Solicitor Experiment' [2004] Crim LR 120.

¹⁶⁹ Bar Standards Board, 'Code of Conduct of the Bar of England and Wales' (8th edn, 2004) Section 3: Written standards for the conduct of professional work, para. 11.3.

¹⁷⁰ P. Tague, 'Tactical reasons for recommending trials rather than guilty pleas in Crown Court' [2006] Crim LR 23, 24.

a. Guilty plea culture

In the late 1970s, Baldwin and McConville's research found intense pressure being exerted by defence counsel on defendants to plead guilty.¹⁷¹ Arguing that *Turner* provided no protection to the voluntariness of a defendant's plea, they concluded that the combination of 'giving advice in strong terms if necessary' and the sentence discount given on guilty plea, caused defendants eventually to enter a guilty plea.¹⁷² The research found that significant numbers of defendants pleaded guilty under pressure and were either entirely unhappy with the process or claimed innocence after sentencing.¹⁷³ Describing the public image of the barrister fearlessly upholding the interests of his client as a 'considerable distortion of the truth'¹⁷⁴, Baldwin and McConville argued that the combination of defence counsel pressure and the sentence discount on guilty plea was overwhelming to defendants, including those who may be factually innocent. A detailed analysis of why some defence counsel conspired with the criminal system to produce guilty pleas was not provided in *Negotiated Justice*. Baldwin and McConville speculated that barristers were overworked and that 'counsel's primary interests lie with the court system and not the defendant.'¹⁷⁵

McConville engaged in further criticism of barristers in *Standing Accused*.¹⁷⁶ For the purposes of the current research here it is necessary to concentrate on what is said about barristers and their advice in the Crown Court, rather than the majority of the research which concentrated on solicitors' practices.¹⁷⁷ According to McConville et al's research, the defending barristers observed presumed the guilt of those they represented and were closed to alternative explanations given by the defendant.¹⁷⁸ In many cases barristers showed an over eagerness to accept a guilty plea and made no attempt to test the

¹⁷¹ Baldwin and McConville (n.31).

¹⁷² Ibid. 101-116.

¹⁷³ Ibid. 62.

¹⁷⁴ Ibid. 56.

¹⁷⁵ Ibid. 111.

¹⁷⁶ McConville et al (n.52).

¹⁷⁷ For further research on plea negotiation by solicitors in the magistrates' court with similar conclusions see: A. Mulcahy, 'The Justifications of Justice' (1994) 34 Brit.J.Criminol 411.

¹⁷⁸ Ibid. 254.

foundations of the defendant's willingness to capitulate. The explanation, according to the authors is that barristers 'begin with a presumption of guilt and assume that a guilty plea is both appropriate and normal.'¹⁷⁹ Barristers, they claim, are involved in manipulating the defendant through subtle psychological pressures applied to force defendants into entering pleas which counsel have decided are appropriate. Counsel 'evinces little interest in scrutinising the evidence or in attempting to convince the defendant of its weight and probative value. Rather, conferences are treated as "disclosure interviews", the purpose of which is to extract a plea of guilty from the client.'¹⁸⁰ In a 'guilty plea culture':

Defence lawyers approach their work on the basis of standardised case theories and stereotypes of the kind of people who become involved in criminal events; images of clients as feckless or dishonest are allowed to structure the way their cases are handled from the outset; the views of clients are given little weight and their accounts not investigated; and the case proceeds on the basis that the lawyer knows best in a context in which all the incentives point towards a guilty plea.¹⁸¹

According to McConville et al, for most advisors the presumption of guilt assumes 'a universalistic character and is unthinkingly applied to the client population at large.'¹⁸² In doing so, barristers are part of an overall culture of criminal defence that, along with solicitors, presumes the defendant's culpability. As Mulcahy comments on the practices of solicitors in the magistrates' court, 'the object of negotiations appears to be the determination not of guilt or innocence, but of the "appropriate" level of guilt.'¹⁸³

b. Court communities

Sanders and Young, referring to the evidence presented in *Negotiated Justice*, believe there to be 'a powerful culture [at the Bar] in which priority given to settling cases rather

¹⁷⁹ Ibid. 256.

¹⁸⁰ Ibid. 268.

¹⁸¹ M. McConville, 'Plea Bargaining: Ethics and Politics' (1998) 25 *Journal of Law and Society* 562, 572

¹⁸² *McConville et al* (n.52) 140-41.

¹⁸³ *Mulcahy* (n. 177) 422

than fighting cases is particularly marked.’¹⁸⁴ Unlike McConville et al who reject a court community model of criminal justice¹⁸⁵, Sanders and Young transplant an American model of loyalty and co-operation amongst criminal lawyers into English courts.¹⁸⁶ Their research presents a community of barristers whose fidelity to due process and testing the evidence has been co-opted to the needs of the system. That system expects and requires guilty pleas in significant numbers and barristers manipulate and distort the strength of the evidence in order to convince the defendant to plead. Sanders and Young argue that the relationship between members of the Bar is based on trust and that this often overrides the duty owed to the defendant:

The interest in maintaining good relations with other barristers (and with judges seeking to manage a heavy caseload) may become more important than the interests of an individual defendant.¹⁸⁷

According to Sanders and Young, the courtroom culture creates strong incentives for barristers of both sides to cause the case to “crack.”¹⁸⁸ Judges are a cooperative part of this culture and ‘prosecution and defence lawyers have little to fear in seeking the approval of the judge for a charge bargain because all the parties involved share a common outlook...’¹⁸⁹

c. Financial incentives

Sanders and Young seek to explain defence barristers’ willingness to settle cases as

¹⁸⁴ A. Sanders and R. Young, *Criminal Justice* (2nd edn Butterworths, London 1994) 343.

¹⁸⁵ *McConville et al* (n.52) 186-188. This model is rejected in the context of solicitors in the magistrates’ court.

¹⁸⁶ *Sanders and Young* (n.14) 401 and 423, citing M. Galanter, ‘Mega Law and Mega Lawyering in the Contemporary United States’ in R. Dingwall and P. Lewis (eds) *The Sociology of Professions* 159 (MacMillan Press, London 1983).

¹⁸⁷ *Ibid.* 423.

¹⁸⁸ A cracked trial is a case which is listed for trial after the entry of a not guilty plea, but is later resolved after a change of plea by the defendant or because the prosecution is unable to proceed.

¹⁸⁹ *Sanders and Young* (n.14) 425.

driven, in part, by financial incentives.¹⁹⁰ Pointing to the research carried out by Morison and Leith and Bredar, they argue that barristers put off placing pressure on the defendant or advising a plea of guilty until the day of trial causing it to “crack”.¹⁹¹ Defence barristers achieve a cracked trial through emphasising the discount available, or commonly, through a charge bargain. In this way counsel maximises the ratio of work to reward.¹⁹² The barrister is then free to conduct another case the next day with the same result. Furthermore, barristers earning case-by-case take on more work than they can handle relying on the probability that a case can be disposed of via a guilty plea. In doing so, barristers keep hold of briefs until the last minute when it becomes clear that they cannot appear.¹⁹³ Barristers are assisted in this process by their clerks who try to keep a case “in chambers” and avoid telling the instructing solicitor that their chosen counsel is unavailable. The instructing solicitor is then forced to keep the brief with that set of chambers as free counsel elsewhere cannot be found.¹⁹⁴ Accordingly, many counsel are instructed at the last minute in cases for which they cannot prepare properly.

Zander and Henderson’s *Crown Court Survey*¹⁹⁵ could support Sanders and Young’s argument that defence barristers purposefully crack cases because of pay. The survey details the high number of cases that cracked and the late briefing in many cases in the early 1990s.¹⁹⁶ Furthermore, Sanders and Young believe that able young barristers will tend to gravitate towards privately funded work, leaving the criminal bar to their less talented contemporaries to ‘eke out a living by settling cases wherever possible.’¹⁹⁷ This view is reinforced by Belloni and Hodgson who have tentatively suggested that barristers crack trials to avoid the potential embarrassment of being unprepared.¹⁹⁸

¹⁹⁰ Ibid. 399, 418-419.

¹⁹¹ Ibid. 418.

¹⁹² Ibid.

¹⁹³ Ibid. 419.

¹⁹⁴ Ibid. 419 citing P. Rock, *The Social World of an English Crown Court* (Clarendon, Oxford 1993) 271-273.

¹⁹⁵ M. Zander and P. Henderson, *Crown Court Study* (Royal Commission on Criminal Justice Research Study 19, HMSO, London 1993)

¹⁹⁶ Ibid. 62. Zander and Henderson’s research in the Crown Court found that defendants do not see their barristers in over half of contested and cracked trials.

¹⁹⁷ *Sanders and Young* (n.14) 420.

¹⁹⁸ F. Belloni and J. Hodgson, *Criminal Injustice* (Palgrave Macmillan, Basingstoke 2000) 156.

Sanders and Young also say that prosecuting counsel have the same reasons to charge bargain over plea as defence barristers. Referring to Temkin's study of rape cases, Sanders and Young believe that prosecutions of overly complex cases that are not matched by correspondingly high pay rates are sometimes passed at a late stage to younger, more inexperienced members of chambers who are more likely to settle by charge bargaining with the defence.¹⁹⁹ Negotiations over charge are conducted at a late stage because prosecutors are unwilling to suggest to the CPS that cases should be discontinued.²⁰⁰ With a charge bargain the defendant receives a substantial drop in sentence and also full credit for a guilty plea. The prosecutor, they argue, has the same incentive in settling cases as they will receive a higher payment over several cases than he or she would do for one trial.²⁰¹

d. Rethinking barrister incentives and culture

Peter Tague, in considering the criticism of McConville et al, argues that some evidence strongly points to a more complex interpretation of barrister behaviour than that presented in *Standing Accused* and *Negotiated Justice*. As Tague argues, if barristers were to act entirely selfishly and to their own financial gain, it would not be in their interests to systematically remove defendants from trial.²⁰² The manipulation of the defendant and the determination to secure a plea of guilty does not meet what Tague calls a barrister's three main 'selfish' incentives: to attract briefs, avoid sanction and maximise remuneration. According to Tague, under the previous fixed fee scheme by which barristers were remunerated it was in their financial interest to run trials.²⁰³ It is

¹⁹⁹ *Sanders and Young* (n.14) 423, citing J. Temkin, 'Prosecuting and Defending Rape Cases: Perspectives from the Bar' (2000) 27 *Journal of Law and Society* 219, 227-228. The CPS now maintains lists of counsel considered experienced enough to instruct. This makes passing off of cases more unlikely.

²⁰⁰ *Ibid.* 421, citing J. Baldwin, 'Understanding Court Ordered Acquittals in the Crown Court' [1997] *Crim LR* 536, 552-553.

²⁰¹ *Ibid.* 422

²⁰² P. Tague, 'Barristers' selfish incentives in counselling defendants over the choice of plea' [2007] *Crim LR* 3.

²⁰³ *Ibid.* 11-22. Tague's analysis is based on the Graduated Fee Scheme introduced in 1997. Defence barristers are now paid according to the Advocates' Graduated Fee Scheme introduced by the Criminal

also, Tague argues, in a barrister's interest to be known as a good advocate rather than a negotiator.²⁰⁴ Finally, the observed habit of counsel meeting the defendant just prior to trial and attempting to manipulate and pressurise defendants to plead guilty would be ruinous to their reputation with solicitors, a reputation counsel should be keen to protect.²⁰⁵ Tague hypothesises that the high guilty plea rate may be the result of barristers acting in what they believe to be the defendant's best interests. According to Tague, adopting either model of the selfish lawyer or the altruistic barrister would result in more trials.²⁰⁶

Tague's research is highly unusual in that he spoke with barristers rather than defendants, unlike *Negotiated Justice* and *Standing Accused*, where no barristers were interviewed about the advice they gave. Tague notes that while 'vociferously critical of the barristers' motives in those conferences, the authors of those studies apparently did not attempt to speak with the barristers, to learn what the barristers thought they were doing.'²⁰⁷ Tague's work draws three conclusions about the current literature. Firstly, the analysis put forward by McConville et al may be empirically incorrect as it is often demonstrably in defendant's best interests to plead guilty rather than contest a trial. Shifting "blame" to barristers incorrectly focuses attention on how guilty pleas are produced. Secondly, barristers' thought processes in relation to plea require greater scrutiny and research, and that drawing conclusions from observed behaviour is an, as yet, under-explored source of empirical research. Finally, the financial incentives provided to the Bar should be carefully analysed to see how barristers' advising behaviour may be affected.

Defence Service Funding) Order 2007 SI 2007/1174.

²⁰⁴ Ibid. 5.

²⁰⁵ Ibid. 10.

²⁰⁶ Ibid. footnote 3. This is not necessarily true. Selfish barristers may encourage more trials, whereas altruistic barristers, acting in the defendant's best interests, may encourage more guilty pleas.

²⁰⁷ Ibid. footnote 4.

6. Gaps in the current literature

The main body of the present literature and research appears to attribute the high incidence of guilty pleas in English courts to a combination of system incentives and manipulation by legal professionals. While it is undoubtedly true that bargaining in some form or another has been a consistent feature of English courts for more than 100 years, there is insufficient empirical research to support the view that lawyers in contemporary criminal justice subscribe to a ‘guilty plea culture’, are part of courtroom communities that encourage guilty pleas, or actively manipulate defendants for financial gain. The explanation that lawyers, and specifically barristers see defendants as ‘unworthy and undeserving’²⁰⁸ is problematic given the wider context of the possible complex and intersecting variables which might affect barristers’ behaviour.

An important limitation of the current literature in this field is the relative lack of evidence regarding barristers’ perspectives of how the matter of plea is dealt with. As Tague’s work indicates, there is a clear need for more empirical research into the practices of the criminal bar. Moreover, the current literature is based on empirical data which is now considerably out of date, having been gathered in a very different legal and political context. In particular, the following four main areas are under-researched and require further attention.

Firstly, work by McConville et al being based primarily on interviews with defendants leaves a gap in the data which might identify how barristers themselves think about their own work and how they come to decisions on plea or why they enter into bargained pleas. Although drawing inferences from observed behaviour is a valuable and recognised research method, it is necessary to analyse data based on interviews with barristers in order to construct a more detailed, nuanced and up to date account of their motivations and behaviour. While it is true that data drawn from interview data will inevitably exhibit a favourable self-bias or suffer from a false consciousness about the

²⁰⁸ *McConville et al* (n.176) 188.

motivation for the content of their advice, practitioners can contribute valuable data and new perspectives that should not be ignored. Previous research by Mulcahy has criticised the value of lawyers' accounts of their own behaviour, arguing that such accounts are 'ideological' as lawyers seek to justify plea negotiations in the face of criticism.²⁰⁹ However, this argument is predicated upon the questionable idea that plea bargaining is always unfair and coercive, and that any explanation given in the face of criticism is a 'justification' and therefore necessarily ideological. Rather, any explanation should be assessed on its own merit, and lawyers' accounts should be carefully scrutinised against other evidence as a potential explanation of why guilty pleas are advised. As Tague's study suggests, previously unaccounted for incentives should be investigated and a more nuanced approach to the question of plea is necessary. The views of barristers may be extremely significant in understanding why and how pleas are produced and this source of information is currently under-explored.

The second area which requires further research concerns the nature and extent of the court community model advanced by Sanders and Young. Difficulties arise in demonstrating the existence of such a model. While the Bar is certainly small enough to ensure barristers on the same circuit come into contact reasonably often and many judges are drawn from the Bar's ranks, there is little empirical evidence in the literature to suggest that a community of co-operation similar to that observed by some in American courts is active amongst the Bar. Sanders and Young rely on James Bredar's work describing plea negotiations during his time as a director of a pilot scheme in a Crown Court centre in the north-west, however, the conclusions presented there could be limited to one court centre.²¹⁰ The risk of drawing national conclusions from this study is that regional variations on how barristers interact may be hidden.²¹¹

Research with barristers might indicate, in line with Tague's research, that defence lawyers believe that negotiated pleas are the best outcome for their client because of the

²⁰⁹ *Mulcahy* (n.177) 426

²¹⁰ J. Bredar, 'Moving Up the Day of Reckoning: strategies for attacking the "cracked trials" problem' [1992] *Crim LR* 153.

²¹¹ Sanders and Young recognise the potential for regional variation in how cases are dealt with: *Sanders and Young* (n.14) 421.

weight of evidence, or because of a realistic evaluation of the defendant's chances at trial. Furthermore, other studies suggest that more complex processes may be at work. In Morison and Leith's research, counsel interviewed put forward many reasons for advising on plea, occasionally forcefully.²¹² Their research revealed that the 'barrister's job is to take all the disparate information that is of relevance and make an evaluation.'²¹³ These matters include not just legal proof but also the character and personality of the accused, witnesses or experts, the strength of the prosecution's case and counsel, the logistics of the legal process and the judge. This view seems more consistent with advice being based on a number of complex reasons, rather than the manipulation of defendants according to a guilty plea culture or to satisfy the expectations of fellow counsel and judges.

The third limitation in the current literature relates to the issue of fee incentives. Although work to date has indicated that fee incentives are an important driver of barrister behaviour, it is not clear how exactly this works in practice. Without knowing how different case outcomes are remunerated, and how this might be related to other contextual factors such as the volume of work available to barristers, it is difficult to draw the conclusion that the fee structure has created an incentive in favour of cracked trials and guilty pleas. Lawyers are thought to be susceptible to fee incentives²¹⁴, however, no thorough research has been conducted on the incentives of the English criminal bar. Although it is argued that there is little financial incentive to barristers to fight cases²¹⁵, the reverse may actually be true. In England and Wales barristers are paid according to the Advocates' Graduated Fee Scheme (AGFS), a fixed fee scheme. The Graduated Fee Scheme has been altered recently following the recommendations given

²¹² J. Morison and P. Leith, *The Barrister's World and the Nature of Law* (Open University Press, Milton Keynes 1992).

²¹³ Ibid. 121

²¹⁴ P. Fenn, A. Gray and N. Rickman, 'Standard fees for legal aid: an empirical analysis of incentives and contracts' (2007) 59 *Oxford Economic Papers* 662; F. Stephen, G. Fazio and C. Tata, 'Incentives, criminal defence lawyers and plea bargaining' (2008) 28 *International Review of Law and Economics* 212; C. Tata and F. Stephen, "'Swings and roundabouts": do changes to the structure of legal aid remuneration make a real difference to criminal case management and case outcomes?' [2006] *Crim LR* 722. Cyrus Tata disputes a simplistic reading of an advice for fees relationship: C. Tata, 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and "Ethical Indeterminacy" in Criminal Defence Work' (2007) 34 *Journal of Law and Society* 489.

²¹⁵ *Sanders and Young* (n.14) 419.

by the Carter Review²¹⁶ in the Criminal Defence (Funding) Order 2007. Furthermore, defence barristers and prosecution barristers are not paid according to the same scheme.²¹⁷ Without the same pay incentives, prosecution and defence barrister might disagree about when is the most lucrative time for the case to crack, and prevent the type of collusion Sanders and Young suggest. Further research is therefore needed which precisely calculates the fees produced by different outcomes. That pay rates have varied over the years may mean that any previous studies are no longer an accurate reflection of barristers' fee incentives.

The last limitation of the current literature concerns the effect of the significant acceleration of changes to the criminal justice process generally, and the funding and provision of legal advice specifically. Much of the literature predates these changes. McConville and Baldwin's description of court practices from 20-30 years ago sets the historical context for developments only. The last major study that included research on the Bar was McConville et al's *Standing Accused* published in 1994. Since that time changes that may have had a significant impact on court practice include: the number of defendants being diverted from the criminal justice system through cautioning and PNDs and thus the type of defendants encountered; the CPS becoming more involved in early charging decisions; the changes to the pay structure for defence work (for example the recent Carter reforms); significant changes to the rules of evidence at trial (the use of bad character evidence; the in-roads into the right to silence; the introduction of hearsay evidence); minimum sentences for certain offences; alterations to the law on disclosure; the enshrining of the one third discount by the Sentencing Guidelines Council; the indication of sentence in *Goodyear*; and, from an evidential point-of-view, the availability of CCTV evidence and improved scientific evidence, such as the widespread use of DNA matching. If those changes are considered together with possible alterations in attitude by members of the Bar, further socio-legal research is required to draw firm conclusions about how barristers approach the question of plea.

²¹⁶ Lord Carter's Review of Legal Aid Procurement, 'Legal Aid: A market-based approach to reform' ("The Carter Review") (2006).

²¹⁷ Prosecuting counsel are paid according to the Crown Prosecution Service Graduated Fee Scheme (Issued November 2005, Amended July 2008).

7. Identifying the research question

The central focus of this research is to examine the factors which determine a barrister's advice on plea and to answer the question: 'what is it that determines a barrister's advice on plea?' Given the relative passivity and lack of legal knowledge of defendants in entering a plea and their inevitable reliance on legal advice, this question is vital to any analysis of criminal justice. The plea is entirely determinative of whether a trial on the facts is held, therefore the advice upon which the plea is determined and entered is of central importance. Although work to date has examined this question, limitations in earlier methodologies and analytical models are such that important questions remain unanswered. Moreover, the very different context in which barristers now operate means that new research is needed in order to shed light on the current decision-making of legal advisors. Gaps in the existing literature are such that a more nuanced, detailed understanding of barrister incentives or "drivers" is required. In particular, there is a need to include the attitudes of barristers themselves as a source of data.

In order to address the primary research question, five areas need to be examined in detail. Firstly, the process of advice-giving itself will be examined at a micro level. This will require an analysis of how defendants are advised on a case-by-case basis and the factors considered relevant by a barrister in determining what advice to give. Secondly, in the light of the central role ascribed in the current literature to the construction of guilty pleas, the thesis will examine why plea bargains are entered into and how bargained pleas might act upon defendants' decision-making. Thirdly, the thesis will attempt to explore the financial incentives which affect barristers and discuss what case outcomes barristers may prefer. Fourthly, given the importance placed in Tague's work on the role of the instructing solicitor in sanctioning barristers who do not live up to their expectations, the thesis will discuss the barrister's relationship with his or her instructing solicitor. Finally, this research will look for evidence of court community and attempt to identify whether or not barristers' values and decision-making are co-opted by organisational drivers.

Chapter 3: The empirical basis for the research

The empirical basis for this research consists of 24 interviews conducted with 22 practising barristers and two solicitors. To ensure the reliability and validity of the data collected this research was designed with close reference to accepted methods of qualitative data collection and analysis. However, to retain the readability and flow of the thesis, the detailed account of the methods used in this research is set out in Appendix A. This chapter briefly discusses the main issues relating to what the research sought to achieve and the reasons why qualitative interviews with practising criminal lawyers were used.

1. Method summary

The aim of the research was to identify the factors or drivers which may determine a barrister's advice on plea. As the previous chapter detailed, no recent published research, with the exception of that conducted by Peter Tague, has spoken to barristers about how and why they advise defendants to plead.²¹⁸ What determines a barrister's advice on plea is almost certainly brought about by complex social processes and cannot be measured through the analysis of quantitative, causal relationships between variables.²¹⁹ On the other hand qualitative research, and more specifically interviewing, allows the exploration of how and why people behave the way they do. Using interviews as the primary research tool is therefore a well suited, valid method to tackle the research question. Although observation of social phenomena provides an understanding of how people behave, it does not allow for the understanding of motivation or experience. The research objective of discovering the motivation of barristers would be partly hidden to someone who merely observed behaviour. Interviews give a chance for participants to think about their own behaviour and to explain it. As the focus of the research was to find out why barristers advise as they do rather than how, the best way of finding that

²¹⁸ P. Tague, 'Barristers' selfish incentives in counselling defendants over the choice of plea' [2007] Crim LR 3.

²¹⁹ For the purposes of qualitative measures: N. Denzin and Y. Lincoln, *Handbook of Qualitative Research* (2nd edn, Sage Publications, Thousand Oaks and London 2000) 11-12.

data was to ask the barristers themselves. Interviewing is a well-established research tool, and has been used extensively in researching the working practices of lawyers.²²⁰

The methodology used can be described as a grounded theory approach.²²¹ The research questions were designed with reference to pre-established variables that were identified as relevant in the literature. These variables were supplemented by questions relating to areas of law that might have some impact on the advice given. Because the current literature has not given a detailed account of how barristers think about their work according to their own perspective, the research adopted an emerging theory method whereby the questions posed during the course of the research could change to address new, interesting or previously under developed areas relating to advice on plea.²²³ Using the research data already collected, the questions partially evolved in an inductive fashion. This allowed an emerging theory about the data to be produced that could be tested against participants' responses as further interviews were conducted. The core questions asked remained the same throughout the interviews, however, additional questions relating to regional factors and pay were added as the research continued.

The questions were arranged in a semi-structured interview format. There was therefore flexibility in the structure of each interview, allowing participants to talk at greater length about areas they felt were of relevance or importance. That is not to say that the question format changed radically or that the structure of any of the interviews varied widely from the question schedule presented in Appendix B. Rather, while most of the interviews were similar in form and content, issues thought important by different interviewees could be explored through follow-up questions and so examined in detail.

²²⁰ For recent examples: C. Tata and F. Stephen, "'Swings and roundabouts': do changes to the structure of legal aid remuneration make a real difference to criminal case management and case outcomes?" [2006] Crim LR 722; *Tague* (n.218).

²²¹ For descriptions of grounded theory approaches: A. Strauss and J. Corbin, *Basics of Qualitative Research Techniques and Procedures for Developing Grounded Theory* (2nd edn Sage Publications, Thousand Oaks CA and London 1998); 'Grounded Theory: An Overview' in N. Denzin and Y. Lincoln (eds) *Handbook of Qualitative Research* (Sage, Thousand Oaks CA and London 1994).

²²³ For the use and development of questions: A. Strauss and J. Corbin, *Basics of Qualitative Research: Grounded Theory, Procedures and Techniques* (Sage Publications, Thousand Oaks CA and London 1990) 183.

The interviewees were also selected according to an emerging theory sampling technique. The initial sample was chosen to take in a number of what were thought to be significant, controllable variables, such as year of call (and therefore experience and type of work undertaken); size of chambers; gender; proportion of work in prosecution and defence; and practice profile of chambers. However, as the study progressed the sample varied according to the needs of the emerging theory.²²⁴ The sample was therefore changed when it was discovered in the initial sample that some regional variation existed between the judicial circuits. This expanded the scope of the study to take in five barristers and one solicitor from the Midlands Circuit. While not a quantitative study, the sample was continually monitored to ensure that the range of relevant variables was represented in the data. Appendix A, Tables A-1 to A-5 show the profiles of the barristers interviewed by each of the variables controlled.

Barristers were selected using the Bar Directory published by Sweet and Maxwell and chambers' own websites.²²⁵ After each interview was conducted, what was discussed was reflected upon and the data transcribed by the researcher. Although the core questions and areas of interests remained the same with each interviewee, there was a process of continual theory development as data was revealed and gaps and weaknesses were discovered.

Although it was recognised that the data would inevitably contain some favourable biases in interviewees' views of themselves, the descriptions given by the participants were treated as potentially accurate depictions of their thought processes in determining what advice to give on plea.²²⁶ The reliability of the data was improved by several other methods. Firstly, the data presented in Chapters 4-8 is set in the context of other studies and statistical measures. This allowed the data to be compared and checked for veracity.

²²⁴ M.B. Miles and A.M Huberman, *Qualitative Data Analysis* (2 edn Sage Publications, Thousand Oaks CA and London 1994) 29.

²²⁵ The Bar Directory <<http://www.legalhub.co.uk/legalhub/app/appinit>>

²²⁶ For treating accounts as depictions of reality: D. Silverman, *Doing Qualitative Research: A Practical Handbook* (Sage Publications, Thousand Oaks CA and London 2003) 122.

Secondly, the researcher has practical legal training and some experience in criminal law and procedure and could approach the topic with an informed view as to how advice is constructed. This awareness enabled a penetration beyond a potential “standard response” that might be given by a participant. The “insider-outsider” status of the researcher also produced a rapport between the researcher and the participants who felt comfortable to speak freely about their work. Thirdly, the data was triangulated with interviews with two solicitors. The solicitors’ accounts about their relationship with barristers and the effect that the relationship has on advice are presented in Chapter 7.

The interviewee extracts are labelled in the thesis according to an alphanumeric system. The letter indicates the chambers of the interviewees, and the number the individual barrister from that chambers. Therefore ‘A1’ is the first barrister to be interviewed from chambers ‘A’. Participants labelled ‘L’ or ‘N’ were interviewed in Leicester Crown Court and Nottingham Crown Court respectively. S1 and S2 are the two solicitors interviewed. Where important, background information about the participant, such as experience or type of practice, is described in the text. The initials ‘JB’ represent the researcher.

Chapter 4: The advice process

This chapter examines the advice process at the case-by-case, micro level. In answering the question *what determines a barrister's advice on plea?* it is important to first understand how barristers interact and advise defendants about the plea-making decision. This first substantive chapter seeks to understand how the decision itself is reached on the basis of law or facts that affect the case at hand. Later chapters will explore pressures that are brought to bear on the advice process, but only as external matters that are not to do with the case itself or the particular circumstances of a defendant. Understanding the plea-making decision in this way appreciates the complexity of what drives advice and how it is given, and reflects the layers of incentives and motives that impact upon barristers as professionals.

In this chapter the nature of advising defendants on plea, most commonly in conference, will be explored. Based primarily on the data gained from interviewees, this chapter will set out how the interviewees explained the process they used to come to decisions about individual cases and how advice is conveyed to defendants. As will be seen, there are a multitude of factors for the barrister to assess which cannot be explored in complete detail here. The advice process and the various matters which may affect a barrister's approach to a case involve a significant number of factors which could not all be explained sufficiently in a thesis of this length. This research has chosen to focus on general matters or more specific examples of burgeoning importance. The data presented here is therefore illustrative and indicative, rather than definitive, of barristers' approaches to advice.

1. Current conceptions of the advice process

Prior analysis of barristers advising defendants is found in two main studies. The first, in the mid-1970s, found a significant number of barristers behaving in an overtly

manipulative manner to extract guilty pleas from defendants who later protested that the way in which they were advised left them with little or no choice.²²⁷ Defendants described being ‘instructed’, ‘ordered’, ‘forced’, or even ‘terrorised’ into pleading guilty by their barrister.²²⁸ These barristers used a number of techniques to get defendants to plead, including ‘throwing a fit’ of anger, paying little or no attention to the defendant’s alternative account, or emphasising the large difference in sentence between that on a guilty plea and that on conviction to frighten the defendant.²²⁹ The second study two decades later which mainly concerned the practice of defence solicitors, but which observed counsel in conference with defendants at the Crown Court, argued that barristers were more subtly manipulating defendants than that found previously.²³⁰ According to this research, defending barristers exhibited a presumption of guilt and were closed to alternative explanations by the defendant.²³¹ Barristers were reported to have displayed an over-eagerness to accept guilty pleas and that they made no attempt to test the foundations of the defendant’s willingness to capitulate. The research claimed that barristers were involved in manipulating the defendant through subtle psychological pressures to force them into entering pleas which counsel had decided as appropriate. Counsel were seen to gain the trust of the defendant but evinced ‘little interest in scrutinising the evidence or in attempting to convince the defendant of its weight and probative value. Rather conferences [with the defendant were] treated as “disclosure interviews”, the purpose of which [was] to extract a plea of guilty from the client.’²³²

These two studies have acted as the foundation of a critical view of the defence bar, which argues that a “guilty plea culture” is predominant among barristers. Sanders and Young, for example, conclude in their recent book on criminal justice that:

...a substantial proportion of...barristers...continue to treat prosecution evidence

²²⁷ J. Baldwin and M. McConville, *Negotiated Justice* (Martin Robertson, London 1977).

²²⁸ *Ibid.* 46.

²²⁹ *Ibid.* 39-56.

²³⁰ M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press, Oxford 1994).

²³¹ *Ibid.* 254.

²³² *Ibid.* 268.

uncritically, ignore protestations of innocence, and advise that the defendant has ‘no choice’ but to plead guilty.²³³

This thesis has, however, identified two important limitations in the current literature. As was noted in Chapter 2, these earlier studies are based primarily on interviews with defendants, and there is a gap in the data which might identify how barristers themselves think about their work and how they come to decisions on plea. Moreover, these studies are potentially out of date, having been conducted prior to a multitude of important changes to the criminal justice process. To rely on these studies as an accurate depiction of the modern Bar is therefore problematic.

The empirical evidence presented in this chapter strongly suggests that a complex process is taking place in how barristers approach the question of plea in individual cases. The descriptions conveyed by the interviewees in the present study do not conform to those previously given in the literature. As will be seen, the accounts presented here are nuanced and detailed, and cannot be described as justifications of an ‘ideological character.’²³⁴

The chapter begins by describing the methods the interviewees used in forming a view of the case against the defendant, and the various important factors that must be taken into account are highlighted. In describing the advice process it is hoped that the nuances and subtlety of advising a defendant on a criminal charge is conveyed. As shall be seen, the advice given to defendants does not lend itself to a monolithic explanation, but is as extraordinarily varied as each of the defendants and barristers involved. This chapter has tried to capture that variety and explain general trends where possible. Secondly, the chapter will explore how tactical decisions are made on the basis of sentence. There appears to be a number of difficult ethical and practical problems that a barrister must overcome in deciding what advice to give. That barristers have given consideration to these problems is indicative of a highly complex process. Thirdly, how the chances of

²³³ A. Sanders and R. Young, *Criminal Justice* (3rd edn OUP, Oxford 2007) 428.

²³⁴ A. Mulcahy, ‘The Justifications of Justice’ (1994) 34 *Brit.J.Criminol* 411, 426.

conviction and the potential sentence are conveyed to the defendant will be discussed. This will include an exploration of the terms that are used to describe to the defendant the likelihood of conviction or acquittal, the differential in sentence that might be achieved, as well as the tone and manner taken when giving advice. As will be shown, there appear to be at least two ways in which barristers deliver advice to the defendant. Neither the “persuasive” or “facilitative” approaches discovered correspond with a guilty plea culture description. A critical analysis will be included in each section, reflecting what the interview participants have said against the broader context of the current literature and development of the law.

2. Constructing advice

a. Forming a view

Before a barrister can advise a defendant on plea he or she must form a view about the prospects of the case and the benefits or disadvantages of pursuing various avenues of possibility. As described by Morison and Leith, a barrister’s first task is to evaluate the case to decide whether a plea of guilty or not guilty is appropriate.²³⁵ In forming an opinion the barrister must attempt to take an overall view of a plethora of information including witness statements, physical evidence, police reports and surveillance, forensics, and police interviews of the defendant, together with what the defendant says about the prosecution case. Because the number of criminal offences is so many and the factual circumstances infinite, it was difficult for the interviewees to explain a standard procedure as to how they approach a case. There are, however, certain features that remain common to all or most of the interviewees’ accounts of how they begin to form a view of the advice to be given.

Without exception all of those interviewed began any case with a reading of the

²³⁵ J. Morison and P. Leith, *The Barrister’s World and the Nature of Law* (Open University Press, Milton Keynes 1992) 114.

prosecution disclosure given to them in their brief to assess the strength of the Crown's case against the accused.²³⁶ This allowed defending barristers to form a preliminary strategy before meeting the defendant as to whether this was a case that would probably fight or plead. Often, although not always, this view was assisted by a proof of evidence that had been given by the defendant to the instructing solicitor. As E1 explained her approach:

I mean you will be given the brief so you read the statements and then you make a decision whether you think the evidence is strong or weak...I read the statements before I've read my defendant's proof, if there is one, mainly because I think, I prefer the prosecutor's view initially and then to get [the defendant's] idea of it.

Taking the prosecution case first is not unusual given the nature of an adversarial trial where it is the prosecution who must prove their case. Evaluating whether the Crown can do so on the papers is a logical first step. Being able to make a realistic assessment of the Crown's case was often cited as a reason for why some of the interviewees preferred to prosecute and defend cases as part of their practice. Some of the barristers interviewed approached the case as if they were prosecuting it to anticipate difficulties for the defendant. As I1 described:

My standard preparation of the case is to prepare a case summary as if I was prosecuting the case anyway before I have met the defendant, which will tell me if there are gaps in the prosecution case or whether the evidence is overwhelming or whether the gaps are likely to be filled...If I thought the defendant really had, was in trouble, I would prepare a list of difficulties that he has got. This client next week, I had a list of 15 problems he had.

Most of the interviewees felt that the police interview was a crucial starting place in assessing the Crown's case. Admissions in interview were considered, for obvious reasons, highly damaging to the prospects of a trial and generally indicative of how the

²³⁶ This reflects the training provided on the Bar Vocational Course and the Inns of Court advocacy training courses.

defendant would be pleading anyway. A2's response was typical:

...the first place I would look I suppose is the interview because I think that's a good place to start. What someone said and did when they were first spoken to about the allegation is usually a good indicator of where the evidence stands and a good place to start in the advice that you're going to give.

Not all those interviewed said they had a clear idea as to what the defendant's response was to the allegation from the briefs given to them by instructing solicitors. In common with a study of the Crown Court in the early 1990s, some of the more junior barristers reported turning up at court without being given a proof of evidence by the solicitor, and were frequently served with the prosecution evidence late.²³⁷ This therefore involved having to familiarise themselves with the case in a relatively short period of time and discuss with the defendant what they had to say for the first time at court. Belloni and Hodgson and Sanders and Young have argued that late briefing increases the chances that a guilty plea will be advised.²³⁸ Equally, however, in common with the *Crown Court Study*, the interviewees felt that they were mostly well-prepared for their 'Crown Court stuff'²³⁹ and that they would not advise defendants until they felt they were well acquainted with the case against the accused. Sanders and Young assume that a barrister cannot properly prepare for a case in the short period before meeting a defendant if the barrister has only one day to read the brief, and that guilty pleas are a natural result of hurried, poorly prepared work.²⁴⁰ However, Tague argues that the high rate of guilty pleas cannot necessarily be attributed to short preparation times and experienced litigators need little time to assess the likelihood of conviction.²⁴¹ According to Tague, barristers boast of their ability to prepare cases at short notice, and can adopt formulaic methods of cross-examining the prosecution case leaving little reason to resort to a

²³⁷ M. Zander and P. Henderson, *Crown Court Study* (Royal Commission on Criminal Justice Research Study 19, HMSO, London 1993) 30. Zander and Henderson found a third of barristers received the brief on the day of the hearing or on the day itself.

²³⁸ F. Belloni and J. Hodgson, *Criminal Injustice* (St Martin's Press, Basingstoke 2000) 156; *Sanders and Young* (n.233) 419.

²³⁹ E1; *Zander and Henderson* (n.237) 30.

²⁴⁰ *Sanders and Young* (n.233) 419.

²⁴¹ P. Tague, 'Barristers' selfish incentives in counselling defendants over the choice of plea' [2007] Crim LR 3, footnote 24.

guilty plea out of desperation.²⁴² In the present study the interviewees believed that they were in fact generally thoroughly prepared for Crown Court cases. Interviewees agreed that short periods of preparation were not a bar to case preparation, and they often worked extraordinary hours or refused other work to make sure that cases were prepared properly. M1 described how the court would not tolerate shoddy case work and that he often had ‘to stay up preparing cases...sometimes into the early hours of the morning in order to satisfy judges, preparing skeleton arguments, doing this that and the other.’ Contrary to the view of critics of the Bar, interviewees believed that they had a duty to the defendant to prepare adequately and they perceived strong pressures from the court, solicitors, and the Bar itself to be thorough in how they dealt with cases.

Armed with a clear idea of the Crown’s case, the defending barristers explained that they generally had a conference with the defendant and solicitor, or solicitor’s representative, where the case was discussed. The standard approach detailed by a majority of the interviewees was to take the defendant through each part of the relevant evidence, seeing what explanation, if any, the defendant had. This approach of questioning the defendant was common to all those interviewed in that they would put each relevant part of the Crown’s case to the defendant for them to answer. This style of questioning has been reported in other studies, most notably in *Standing Accused*.²⁴³ The behaviour of counsel described there was explained by the authors as counsel being uninterested in the defendant’s account, that they had already accepted the Crown’s version of the events surrounding the alleged offence, and that guilt had been presupposed. Although for all intents and purposes that is how counsel’s behaviour might appear, the barristers interviewed in the current study explained their technique differently. Barristers here adopted a robust style of questioning, not because they necessarily assumed guilt, but because they wanted to project the chances of success of the defendant’s account against the Crown’s in front of a jury. Ultimately, unless a half-time submission by the defence succeeds, a defendant must introduce a reasonable doubt.²⁴⁴ L2 explained the need of an

²⁴² Ibid. 8.

²⁴³ *McConville et al* (n.230) 254.

²⁴⁴ Under *Galbraith* [1981] 2 All ER 1060, the defence may make a submission to the judge after the conclusion of the prosecution case that there is no case to answer and that the case should be stopped as the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly

explanation from the defendant:

...“the prosecution’s case is Joe Bloggs and Fred Smith say you were there, they both know you and they say you hit him over the head with a glass. What do you say? Are they lying because they’ve got it in for you? Have they got it wrong because they saw you earlier in the evening? What are you saying to me?” Depending on the answer you might sit there and say, “in which case you are saying they are lying. Why are they lying?” And you wait for whatever the reason may be. Once you’ve got those instructions that relate to specific circumstances you sit down and say, “well those are your instructions, there are the following holes in your case, have you got an answer to them? Yes, no?”

Those interviewed therefore set their advice within the context of an outcome at the trial. If the defendant was unable to provide them with a convincing account within the relatively unpressurised atmosphere of a conference, the defence case was likely to wither under cross examination from the Crown. As Tague says, before meeting the barrister, a defendant may have believed his defence unassailable while the solicitor has not provided a realistic evaluation of the case.²⁴⁵ The barrister’s role has traditionally been that of an objective professional who brings his or her courtroom expertise to the case to provide an honest assessment which can appear crushing to a defendant. In *Standing Accused*, the researchers did not ask the barristers they observed working why they had given advice in such terms and relied upon either their own interpretation of what they had seen, the reaction of the defendants, or that of the clerks who represented the solicitor’s firm.²⁴⁶ While some barristers may have been overly abrupt or too easily dismissive of the defendants’ accounts, the motive for such advice may have been explained in these terms. Tague argues that that the reason for this style of advising (including an eventual recommendation of a guilty plea) ‘for whom a conviction seems very likely’ is paternalistic, rather than as part of a guilty plea culture.²⁴⁷ From the accounts given by the interviewees in this research, barristers questioned defendants out of a genuine concern that an unsubstantiated account might result in a conviction after trial and a concomitant higher sentence. The manner and motive for how advice is

convict on it.

²⁴⁵ P. Tague, ‘Tactical reasons for recommending trials rather than guilty pleas in Crown Court’ [2006] Crim LR 23, 23-4.

²⁴⁶ *McConville et al* (n.230) Chapter 10.

²⁴⁷ *Tague* (n. 245) 25.

conveyed to defendants is explored further below.

Contrary to the account of the criminal bar given in *Standing Accused*²⁴⁸, the interviewees in the present research said that they did not take the Crown's case as authoritative nor did they appear to be closed to alternative explanations given by the defendant.²⁴⁹ McConville et al's research depicted barristers as ignoring defendants' protestations or alternative accounts²⁵⁰ and seems in conflict with the complex management of facts and witnesses that interviewees in the present research described. The current research was unable to ascertain the extent to which briefs given to counsel were fully prepared, however, interviewees described receiving a variety in the quality of preparation done by their instructing solicitors.²⁵¹ Those who received poor instructions were keen to point out that they made efforts to find out from the defendant their account and prepare the case adequately. Many described how meeting the defendant radically changed their view either because of the defendant's explanation, refutation, or general character. A very senior barrister, D1, was anxious to point out that a defending barrister needed to know what the defendant said about the allegation:

You need to know what the client is saying about an allegation. After all he may have a completely overwhelming defence which just isn't apparent on the prosecution papers.

E2 was able to describe a particular case where her view of the prospects of conviction changed completely after speaking with the defendant:

...when I went to do the trial first off, without any idea about what he was going to say, then I was saying look, there's this, this, this, and this. And actually he was really compelling in his explanation and there was something about him that just rung true...we just ran the trial this year and he was acquitted. You see, so it

²⁴⁸ *McConville et al* (n.230) 254.

²⁴⁹ Cf. *Ibid.* 248, 257

²⁵⁰ *Ibid.* 257.

²⁵¹ *McConville et al.* observed extremely limited case preparation by some solicitors for Crown Court cases: *Ibid.* 247-49.

was brilliant. But it just goes to show that my perception of the strength of the evidence may be wrong, because the really important feature of the strength of the evidence is how well it is going to come across.

Even if the account given by the defendant was fantastical, one barrister felt it was incumbent upon him to make sure that the account put forward by the defendant was properly explored before he could give advice on plea. Rather than dismissing a defendant's explanation, H1 went to long lengths to verify through medical evidence whether he was suffering from a psychological condition when in fact, according to both a psychologist and a neurologist, the defendant was malingering. Indeed H1 and a number of others commented that in more ordinary cases it was occasionally impossible to advise thoroughly because the prosecution had not served all their evidence. Overall, the interviewees gave a very strong impression of wanting to know the complete case against the defendant, and his or her account before giving their advice on plea.

b. Timing of advice

Those interviewed located their first contact with the defendant as being on the day of the plea and case management hearing (PCMH) or at some time prior to that hearing.²⁵² Since the PCMH was introduced, the trial barrister should be the barrister who conducts the PCMH.²⁵³ From the present research it was impossible to know whether that requirement is being complied with²⁵⁴ although the Carter Reforms to the Graduated Fee Scheme should assist in getting barristers to do their own PCMHs.²⁵⁵ The more senior interviewees dealing with more serious and complex cases generally located their first

²⁵² The plea and case management hearing was introduced by the Criminal Procedure Rules 2005, replacing the Plea and Directions Hearing (PDH). At the hearing the defendant is asked to enter a plea. If the defendant pleads guilty the court proceeds to consider sentence. If the defendant pleads not guilty the court sets a trial date and attempts to resolve legal matters pertaining to trial, such as applications to adduce bad character, hearsay, and service of evidence.

²⁵³ The Consolidated Criminal Practice Direction, Plea and Case Management Hearing, Part IV.41.8.

²⁵⁴ Zander and Henderson found in the early 1990s that defendants did not see their barrister until the day of trial in over half of all contested and cracked trials: *Zander and Henderson* (n.237) 62.

²⁵⁵ Under the Criminal Defence Service (Funding) Order 2007, Schedule 1, the fixed payment to the trial advocate is reduced by payments to 'substitute advocates' who conducted other hearings. See Chapter 6 for discussion of the Carter Reforms and fees.

contact with the defendant as a conference with the defendant and solicitor either in chambers or at the solicitor's office. Those of five or less years call reported often meeting defendants at court on the morning of the PCMH. Therefore, a variety of scenarios were reported. In more serious cases there tended to be better preparation of cases by both prosecution and defence, with counsel being instructed well in advance of the trial. In simple, minor cases, counsel was often instructed only shortly prior to meeting the defendant. However, when asked, those interviewed reported unease with advising unprepared, especially in the pressurised environment of the court setting and were conscious of the problem of a defendant making a hasty decision. D1, a QC, who commonly represented defendants involved in organised crime and serious violence described how he came to his decision on how to advise:

D1: If I think it's a case where there is a very strong prospect of conviction, I normally have a conference with them in which I do not discuss the question of plea. It's getting to know them, it's getting to have a feel for them, it's getting them to trust me, it's getting them to know that I have worked on the case, that I know this and that and so on. And making sure that I haven't missed anything important.

JB: So, you would be reluctant to advise on plea at all at the first meeting?

D1: Very, very reluctant. I can't think of a case for many years where I have done that. Then I will go away, talk it over with the junior and the solicitor, and in the light of what we think about the realistic prospects go back and see the client again.

I1, a more junior barrister of 12 years call, showed an awareness of the pressure and dangers of defendants reacting to evidence and making decisions on plea without having time to think:

Sometimes they are reacting to evidence that has been served on the day of the hearing that changes things. Sometimes they have not had a conference with the solicitors before, they haven't had enough interaction with the lawyers...I think that usually we have plenty of time before the PCMH to consider their position, so they know what they want to do. If it's a big case, a complicated case,

hopefully there's been a conference in advance of the hearing. If there was a particular difficulty where I didn't think they'd had enough time, I would ask the judge for further time whether it be that day or to another date. There is no particular difficulty with that.

J1 echoed these concerns of a defendant being made to make a decision too quickly, especially when they were meeting and receiving advice from counsel on the case for the first time:

What I'm anxious to head off is at court there obviously is a higher degree of tension, and what I'm anxious to avoid is someone feeling that they've met me for the first time or a barrister for the first time and that what they hear is that they have to plead guilty. They're not actually been told that but I'm anxious to avoid them latching onto that...

These accounts by barristers of their own behaviour are in sharp contrast to what appeared to be inferred by McConville et al in *Standing Accused*. In the fast-paced environment of the court, where the defendant may be meeting their barrister for the first time, 'the atmosphere [in conference] is marked by severe tension in which decisions can no longer be deferred but are required *immediately*.'²⁵⁶ However, when asked specifically, the interviewees in the present research argued that a defendant lost little or nothing from taking time over their decision. According to the barristers in this study judges were happy to preserve credit for a guilty plea at PCMH if the defendant needed time to consider their position. J1 explained:

If I don't want them to plead guilty at the moment because it seems they're not quite settled in their view of what they want, I will just asked the judge for more time. I will put it over a week so this person can think about it.

Being able to preserve credit is significant in reducing the pressure under which decisions over plea are taken. A decision over plea is not therefore necessarily subject to the rushed, pressurised immediacy described in *Standing Accused*. Rather, a defendant

²⁵⁶ McConville et al. (n.230) 254.

may deliberate over the decision in a more considered fashion and enter a plea made on the basis of a sensible assessment of the evidence. The interviewees made clear that they would not allow a defendant to enter a plea, if they believed that the defendant had not fully considered the implications of their choice.

The timing of advice and how a barrister forms a view of the evidence were general matters discussed with each of the interviewees. There were also two specific matters relating to evidence and procedure that were raised with interviewees relating to how they formed a view of the case against the defendant. The admissibility of the defendant's bad character was volunteered by the interviewees, without prompting, as of central concern in approaching what advice to give. The impact of the Criminal Procedure Rules 2005 relating to plea and case management hearings were also discussed in detail with each of the interviewees as the researcher believed the Rules might have had a significant impact on the timing of advice. The Rules created a series of deadlines and procedures that attempted to improve the efficient running of criminal cases through the court.

That is not to argue that other factors relating to evidence and procedure are not important in criminal cases. Quite to the contrary, as the interviewees explained, it would be impossible to provide a definitive account of what different legal rules in combination with the facts of cases produce the final advice given. Other law relating to evidence and procedure are highly significant in deciding how cases are approached, however, both bad character and plea and case management hearings were identified as of burgeoning importance in the advice process. Both areas were therefore focused on during the course of the interviews and in the analysis provided here, and are illustrative rather than encompassing of the type of considerations that a barrister must weigh up in approaching a case. That these two factors are only a small part of the complexity of the advice process assists the argument that the current literature is missing vital empirical evidence about what motivates barristers' advice.

c. Bad character

Through the enactment of the Criminal Justice Act 2003, the government introduced substantial changes to the admissibility of bad character evidence in criminal trials. Although the defendant's bad character was previously admissible under common law 'similar fact' principles and the Criminal Evidence Act 1898, the Criminal Justice Act 2003, sections 98-113 replaced these rules giving much wider scope to the court in considering whether the bad character of the accused or non-defendants should be heard by the jury.²⁵⁷ The controversy surrounding these provisions is well known and will not be rehearsed here. Suffice it is to say that a large part of the legal profession and academia expressed disquiet at the prospect of an expanded role of bad character in trials.²⁵⁸

The Criminal Justice Act 2003, sections 98 to 113 abolish the common law rules on the admissibility of the previous bad character of the defendant, and introduce seven "gateways" through which it may now be introduced at trial. As the Court of Appeal noted in *Hanson*²⁵⁹, one of the most commonly used of these gateways is evidence relevant to an important matter between the defendant and the prosecution.²⁶⁰ Through this gateway the prosecution may, among other things, introduce evidence that the defendant has the propensity to commit offences of the kind with which he is charged, or the defendant has a propensity to be untruthful.²⁶¹ Therefore under the section, the prosecution may issue an notice of intent to adduce the defendant's bad character and have admitted as evidence the defendant's previous convictions for previous offences

²⁵⁷ The bad character provisions of the Criminal Justice Act were introduced following recommendations by the Auld Review: Lord Justice Auld, 'Review of the Criminal Courts of England and Wales' ("The Auld Review") (TSO, London 2001) 563-68.

²⁵⁸ For discussion of the law prior to the Criminal Justice Act 2003 and results of consultation on reform proposals see: Law Commssion, 'Evidence of Bad Character in Criminal Proceedings' (Law Com No 273 Cm 5257, 2001) For academic discussion of the uncertainty surrounding the probative and prejudicial effects of bad character evidence see: M. Redmayne, 'The relevance of bad character' (2002) 61 CLJ 684.

²⁵⁹ [2005] EWCA Crim 824, [5].

²⁶⁰ Section 101(1)(d). The court's conjecture is supported by recent government research: The Office for Criminal Justice Reform, 'Research into the impact of bad character provisions on the courts' (Ministry of Justice Research Series 5/09, Ministry of Justice 2009) 22.

²⁶¹ Section 103(1)(d).

including those for the same kind of offences with which he is now charged, and more generally, previous convictions demonstrating untruthfulness (provided that the defendant's credibility is a matter between the prosecution and defence).²⁶² In *Hanson* the court explained that while one prior offence of the same type would probably not show propensity²⁶³, however, unusual behaviour, such as starting fires or sexual abuse of a child on a single occasion might do so. Similarly, single offences with the same modus operandi as the charged offence might be sufficient.²⁶⁴ The period since the previous behaviour alleged to constitute bad character is also relevant as to whether it should be admitted.²⁶⁵ The prosecution may not use bad character to support a weak case.²⁶⁶

The admissibility of the bad character of the defendant may have greater implications for the plea entered, rather than on the verdict of juries. Although the introduction of bad character might change the conviction rate, the more important effect might be the impact on the psychology of the defendant contemplating his or her chances of conviction and therefore their plea at PCMH. Recent research released by The Office for Criminal Justice Reform was unable to conclude whether bad character applications had any impact on plea, as applications were often made late or went unresolved until the morning of trial.²⁶⁷ In their Crown Court sample only 10% of defendants changed plea after the application was made.²⁶⁸ The Office for Criminal Justice Reform, however, did not collect case data on whether defendants changed their plea at the prospect of an application, although one Crown Prosecutor told them he 'might put the defence on notice of [his] intention to consider bad character before making a formal application that might not be pursued. This was done in an attempt to save time or force a guilty plea.'²⁶⁹ None of those interviewed for that research said that they would advise a change of plea as the result of a successful application²⁷⁰, however, the present research

²⁶² The same kind of offences means the same description or category of offence: section 103(2).

²⁶³ *Hanson* (n.259) [9].

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.* [11].

²⁶⁶ *Ibid.* [10].

²⁶⁷ *The Office for Criminal Justice Reform* (n.260) 32.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.* 6.

²⁷⁰ *Ibid.* 32.

found that bad character was a very important indicator of what advice was given by the defending barrister *prior* to an application being made in the first place.

Interviewees were asked whether any recent changes to evidence and procedure had had an impact on their advice to defendants. Nearly all, without prompting, immediately raised the issue of bad character. The majority of those interviewed felt that bad character had dramatically changed the way that they advise. In particular, the change had affected their advice where the prosecution seeks to show a propensity to commit an offence under section 103(a) of the Criminal Justice Act 2003. Almost all of the barristers interviewed felt that defendants with previous convictions for theft and sex offences faced great difficulty in sustaining a not guilty plea in the face of a successful application:

...there are some cases where it becomes an open and shut case because the guy's got some form which is going to go in. So, you say to him the first thing that the jury are going to know is that you've sexually assaulted a 15-year-old before, and that's almost game over for you really.²⁷¹

A3 was equally pessimistic about a successful bad character application:

And it's spelt out to them in no uncertain terms that is, look, if your character goes in, you are probably dead.

Despite a general perception that defendants with a substantial history of relevant criminal activity and reprehensible conduct faced severe difficulties in maintaining a not guilty plea, some felt that there were circumstances where bad character needed to be dealt with in the same way as any other negative part of the evidence. Because bad character under the legislation and *Hanson* cannot be relied upon by the prosecution to bolster a weak case, successful applications were not conclusive of their view about a defendant's prospects. K1 believed that although a bad character application might be

²⁷¹ 11.

successful, a defendant might already be thinking of pleading guilty due to the strength of the rest of the Crown's case.

K1: I wouldn't imagine that there would be a scenario, very often, where a ruling on whether [bad character went before a jury] would totally altered the advice that you'd give....

JB: ...So you don't think that an application like that has, that the defendant's plea has hinged on something like that?

K1: No. There are very, very, very few cases where because of the nature of the safeguards of the legislation, where the crux of the prosecution case is dependent on a person's previous convictions going in...

Others felt that they as skilled advocates could find a way to neutralise bad character during the trial, despite the obvious difficulties it might create:

There's probably one or two where the bad character going in you just know will put such a slant on a case that if we are in trouble on those two points it's just going to make the hill that much steeper. But, in the main and one's arrogance as an advocate makes you think I can put a spin on that if it goes in anyway. You know, the Crown are so desperate that they're now relying on things that he did five years ago. You can put a spin on it.²⁷²

A number of the barristers interviewed believed that an over reliance on bad character could potentially backfire on the Crown. Interviewees believed that juries did not like a prosecution case that seemed to rest on prior criminality. C1, a barrister who prosecuted more than he defended, explained:

There are some cases where the prosecution apply and get it in, but it doesn't help them because it allows the defence...to make a song and dance in their closing speech about how the, they haven't got any evidence and they are using the past. Juries don't like it actually, unless it strikes them as being relevant. So,

²⁷² F1.

when prosecuting I would not make them, I would try to avoid making an application I thought was likely to backfire.

For J1 there was an anxiety that defendants could be over awed by the prospects of their bad character going in, however, she felt that juries were able to approach character sensibly and that character itself rarely decided a case:

J1: I really strain to have defendants not to be overly influenced by the bad character provisions, simply because in my view juries are pretty sensible and at the end of the day I don't think that bad character actually makes juries convict.

JB: But, it can sound very bad to a defendant?

J1: It can sound bad for a defendant, and it can have an impact in terms of, "oh no what's the point of having a trial, they will find me guilty." So you have to do quite a lot of spadework in saying, "look, I know this looks bad, but", and try and reel a defendant back from falling into pleading guilty out of a sense of hopelessness, which is obviously not the right reason to plead guilty. So I think the legislation does have an impact, not on the outcome, but on the way that a person feels in terms of how confident they are about the trial.

The view of these interviewees is only partially supported by research carried out with mock juries. In Sally Lloyd-Bostock's simulation of criminal trials in which jurors were given information about the defendant's previous convictions, she found that the defendant was not only less likely to be believed as a witness, but jurors were more likely to convict when the previous convictions were of a similar type to that charged as compared with a defendant of good character, or a defendant with previous convictions for dissimilar offences, or a defendant whose character went unmentioned.²⁷³ Lloyd-Bostock also found that a defendant with a previous conviction for a sexual offence was generally distrusted by jurors compared to defendants of good character or those with convictions for dishonesty offences. However, contrary to the reason for why dishonesty offences may be introduced under section 101 of the Criminal Justice Act 2003 (to introduce evidence which questions the defendant's credibility), Lloyd-Bostock found

²⁷³ S. Lloyd-Bostock, 'The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study' [2001] Crim LR 734, 741-745.

nothing to suggested that dishonesty offences affected juror perceptions of the trustworthiness of the defendant.²⁷⁴ Furthermore, defendants with previous convictions for dissimilar offences to that charged were more likely to be believed than defendants of good character or when character was left unmentioned.²⁷⁵ The research suggests that jurors subscribe to stereotypes of criminality; that defendants in court are probably involved in crime of some kind and are consistent in the type of offence that they commit.²⁷⁶ Importantly, the types and extent of evidence made available to Lloyd-Bostock's mock juries was limited when compared to the current statutory provisions. Therefore, the effect of evidence of bad character on juries may be more significant than that found in her research.

On the basis of Lloyd-Bostock's research, barristers are probably correct to advise a defendant of the damaging effect of previous, similar convictions, but not necessarily where the credibility of the defendant is attacked with previous, unrelated dishonesty offences. Counter-intuitively, defence counsel ought to consider adducing the defendant's bad character when the previous convictions of the defendant are unrelated to the offence with which the defendant is charged, otherwise jurors may assume that the defendant has convictions of the same type and be affected accordingly. Out of all the barristers interviewed, only D1 believed that putting in his client's previous convictions should be as a matter of course:

Although it is rather counterintuitive I normally put in my client's bad character anyway. Because I generally reckon that in the class of work that I do the jury will have worked out that he's got bad character, they'll very often think it's worse than it actually is.

As these interviewee excerpts and research illustrate, bad character applications do, and should have a profound effect on the pre-trial decisions of counsel and defendant. Despite some barristers stating that they could tackle bad character evidence as any other

²⁷⁴ Ibid. 748.

²⁷⁵ Ibid. 749.

²⁷⁶ Ibid 753.

part of the prosecution case, there was a widely held belief that the defendant's bad character being admitted into evidence could sway the jury into returning a guilty verdict.²⁷⁷ According to the Lloyd-Bostock's research, these perceptions of the effect of bad character are rightly held.

More generally there was a consensus that bad character applications, although useful in some cases, were being made too often and were poorly drafted. Although the Office for Criminal Justice Reform concluded that applications were not being used to bolster weak cases, their conclusions were based on the beliefs of CPS lawyers only.²⁷⁸ In the present research, there was a sense that, as with much of the Crown's paperwork, bad character applications are written by uninformed and/or overworked CPS caseworkers who, erring on the side of caution, made bad character applications without properly considering the case itself or the guidance on bad character from the Court of Appeal.²⁷⁹ This is problematic as defendants end up facing applications to adduce their character when no application should have been made at all. As B1 commented:

CPS prosecutors churn them out...because they are unable in many cases to make an informed judgement so they just churn it out, the prosecution barrister picks-up the brief and probably doesn't give it a great deal of thought. I mean, very few prosecution barristers when briefed in connection with one by the CPS will then decide off their own bat to drop it, they'll just go ahead with it.

This means there is a break down in prosecutorial discretion, creating an additional pressure for the accused and his barrister to deal with. Even though the judge may eventually exclude the evidence, it is the prospect of an application which can affect the defendant, who very often must enter a plea before an application is made, but pending. Of course, mitigation on a plea of guilty and credit might be more difficult to sustain when the defendant changes their plea as a result of a successful bad character application. As C1 said:

²⁷⁷ Cf. *Office for Criminal Justice Reform* (n.260) 36.

²⁷⁸ *Ibid.* 33. As the report itself details, some judges felt that applications were being made inappropriately, but no attempt was made by the researchers to quantify the extent or frequency.

²⁷⁹ *Hanson* [2005] EWCA Crim 824.

Defending one would prefer to at least appear to be entering a guilty plea without a bad character having made the difference because it makes the mitigation about credit a bit more difficult, I think, if it flies in the teeth of a successful application.

A defendant must therefore be advised to consider a guilty plea before a bad character application is made to effectively maintain the greatest credit and mitigation possible.

d. Plea and case management

In 2005 the Criminal Procedure Rules were issued to govern the passage of cases through the courts. The rules are designed to enable courts to deal with cases ‘efficiently and expeditiously’,²⁸⁰ and, amongst other things, set time limits for disclosure and applications to adduce evidence at trial. The purpose of the rules is to try and concentrate the minds of those representing the Crown and defence so that by the time of the plea and case management hearing a guilty plea, if appropriate, can be entered, and all relevant problems and issues are known so that the judge can issue orders to ensure trial readiness. Essentially the rules try to front load cases, ensuring preparation is done early and adequately, so that they do not later fall apart because of a delayed guilty plea by the defendant or failures in the prosecution case.

It was identified in this research that the Criminal Procedure Rules 2005 might have had an important impact on the timing and content of advice. Barristers were therefore asked whether the rules had made any difference to the progression of cases through the courts. Every barrister interviewed reported that the case management rules had had little, or no effect on the timing and manner in which cases were dealt with. E2 argued that while some of the reforms were sensible, other strains on the criminal justice system made them impossible to implement:

²⁸⁰ Criminal Procedure Rules 2005, 1.1(d) SI 2005/384.

Every change that happens just rolls in and then rolls out again...the idea was that you'd be trial ready before the PCMH, but at the same time the CPS are recruiting more people, higher court advocates to work in-house... You've got the situation now where recently at Southwark, a really nice CPS HCA²⁸¹ guy, but he turned up at court and he was saying to me that he could turn up and get 11 PCMH files for plea and case management that day. So he hasn't got time to read any of them before the day starts. He is effectively running his list as if he were in a magistrates' court... And so you go through the form and the form says bad character, and he has to say 14 days, any bad character application in 14 days. Never can be done in 14 days, everyone knows that.

E2's observation of the lengthy time lag in bad character applications was repeated in the Office of Criminal Justice Reform's research. It was discovered that the average time for a bad character application was 121 days after the case was sent or committed to the Crown Court, well in excess of the 14 day requirement.²⁸²

E2's explanation corresponded closely with other barristers' complaints about internal tensions in the system that were not being adequately funded or given the right amount of manpower and expertise to do things properly within the strict time limits the rules impose. As I1 reported:

JB: The applications of bad character should be made then [at PCMH], the hearsay application should all be made then...

I1: They should but they're not. I mean they're never made adequately by the time the PCMH happens.

JB: And why is that?

I1: Usually because the CPS would be trying to deal with it and they're not very effective in lots of cases. Often because it's too quick. The time limits are stupid for some.

²⁸¹ Higher Court Advocate.

²⁸² *Office of Criminal Justice Reform* (n.260) 8.

JB: 14 days?

I1: That's pointless because you do not get the information on his old convictions in time. It just doesn't work at all. So it's a combination of bad drafting of the applications and just not having the information... There's always orders at the PCMH to have these done and those orders are often, not ignored, but there's all sorts of applications being made to all the way through to the trial hearing.

According to F1, this problem is further exacerbated by the defence fee scheme. As he pointed out, defence barristers are not incentivised under the Graduated Fee Scheme to do the preparation for PCMH, unless they can guarantee that they are also doing the trial itself:

...if I couldn't cover the trial there is no fee structure which allows me to be paid for all the work I've done already. So, I'm afraid from a mercenary point of view the Bar approach things in very much the same way as they did the old PDHs. That is you read the papers, you get the client's view, you tick whatever box is on the form you really need to tick and then you wait and see what happens in four months time when it's in for trial.

If the prosecution have not disclosed evidence properly at PCMH, nor made applications such as to adduce bad character, the defence barrister might not be able to say whether there will be a trial at all being unable to advise the defendant of the nature of the case against him.

The general view which emerged from the interviews was that the Criminal Procedure Rules 2005 have been somewhat disorganised in their implementation and few changes to the quality, efficiency or expediency of the criminal justice system have been brought about as a result of their introduction. Interviewees who conducted defence work frequently complained about the speed of prosecution disclosure and the inability of the CPS to comply with any order given by the court.

The interviewees' comments here reveal a complex working world that does not conform to a guilty plea culture. The interviewees were not merely waiting for applications to be made and evidence to be disclosed so that they could go through with the formality of advising a guilty plea, rather, the interviewees were frustrated because they were unable to properly form a view of the case against the defendant and advise properly about the respective choices available to the defendant.

The effort described by interviewees in the present research in making sure that they had satisfied themselves that the defendant's account together with the prosecution case and evidentiary law had been properly considered is in marked contrast to the description of barristers in *Standing Accused*. The description given by McConville et al is one which depicts barristers as gaining, at best, a superficial understanding of the case, which presupposed a plea of guilty to the offence and ignored defendants' protestations of innocence. The interviewees here were able to articulate a complicated process where the strength of prosecution and defence case were thoroughly considered by them. The interviewees described a careful approach where the evidence was carefully weighed up and defendants were given sufficient time to consider their plea. According to the interviewees, evidence and procedure were thoroughly considered in each case, however, also relevant were tactical decisions relating to sentence. This chapter will now explore the explanations given by the interviewees on how sentence played a role in what advice was given to defendants.

3. Tactical considerations relating to sentence

According to the accounts given by those advising defendants on plea, a series of complex decisions had to be made about the strength of the evidence and the chances of a conviction or acquittal in a trial. Furthermore, important tactical decisions had to be made that, though external to the likelihood of a finding of guilt, were nevertheless vital to defendant decision-making: those relating to a potential final sentence. Discussed below are three factors that were identified from Chapter 2 and the barristers themselves

in interview as being considerations central to whether a defendant should go to trial or not. All are in some way eventually related to sentence, something which might in some cases be as, if not more important than the likelihood of conviction.

As with those particular factors considered in relation to evidence and procedure, the following paragraphs do not serve as a definitive account of the sentencing provisions that a barrister must consider when approaching a case. The factors mentioned below, are illustrative of the types of matters that a barrister must take into account when thinking about what advice to give to a defendant about plea and sentence.

a. Using a trial to expose mitigation and the defendant's character

A number of the interviewees discussed the tactical benefit of advising a defendant to enter a not guilty plea when a trial might expose the mitigating elements of the offence and the defendant's character that appear much worse on paper, even though an acquittal itself was highly unlikely. B1 classified this option as a 'glorified *Newton*'²⁸³, using the trial as a way of gaining a favourable factual basis for guilt and allowing the judge to make an assessment of the defendant's character while they give evidence.²⁸⁴ As B1 explained:

...there are some cases which appear terrible on paper and so you might think the client should really be thinking about pleading guilty but you meet your client and you take the view that they are far more an attractive individual or less unpleasant an individual as the prosecution papers seem to suggest. And that is because the prosecution witnesses may have an axe to grind and they are painting a very dismal picture of the defendant. So, if you go to trial despite the fact that

²⁸³ (1982) 77 Cr App Rep 13. In *Newton* the Court of Appeal outlined the procedure to be used when a defendant pleads guilty but the prosecution and defence cannot agree on the factual basis for the plea.

²⁸⁴ Some might argue that using a not guilty plea for tactical reasons is potentially improper: *Tague* (n.245) footnote 12. However, even if a defendant admits his or her guilt to a barrister, they may continue to represent the defendant in a trial provided that the barrister does not 'assert as true that which he knows to be false...or connive at, much less attempt to substantiate, a fraud.' Bar Standards Board, 'Code of Conduct of the Bar of England and Wales' (8th edn, 2004) Section 3: Written standards for the conduct of professional work, 12.3.

the client will at the end of the day still be convicted, the judge will see the defendant for the person he really is, and by the same token will see the prosecution witnesses for the people that they are, and so the whole complexion of the case when it comes to sentencing will have changed so dramatically.

Therefore a barrister occasionally has to weigh up the advantages of going to trial, and subsequent loss of sentencing discount, against the potential benefit of putting a compelling, or personable defendant in the witness box against a prosecution with ‘an axe to grind.’ Although rarely used, this possible route of using a not guilty plea to expose a defendant’s character illustrates the complexity of a barrister’s task. Here the barrister must make a detailed examination of the strength of the evidence, the character of the accused and prosecution witnesses, as well as the likely response of the judge to different versions of the alleged offence. The barrister is required to make a fine judgment call on the basis of experience:

...there are also some cases where you actually lose nothing at all for fighting I think. I had one recently and in fact we were acquitted. It was just a case that I know, I knew I could smell it on the papers on a plea that the judge would have found what we had to say quite hard to take, would have found it hard to accept even if the prosecution had accepted it...you know I had to call my client for the judge to get a totally different flavour of the case.²⁸⁵

Interviewees who discussed this tactical use of a not guilty plea clearly did not seize the chance to get a defendant to enter a guilty plea as would otherwise be typical under the McConville et al portrayal of the Bar. These barristers displayed a keen tactical sense of how the defendant’s interests could be best preserved and promoted. That a trial was considered appropriate where a defendant was clearly guilty of an offence is in complete opposition to “guilty plea culture”.

²⁸⁵ C1

b. The discount and sentencing

Given the attention paid to the sentencing discount on guilty plea in the literature, most notably by McConville and Baldwin, it was determined that the barristers in this research should be questioned about how they advise on the available discount as well as their perception of its effect on defendants. In *Negotiated Justice*, McConville and Baldwin observed defendants being pressured by barristers into pleading to offences in the face of the discount.²⁸⁶ Their research found that some barristers were seen to use the differential between sentence on conviction with the perceived discount on a guilty plea to extract a plea. This important element of the discount and ‘advising in strong terms’ is discussed below. The discount is also discussed within the context of charge bargaining in Chapter 5. Here the effect of the discount is dealt with in itself, rather than as a potential tool used by ‘manipulative’ barristers to persuade the defendant to choose a course of action that they believe is best. The relevant law and literature was discussed in detail in Chapter 2. As will be recalled the discount has been enshrined in statutory law and guidelines from the Sentencing Guidelines Council. The following section examines the responses given by the interviewees regarding the application and effect of the discount on defendants.

i. Is the discount being properly applied? Evidence from the research.

Participants reported varying descriptions of how strictly the discount is now being applied by the judiciary, although the majority within London said that that sliding scale was not being put into practice. B1, a barrister with a 100% defence practice, felt that judges were justifiably flexible about how the discount was given to defendants. B1 said that in his experience even late pleaders were liable to attract a full discount because of judicial pragmatism over court targets²⁸⁷:

²⁸⁶ *Baldwin and McConville* (n.227) 39-58. Although not recorded at the time, different discounts may have been available to those defendants in the 1970s than today.

²⁸⁷ See court targets for ‘efficient’ disposal of cases: Her Majesty’s Court Service, ‘Her Majesty’s Court Service Business Plan 2006/7’ (2006)

By and large judges are relatively flexible about giving the one third discount because if they start playing hardball with the discount they know that a case that could carve might not carve and judges are under pressure like every other part of the court system to crack cases. I mean, everybody has their targets. Judges, shouldn't overlook that, judges are under the same pressures. So, it's always possible to dress up a belated guilty plea in a way that will still attract before one third discount. For example, papers were served late, trial Counsel didn't have a conference until late, there's been a plea to only part of the indictment, and so on and so forth.

The observation made here by B1 supports the studies of Moxon and Baldwin and McConville, who found high discounts being given to late pleaders.²⁸⁸ It does not necessarily mean that the discount is higher than that which can be expected on an early plea, rather that credit is preserved and then dressed up by the judge and counsel as a plea that could not have been entered earlier.

I2, a barrister who mainly prosecuted, but also sat as a Recorder, even went as far as to say that he believed that the Sentencing Guidelines Council's sliding scale discount was 'shameful', in that 10% at the doors of the court was just not enough. Speaking with some insight into judicial practice I2 said that 'with very few exceptions judges ignore the Sentencing Guideline Council on the 10% rule.'

This should be contrasted with K2, a senior prosecutor who, while confirming that the sliding scale was being disregarded, felt that this was wrong:

...despite the best efforts of the Sentencing Guidelines Council who have now laid down the sliding scale from a third down to 10%, judges are routinely not applying that...So you're still getting, you still get judges who will give a full

http://www.hmcourts-service.gov.uk/publications/business_plans/index.htm

²⁸⁸ D. Moxon, 'Sentencing Practice in the Crown Court' (Home Office Research Study 103, HMSO, London 1988) 18, 32; M. McConville and J. Baldwin, 'The Influence of the Sentencing Discount in Inducing Guilty Pleas' in J. Baldwin and A.K. Bottomley (eds), *Criminal Justice: Selected Readings* (Martin Robertson, London 1978) 121. As previously noted, these studies took place in a very different legal environment and may not reflect current practices.

third discount for a plea at the doors of the court because they will say you've saved the public expense of a trial. But, the expense of a trial is not really the time in court...And all the witnesses have been inconvenienced, they've all been putting off their holidays. You know, there's a massive amount of work that goes on and I think the message has to be, to be underlined by judges, that you really will get substantial credit for an early plea.

The views held by B1, I2 and K2 are predictable given their practice and position in the criminal justice system. B1 practising solely in defence work would argue in favour of disregarding the scale, if it inevitably resulted in lesser sentences for the defendants that he represents. The position of I2 is also explicable in these terms. As a member of the part-time judiciary, he seemed to sympathise with the pragmatic, target driven, argument. K2, on the other hand, as a senior prosecutor, might wish to encourage early guilty pleas, especially when a great deal of cases crack through last minute pleas. Any preparation done by her or the CPS staff working towards trial would be wasted by later pleaders and might be professionally frustrating as well as expensive. The position of K2 is very similar to the reason why the Sentencing Guidelines Council fixed the sliding scale as they did. As explained in the Reduction in Sentence for Guilty Plea Guidelines, Annex 1 First Reasonable Opportunity:

The key principle is that the purpose of giving a reduction is to recognise the benefits that come from a guilty plea not only for those directly involved in the case in question but also in enabling Courts more quickly to deal with other outstanding cases.

The purpose of the sliding scale is therefore to get guilty pleas out as soon as possible and attempt to bring down the cracked trial rate. Certainly, in the long term, if the sliding scale properly applied did produce earlier guilty pleas, the policy goals of the discount would be undermined if the view of B1 and I2 were to continue to represent practice in the Crown Court. It seems, however, that it may be difficult to avoid giving late guilty pleaders high discounts, and in some cases desirable to let the practice continue. As discussed above, some interviewees reported that evidence was often served late and that applications by the Crown were regularly delayed to the point that they would not let their defendant enter an early guilty plea. In these cases, only once the barrister and

defendant are fully apprised of the Crown's case should a guilty plea be entered, with, arguably, full credit preserved. Applying the discount too rigidly in these circumstances might unfairly penalise such defendants. Other justifications for a hard line approach to the discount such as the cost of lawyers' fees and witnesses' time as well as the distress to victims, however, constitute good reasons why late pleas should be avoided in most cases.²⁸⁹

ii. How the discount is discussed with defendants

It is important to note from the beginning that under the Criminal Procedure Rules 2005, a barrister is now required to advise a defendant about the credit received for a guilty plea, and must tick a box on the Plea and Case Management Hearing Advocates Questionnaire to indicate to the judge that they have done so.²⁹⁰ Therefore, at some point prior to the PCMH a barrister must broach the subject of the discount even though counsel might not think that a guilty plea is appropriate and the defendant is determined to proceed to a trial. How the discount was raised with the defendant was discussed with each of the barristers interviewed.

According to the interviewees, when and how a defendant is advised on the discount seemed to be dependent on the barrister's assessment of the case. When a barrister was confident that either a not guilty plea was appropriate or, in some cases, the defendant had indicated a desire to go to trial, advice on the discount was 'slipped in at the end.'²⁹¹ Therefore, the focus of the discussion with the defendant who was to plead not guilty was entirely on the merits of the case against them, with the discount mentioned as a

²⁸⁹ Cf. M. McConville, 'Plea Bargaining' in M. McConville and G. Wilson (eds), *The Handbook of the Criminal Justice Process* (OUP, Oxford 2002) 366-367. McConville alleges that the cost to criminal justice of cracked trials is over inflated by those in favour of a rigid approach to the discount. Further research is required to investigate the true costs of cracked trials.

²⁹⁰ Question 5 of the Plea and Case Management Hearing Advocates Questionnaire. Advocates are required to complete the Plea and Case Management Questionnaire according to the Criminal Procedure Rules 2005, Rule 3.11 and the referred to Consolidated Criminal Practice Direction Part IV, paragraph 41.10. The form itself is found at Annex E to the Consolidated Criminal Practice Direction.

²⁹¹ A2.

mere afterthought. B1 explained that by the time the discount is brought up with the defendant, the issue over plea had already been resolved:

I will say obviously if you are pleading not guilty today I have to tell you that blah, blah, blah. The clock starts running... But by then... the client is saying no, it's definitely not guilty and I know it's going to be not guilty then that is just a formality. The client is not really listening.

Conversely, barristers were of the opinion that a defendant who faces an overwhelming case or wishes to plead guilty can be advised immediately of the discount that they will receive without difficulty.

Interviewees identified the more difficult cases as being those where the defendant was wavering on whether to enter a guilty plea, and has not yet made up their mind. All of the barristers interviewed argued in defence of the discount in this situation. L2 was typical in saying that 'with a lot of people it clarifies in their minds how sure they are about the account that they have given you.'²⁹² To many, the discount acted as a sufficient benefit to tip a wavering, guilty defendant into entering a plea. When questioned about whether barristers felt that defendants might be compelled to plead guilty because of the discount, none agreed that the discount, in general, posed any such risk. When asked whether he believed the discount to represent an unfair pressure, M1 said 'I don't think it is unfair. I think that it encourages those who should plead guilty to plead guilty, generally speaking.' N2 equally felt that the discount posed little risk to defendants:

...lay clients who have a good run have been advised that they have a good run. I've never come across one who then wants to plead guilty out of some remorse... Very rarely when facing a weak case does any barrister get somebody coming to them and saying I know the evidence is weak, and I know I went no comment in the interview, but I just want to cop it. If they've got a good case they'll usually see it out.

²⁹² L2.

According to virtually all of the interviewees, the discount was proper in that it provided sufficient incentive to those who were *de facto* guilty to plead, but placed little pressure on defendants who had a good chance of acquittal. Nevertheless, critics of the sentencing discount have argued that the discount places unacceptable pressures on innocent defendants, and it is to this problem to which we now turn.

iii. Does the discount place pressure on *de facto* innocent defendants?

Previous analysis of the discount has argued that the offer of a reduced sentence places unacceptable pressure on innocent defendants to plead. The threat of a higher sentence is said to cause innocent defendants to plead²⁹³ and that because of the discount, ‘many innocent persons will thus inevitably face advice from their barristers about the advantages of pleading guilty.’²⁹⁴ This is combined with a critical view of defence barristers who are accused of using the discount as ‘powerful ammunition to fire at defendants’²⁹⁵ in order to settle cases by guilty plea for their own unscrupulous reasons. Ashworth and Blake’s more moderate view is that:

...the English system, with its large discount for pleading guilty, militates against the “free-choice” of the defendant. The committed defence lawyer should recognise this, and strive to maximise the client choice within the structure of the legal system as it exists.²⁹⁶

According to Ashworth and Blake the discount itself creates an overwhelming pressure that prevents a defendant from making a voluntary choice on plea.²⁹⁷

However, this chapter argues that these critics misstate the problem faced by defendants, and conflate several issues that should be considered separately. Firstly, the current

²⁹³ M. McConville, ‘Plea Bargaining Ethics and Politics’ (1998) 25 *Journal of Law and Society* 562, 566.

²⁹⁴ *Sanders and Young* (n.233) 431.

²⁹⁵ *Ibid.* 399.

²⁹⁶ M. Blake and A. Ashworth, ‘Ethics and the Criminal Defence Lawyer’ (2004) 7 *Legal Ethics* 168.

²⁹⁷ See also: A. Ashworth and M. Redmayne, *The Criminal Process* (3rd edn OUP, Oxford 2005) 288.

literature does not distinguish between *de facto* innocent defendants and those defendants who should contest their case at a trial because they have a good chance of acquittal. Discussing *de facto* innocent defendants is a poor tool for analysing the criminal justice system because the arbiter of guilt and innocence is the evidence and the trial itself. While it would be desirable for *de facto* innocent defendants to plead not guilty and be found not guilty, the defendant and his or her representatives must deal with the reality of the chances of whether the defendant will be acquitted or convicted on the basis of the evidence. Secondly, the literature does not isolate the effect of the discount by itself, and the effect of the discount as a tool used by unscrupulous barristers who wish to manipulate defendants. These are two separate issues: the first is a feature of the criminal justice system, whereas the second relates to the potential misbehaviour and culture of actors within the system.

Thirdly, the defendant, if allowed to choose his or her plea (without coercion), is always given a “free-choice”. Because one course of action is highly undesirable does not necessarily mean that the defendant is denied “free-choice”.²⁹⁸ A defendant who pleads guilty when faced with the choice of a trial with the possibility of conviction, followed by a heavy penalty, or admitting guilt and receiving a one-third reduction, is making a free-choice on the basis of the two outcomes. This may seem like a semantic point, however, Ashworth and Blake seem to imply that “the committed defence lawyer” should be trying in some way artificially diminish the role of the discount in plea-making decisions. Rather, a committed defence lawyer should strive to accurately convey the risks undertaken by the defendant in making their choice and ensure that they properly understand the consequences of each course of action.

This section will now deal with the first point relating to *de facto* innocence and the reality of barristers and defendants making decisions in relation to the evidence. The discount is discussed here as a feature of criminal justice and its impact on defendants. Defendant choice is discussed in more detail in the next chapter in relation to plea bargaining.

²⁹⁸ R. Scott and W. Stuntz, ‘Plea Bargaining as Contract’ (1992) 101 Yale LJ 1909, 1920-21

While there may be defendants who face criminal charges who are *de facto* innocent, their actual position, as far as the court and their representatives are concerned, is dictated by the prosecution and defence evidence. As Easterbrook says: ‘innocent persons are accused not because prosecutors are wicked but because these innocents appear to be guilty.’²⁹⁹ Defendants are therefore advised by their barrister about the chances of conviction on the prosecution papers, in light of the positive case asserted by the defendant. It may be that an entirely innocent defendant is accused of a crime where, as a matter of poor fortune and coincidence, the evidence against them is exceedingly strong. However, to the defence barrister the true status of their client in terms of factual guilt is unknowable, and they must advise on the evidence to be put forward. It may be that barrister can make an informed guess as to whether the defendant is telling them the truth, but guilty defendants can mimic innocent defendants with some ease.³⁰⁰ Barristers can only assess a defendant’s legal guilt on the basis of the evidence, therefore a *de facto* innocent defendant who pleads guilty in the face of strong evidence, and in response to the offer of the discount would be exceedingly difficult to detect. Such *de facto* innocent defendants are indistinguishable to barristers from *de facto* guilty defendants in most cases. As K1 explained:

Well, it’s difficult to know isn’t it? You are only looking at it from the point of view of an assessment of the evidence, but you don’t know the reality of what took place. And you don’t know the factors that may influence somebody. If there’s one person’s word against another’s you may think well, that is not very strong, and if somebody says I want to plead guilty they may know more about the other person than you do, like, they are telling the truth...[the defendant] would not be very good [at trial] because they would be lying, whereas the other person would because they’re telling the truth.

In this sense, barristers advise and deal in chances of conviction on the papers and are blind to *de facto* innocence or guilt. A barrister essentially tries to predict the outcome at

²⁹⁹ F. Easterbrook, ‘Plea Bargaining as Compromise’ (1992) 101 Yale LJ 1969, 1970.

³⁰⁰ See, in the American context, lawyers’ ability to assess defendants’ accounts: M. Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys* (University of Chicago Press, Chicago 1978) 59-60.

trial and cannot readily distinguish between a *de facto* innocent defendant against whom there is strong evidence and a *de facto* guilty defendant against whom there is strong evidence. The defendant must be assisted to make a choice on the basis of the evidence against them and be given advice to properly evaluate the risks of conviction against the benefits of pleading guilty, and the advantage of the discount. To say that the discount places pressure on innocent defendants is therefore too simplistic. The correct problem is characterised as whether defendants are given a proper evaluation of the risk they are undertaking by their barrister and whether defendants, together with what they know, properly calculate the risks they face.

It has been said that innocent defendants are pressured into pleading guilty by their barrister, who at best, overestimates the chances of conviction. Pointing to the Crown Court Study carried out by Zander and Henderson, McConville believed that the cracked trial statistics raised concerns about whether barristers accurately convey the chances of conviction to defendants. In more than one quarter of cracked cases, the prosecuting solicitor believed that the defendant had a 'good' or 'fairly good' chance of acquittal; and prosecutors viewed the guilty plea outcome as 'good' in 13 per cent of cracked cases because, without the plea 'it would have been difficult to get a conviction'.³⁰¹ The difficulty with McConville's conclusion is that these are the opinions of the prosecuting solicitors who are not ideally placed to assess the chances of conviction. Firstly, they are not the prosecuting barrister, and therefore perhaps are less likely to be able to make completely accurate predictions about how the evidence might play out in a trial. According to another part of Zander and Henderson's study, in only 9% of cases where the defendant pleaded guilty did the prosecuting barristers believe that the defendant had a 'fair chance of acquittal.'³⁰² Secondly, neither the prosecuting solicitor nor barrister had met the defendant and did not know the defence case.³⁰³ Although prosecuting solicitors may be good at spotting flaws in their own case, a defendant when questioned about the case by his advocate may be a less than compelling witness, produce a very poor account of the alleged offence or otherwise give the defence barrister every reason

³⁰¹ *McConville* (n.293) 567, footnote 17, citing M. Zander and P. Henderson, *Crown Court Study* (Royal Commission on Criminal Justice Research Study 19, HMSO, London 1993) 156-57.

³⁰² *Zander and Henderson* (n.301) 188.

³⁰³ This study was carried out prior to the defence having to make a defence statement to the prosecution.

to believe they might be convicted. Barristers are ‘straight-jacketed by their instructions’ and cannot ethically suggest that defendants change their defence.³⁰⁴ That is not to say that defence barristers are infallible in their predictions relating to the chances of acquittal, however, perhaps prosecuting and defending barristers are better placed to predict the possible outcome of a Crown Court case.

As discussed above, the interviewees in this research reported that the discount on a sentence of imprisonment, by itself, did not generally persuade defendants who they believed should be contesting the case into pleading guilty instead. Here, interviewees argued that defendants pleaded guilty in the face of the discount when they had a poor case and the advantages of a third off a sentence of imprisonment outweighed the chances of an acquittal. The only circumstances in which interviewees felt that a defendant who should contest their case might be put at risk were when the discount made the difference between a custodial or non-custodial sentence. K2 expressed reservations about the effect on a defendant of the custody threshold:

I think that it depends on, if a defendant is not of good character, and therefore has less of a reputation to lose, and if he’s got to family commitments, I think that it would be highly likely in those circumstances that he might plead guilty to a crime he didn’t commit. Let’s say a commercial burglary or something, but I think that it would be very limited circumstances where that would happen...we are only talking about those offences that fall upon the borderline in any event and I think probably the difference would be that a person of good character is not going to plead guilty to even a shoplift, they’re not, because they have so much to lose. Once you’ve lost your good character then I think the stakes are rather different and your liberty rather more important.

C1 was very unhappy about advising defendants whose choice of plea might put them either side of the custody threshold. He feared a defendant might make the decision on that basis alone:

C1:...I’m very loath ever to say that the discount may turn a, or change a

³⁰⁴ *Tague* (n.245) 31.

sentence i.e. from custody to non-custody, unless I'm pretty sure of my grounds on that. And that would be quite a hard call. I mean that would mean an offence that wasn't particularly serious. One has to be very careful with that.

JB: Would you be happy advising on that?

C1: Yes. I mean I do say that sometimes. I mean I do say but, I would usually put it in these terms which is following the trial, the prospect is practically impossible, whereas in the event of a guilty plea, a relatively early guilty plea, you maintain the possibility of a non-custodial sentence.

JB: And why is it that you feel uncomfortable, just to clarify?

C1: Because, because of the question of credit there is the risk of the client jumping at the carrot of credit and then regretting it later, so I think I would always be cautious...

Perversely, the problem of the discount and the custody threshold was something encountered much more by junior barristers with less experience of advising defendants on sentence. Barristers of ten years call or more are dealing with more serious cases with sentences in 'round figures'³⁰⁵ and forgo the difficult task of advising a defendant faced with a decision that may make the difference between custody or community punishment. E1, a junior counsel of less than five years call seemed to be unaware of the risk, and may have encouraged defendants to plead by the style of her advice:

I say to them to be practical about it, and your life is up for grabs here, and if you plead now you're going to get a community sentence and you're going to be able to go back to your job tomorrow and move on. If you don't plead guilty you've got a long drawn out process, we've got a trial, you're probably going to lose, you might go to prison and they've got to think about those things...

Being 'practical' to avoid trial and 'go back to your job tomorrow' is an invitation to an apprehensive, risk-averse defendant to plead.

³⁰⁵ C1.

According to the interview data, the danger to a defendant who should contest his or her case appears to be far greater on the custody threshold than when the discount takes the form of a reduction in sentence. None of the interviewees accepted that a third discount on a sentence of imprisonment remotely approached a sufficient incentive to encourage such defendants to plead guilty, despite the existing literature that argues that the discount is a principal tool used in “extracting” guilty pleas. As argued above, the literature, written before the current scheme of discounting, puts forward the idea of the “innocent defendant” but then fails to acknowledge by what standard both defendants’ representatives and the court judge innocence itself. While it is accepted that the discount may represent pressure on the accused, that pressure generally only becomes decisive in what plea is entered when combined with the weight of the case brought by the prosecution. Of course, this requires that the defendant is represented by a competent, reputable barrister who can identify the chances of conviction and accurately convey the risks to the defendant. This includes a thorough exploration of the defendant’s account, as well as understanding the danger that a defendant might make a false confession about his or her guilt. The barristers here seemed confident that they could do this, although, as E1 showed, there are situations where the barrister misrepresents the risks of trial to the detriment of the defendant.

The discount of prison sentence alone, without pressure from the barrister, is probably minimal in decision-making on plea where the defendant has an arguable defence. That is not to say that the discount may not be used as an effective part of a barrister’s persuasive technique in getting a defendant to plead, if the available discount is combined with a negative assessment of the evidence. As previously mentioned, and discussed below in the next chapter, a barrister who believes that a conviction is likely may be highly justified in emphasising the sentence differential. In respect of the discount affecting the form of sentence, it is likely that the discount alone can place defendants under strong pressure to plead guilty, particularly defendants of bad character for whom liberty is rather more important than reputation. In these circumstances it may be difficult for a defence barrister to advise a defendant so that they properly evaluate

the risks that they are undertaking and focus on the otherwise positive assessment of the defence case. This problem appears to be exacerbated by having inexperienced barristers who either emphasise the benefits of a non-custodial sentence or are unwilling to go behind the reasons for the defendant's plea and provide reassurances. As is discussed below, this is a negative effect of having a detached counsel who acts in a merely facilitative role.

The sentence discount again illustrates the countless quandaries that a criminal case presents for a defence barrister. The interviewees do not appear to be part of a guilty plea culture but conscious of their role in providing advice to the defendant so that they might make an informed decision. Although some junior barristers interviewed did not recognise that a defendant may inflate the risk of going to trial, especially when the defendant might avoid a custodial sentence, others were able to explain their feelings of professional responsibility in helping a defendant to make the right decision. While none of the barristers agreed that the sentence discount represented a risk to *de facto* innocent defendants, this was explained with reference to the evidence and the strength of the case against the defendant. So-called "innocent" defendants were not innocent unless the evidence indicated. To the interviewees any defendant who pleaded in light of the discount made a good choice on the basis of the potential sentencing outcome and trial.

c. The *Goodyear* indication

In *R v. Goodyear*³⁰⁶ a five judge panel in the Court of Appeal outlined a new procedure to be followed in the event that a defendant wished to seek a trial judge's specific thoughts on sentence before trial in the Crown Court. Under *Goodyear*, a judge may, if asked by the defence, indicate the maximum sentence he or she would be minded to impose if the defendant were to plead guilty at that stage of proceedings. Such an indication is binding on the judge and remains binding on any judge who takes control of the case until a reasonable time for acceptance has passed. The prosecution may not

³⁰⁶ [2005] EWCA Crim 888.

initiate the process although the judge may remind a represented defendant that an indication may be sought. While it should be normal for a written basis of plea to be agreed, the court will hold a *Newton*³⁰⁷ hearing if there is disagreement between the defence and prosecution. Although the court expressly disowned the idea of plea bargaining in *Goodyear*, the implications of the judgment are clear. Defendants with the advice of their defence counsel and the Sentencing Guidelines now have a calculable and accurate estimate of the difference between sentence at trial, and sentence at first appearance. The court in *Goodyear* argued that in the current environment of sentencing, a defendant should have information available to him to make a fully informed decision on plea. The decision has been cautiously welcomed by some commentators, if only because *Goodyear* made the process of plea bargaining in English courts more transparent.³⁰⁸

Exactly how *Goodyear* has been used in the courts in terms of the regularity of applications and the effect on defendant decision-making has not yet been studied. In fact scant commentary is available on the case other than general remarks about possible implications.³⁰⁹ The present research determined at an early stage that *Goodyear* indications may radically change the approach to advising defendants in some cases. Interviewees were therefore asked about the regularity with which *Goodyear* indications were sought, the usefulness of such indications and whether they believed that sentence indications created unfair pressures on the accused. Barristers were also questioned about any ethical difficulties that *Goodyear* presented.

i. Application and use

Goodyear was roundly applauded by the barristers interviewed, nearly all of whom felt that in at least some cases an indication from the judge could be exceedingly useful to

³⁰⁷ (1982) 77 Cr App R 13.

³⁰⁸ P. Darbyshire, 'Transparency in getting the accused to plead guilty early' (2006) 65 CLJ 48.

³⁰⁹ D.A. Thomas, 'Sentencing: advance indication of sentence - new procedure' [2005] Crim LR 659; *Sanders and Young* (n.233) 403-05; J. Morton, 'Pleas please me' (2005) 69 Journal of Criminal Law 277.

the defendant. A1 gave a clear example of how an indication allowed a defendant he represented to make a fully informed decision:

The *Goodyear* case has helped in certain situations. I'll give you one example, a case of a fraud that I did, where at the door of the court the defendant when I advised him of some new evidence that was served that made the case against him stronger, and some of the defence preparation had not thrown up some of the points that I was hoping. I then suggested we go for a *Goodyear* indication which the client considered. He then gave me instructions to go for a *Goodyear*. We approached the judge on the day...an indication given was up to a maximum – subject of course to personal mitigation... It was helpful because the judge gave an indication which the client considered, considered overnight. Worked out the mathematics of the actual term he would serve, and without divulging any confidential information, he said I will plead guilty on having heard that indication.

Here A1 described an intelligent defendant who was able to weigh up the indication against the risk of a trial and subsequent conviction. The defendant in this case was happy to know what sentence he was going to receive and to be able to make a rational, calculated choice on that basis. The clear argument in favour of *Goodyear*, for most barristers was that such an indication provides information that can fill in the gaps in their advice to a defendant. It is easy to imagine that a wavering defendant would want to know how they would be sentenced on a guilty plea and after a trial, in fact to many it would be the central consideration. As A3 said simply: 'They want to know when that release date is, they want to know how much bird they are going to get. That's what they really want to know.' Other than fixed sentencing guidelines that reduced judicial discretion to a minimum it is difficult to know how else such information could be made available to defendants and their counsel.³¹⁰ The use of *Goodyear*, according to the interviewees, seemed limited, with some having never asked for an indication and others asking for indications infrequently (3 times or less since the new practice was given approval in 2005). As will be discussed below, there are several apparent difficulties

³¹⁰ Highly prescriptive sentencing guidelines are proposed under section 111 of the Coroners and Justice Bill 2009. The Council of Circuit Judges, a body that represents circuit judges in England and Wales, is strongly opposed to the Bill:
<http://www.judiciary.gov.uk/about_judiciary/governance_judiciary/cocj/statements.htm>. Some jurisdictions already provide such guidelines and imprisonment 'grids' to sentencing judges. For example: Minnesota Sentencing Guidelines Commission Guidelines and Sentencing Grids
<<http://www.msgc.state.mn.us/msgc5/guidelines.htm>>

with *Goodyear* in both practical and ethical terms.

The interviewees also believed that *Goodyear* brought an unofficial process into open court. In common with the observations of numerous studies³¹¹ and the Court of Appeal itself³¹², many of those interviewed described continuing breaches of the *Turner Rules*³¹³ where judges would explicitly give indications to counsel of what a defendant might expect on a guilty plea pre-*Goodyear* even though that was expressly prohibited. Under the *Turner Rules*, a judge could never:

...indicate the sentence which he is minded to impose. A statement that on a plea of guilty he would impose one sentence but that on a conviction following a plea of not guilty he would impose a severer sentence is one which should never be made...The only exception to this rule is that it should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form...³¹⁴

However, as Lord Justice Rose more recently observed of Crown Court practice, that ‘despite repeated judgements of this court to the contrary, counsel, in cases which are not wholly exceptional, have recourse to the judge, in his room, in order to discuss pleas and sentence.’³¹⁵ Barristers of more than five years call recounted stories of judges being willing to give indications of sentence where they felt it might crack the case and move matters along. B1 recalled being called into the judge’s chambers for an unofficial chat:

So you would go in and you would have a conversation, nudge, nudge, wink, wink. And the judge would say well he might as well plead, he is not going away. But, they wouldn’t say exactly what’s going to happen...But it would be basically custody or non-custody. Custodial or non-custodial. And that would be

³¹¹ J. Baldwin and M. McConville, ‘Plea Bargaining and the Court of Appeal’ (1979) 6 *British Journal of Law and Society* 200; J. Morison and P. Leith, *The Barrister’s World* (Open University Press, Milton Keynes 1992) 135; McConville et al (n.230) 253; J. Plotnikoff and R. Woolfson, *From Committal to Trial: Delay in the Crown Court* (Law Society, London 1993) 67-68.

³¹² For example: *Bagery* [2004] EWCA Crim 816.

³¹³ For discussion of *Turner Rules* see Chapter 2:4.b.

³¹⁴ *Ibid.* 327.

³¹⁵ *Attorney-General’s Reference No. 44 of 2000 (Peeverett)* [2001] Cr App R 416, 417.

it.

Although probably in breach of *Turner*, this type of occurrence was, according to the interviewees, very common. Often the indication might be even more subtle, so that according to official records of judicial practice everything seemed above board.

...there are stories of judges seeing counsel in their rooms saying loudly and being asked to give an indication, and saying loudly for the benefit of the tape, “certainly not, the Court of Appeal have made it quite clear that I shouldn’t give such indications”, and then as the barristers are rising to go putting the thumbs up sign in the air.³¹⁶

L2 gave an account of a judge making known that only a fine would be imposed by pointedly inquiring into whether the defendant had a job:

...he’d said “I’m terribly sorry Mr [L2], but the Court of Appeal have said we are not able to assist you.” “Thanks very much judge, forgive me for coming round.” “No, not at all.” As we were leaving he said, “oh Mr [L2], I noticed your defendant was arrested at work.” I said, “yes, yes he was.” He said, “that must have been embarrassing for him.” I said “yes, he was quite upset about it.” He said “does he still work?” I said, “yes.” “The same job?” “Yes.” He said, “must be quite well paid for that.” I said, “yes he is.” “Jolly good. Thank you very much.” Guilty. £600 fine. You see? There are ways of getting it across.

In this respect, the introduction of *Goodyear* was welcomed by many barristers who felt that when matters were brought into the courtroom there was less scope for perceived negotiated justice and back-door deals. As K1 explained, giving sentence indications an official process that tied the judge’s hands once it was given meant that no nasty surprises could be in store for the defendant after plea:

...*Goodyear* is negotiated justice that is in the open. And it’s easy, and it is safe, I think it’s better for the defendants. Because I had a case last year where...a guy had got a *Goodyear* indication from a High Court judge sitting in a Crown Court

³¹⁶ K2.

centre. A week later, the case had been adjourned to him to think about things, week later went back pleaded guilty before the same High Court judge who made even more positive noises about things and then it was adjourned for sentencing for a PSR to be prepared. And it came up in front of a very, very, very hard judge...the High Court judge having gone off somewhere else. But, because the High Court judge said what he said when he had said it, there was nothing this judge could do...But, if it had been all been in the High Court judge's room, none of that would have happened.

ii. Whether Goodyear creates unfair pressures

The introduction of *Goodyear* indications has brought an accompanied concern that defendants may be subject to unfair pressure to plead guilty- that defendants who could not be proved to be guilty might be tempted by the incentive of the sentence indication from the judge, especially if that indication is that the judge has ruled out custody. Interviewees were asked about the merits and difficulties of *Goodyear*, and at what point they introduced the idea of an indication to a defendant. The circumstances where an indication would be sought were highly specific and even raising the possibility of a *Goodyear* indication would only be done when it was clear that a defendant was unsure about the pros and cons of pursuing guilty plea. As D1 forthrightly argued:

Some of my cases are always going to be a fight and the question of plea never crops up. The defendant's got a sensible workable defence on the papers. It's not my job to go round and try and persuade him to plead guilty. I can't see that I'd even raise it. It would undermine his confidence in me and so on, in the absence of some sort of indication that the defendant might be interested in a plea.

In a similar response to that given to the question on the discount, barristers felt that the indication did not create pressures on the accused that were necessarily unfair, unless of course the question of the custody threshold was raised. The interviewees felt that, on the whole, in the situation where there was an uncertainty about the nature of a plea, a *Goodyear* indication gave defendants exactly the information that they wanted:

F1:...in practical terms I think [*Goodyear*] works well. I think there's always been a need to cut through all of this wooliness...And, where there is certainty you get clarity of thought. A lot of defendants find *Goodyears* quite useful in that regard.

JB: You don't think that places pressure on defendants to plead guilty where they might not otherwise?

F1: For some it probably would. But, only in the same sense in knowing what the strengths and weaknesses of the Crown's case are. You know, those put pressure on the defendant to plead whether they've done it or not, if you want to run that argument.

It is perhaps correct to say that the *Goodyear* indication does not create an unfair pressure on the defendant. Once a system of criminal justice has given the defendant choices which can determine the sentencing outcome, they should have that information available to the defendant about the consequences. Using the analogy of a surgeon and patient, one would not expect a patient to take choices about their care without knowing the risks that they exposed themselves to, no matter how unpleasant they may be. Equally, a defendant should be fully entitled to know if a guilty plea will allow them to avoid a custodial sentence on conviction. In that context, *Goodyear* is a sensible innovation that provides clarity in what options are available to the defendant.

iii. Practical problems

Goodyear is not without some serious practical difficulties which has rendered it almost useless in the case of serious offences. Firstly, according to the 'labyrinthine'³¹⁷ law on sentencing in the Criminal Justice Act 2003 as amended by the Criminal Justice and Immigration Act 2008, in cases where the defendant is considered dangerous, the court may impose a life sentence or imprisonment for the public protection (IPP) for certain

³¹⁷ *R v. Johnson and others* [2006] EWCA Crim 2486, [2007] 1 All ER 1237, 1243 per the then President of the Queen's Bench Division, Sir Igor Judge. For general criticism of recent, 'impenetrable' criminal law statutes: J. Spencer, 'The drafting of criminal legislation: need it be so impenetrable?' [2008] CLJ 585.

so-called ‘serious’ offences.³¹⁸ Offences for which IPP is available are those specified under Schedule 15 of the Act for which a sentence of ten years or more is available under normal sentencing provisions. Offences considered serious include grievous bodily harm with intent, manslaughter, and firearms offences as well as a large number of sexual offences. A defendant is considered dangerous if they pose ‘a significant risk to members of the public of serious harm occasioned by the commission by him of further such offences.’³¹⁹ IPP sentences are indeterminate sentences, where the defendant must serve a minimum tariff period set by the court before being considered for release under licence by the Parole Board. According to section 229 and the guidance given in *Lang*³²⁰, the court in assessing dangerousness ‘must take into account all such information as is available to it about the nature and circumstances of the offence, may take into account any information which is before it about any pattern of behaviour of which the offence forms part, and may take into account any information about the offender which is before it.’³²¹ To assess dangerousness therefore invariably requires the court to have a pre-sentence report prepared on the defendant, their personal history and pattern of offending. As the court cannot have a report made until the defendant pleads guilty, a defendant who is possibly ‘dangerous’ cannot be told by the court whether the IPP regime will apply while he or she maintains a not guilty plea. As is clear from the judgment given in *Kulah*³²², if a judge is to give an indication before the issue of dangerousness has been resolved, it must be qualified by telling the defendant that there is a possibility that IPP may be imposed.³²³ The practical outcome is that in any case where IPP might be available, judges are refusing to give *Goodyear* indications. As L1,

³¹⁸ Under the former wording of the Criminal Justice Act 2003, section 225, which was in force at the time of this research, the court *must* impose a sentence for the public protection if a defendant was judged to be dangerous and a life sentence was not imposed. The Criminal Justice and Immigration Act 2008, section 13 has amended section 225 so that a court *may* impose an IPP sentence under section 225(3)(3A) and (3B) only if a) the defendant has a previous conviction of the type listed in Schedule 15A (murder, manslaughter and a number of serious violent or sexual offences) or b) the notional sentence for the present offence would be at least two years.

³¹⁹ Criminal Justice Act 2003, section 229(1)(b). Those offences are listed in Schedule 15.

³²⁰ [2005] EWCA Crim 2864.

³²¹ Criminal Justice Act 2003, section 229.

³²² [2007] EWCA Crim 1701.

³²³ The problem raised by in *R. v Seddon* [2007] EWCA Crim 3022, where a judge might give an indication that ignored the mandatory statutory requirement that IPP *must* be imposed if a defendant is ‘dangerous’ should now have been removed by the Criminal Justice and Immigration Act 2008, section 13. The court *may* now impose IPP if the defendant is found to be dangerous. However, whether an indication is binding when given before the judge has assessed dangerousness under the new Act is a question yet to be answered by the courts.

a recorder, explained:

I do agree there are difficulties with *Goodyear*. IPPs where you've got assess the dangerousness is another example. I would never give an indication as a recorder of *Goodyear* where dangerousness had to be assessed. Because if you give an indication and then you get to report back saying he is a danger, you put yourself in an impossible position.

Therefore, any serious violent or sexual offences now, for all intents and purposes, fall outside the scope of *Goodyear*, and defendants charged with these offences cannot discover from the judge the sentence they would face with on a guilty plea. This creates a serious lacuna in the law and prevents those charged with these serious offences from having sufficient information to make a properly informed decision on plea.

The second problem highlighted during the research was the tendency of judges to pitch their indication too high. Because the indication becomes binding once given, judges were reported to be anxious not to bind their own hands by indicating inappropriate sentences. The result, some barristers found, was that asking for an indication could back fire, resulting in defendants, who may have previously pleaded to offences, going to trial:

N2: [*Goodyear*] can entrench positions, which is a problem. You might have somebody who has all the things that I talked about earlier- a lot to lose if they went to prison. They might have been on the verge of pleading guilty, bringing matters to an end, accepting responsibility for what they've allegedly done, putting it all behind them, all of that, and obviously getting a lesser sentence at PCMH. They might have been on the verge, and I've come across this, on the verge of that, and you mention, perhaps foolishly on my part the *Goodyear* procedure. And you use a *Goodyear* procedure and as soon as the judge has said I can't promise, I can't rule out custody, custody is an option, it can almost entrench the want to plead not guilty...Because you can happily say to a lay client on one of those borderline cases, look, I can't rule out custody, custody is an option. It's probably more likely than not going to be custody. But, there is a significant chance that this will be a suspended sentence, especially in front of the right sort of judge. A lot of lay clients will react positively to that advice in those terms. When they go in front of the judge and the judge says, sorry I can't rule out custody...

JB: It sounds bad?

N2: Yes. It spooks them. I don't know what it is, but what I found in one particular case, and this person went on and had a trial and was found guilty and went to prison. And, I think if it had not been messing around with the *Goodyear* they would have put in a plea and probably had something like a 40% chance of them staying out

Paradoxically, cautious judges not wishing to underestimate the potential sentence may give defendants an inaccurate indication of their true position, and increase the number of trials as defendants reject the opportunity to plead guilty. Overall this is to the detriment of both the court and the defendant. Where a defendant should have pleaded guilty to an offence, they may go to trial with a weak defence case, be convicted and receive a higher sentence as a result.

A third difficulty is that *Goodyear* indications are the same as any other sentence in that they may be subject to an Attorney-General's Reference to the Court of Appeal, if the prosecution believes that the judge has been too lenient.³²⁴ Therefore a defendant may plead guilty on the basis of a certain sentence, only to find that it is increased on appeal. Despite raising serious questions about whether the defendant was led into pleading on a false basis, none of the decisions of the Court of Appeal recognise this to be problematic.

iv. Ethical problems

In *Goodyear*, the Court of Appeal made clear that a written basis of plea should be agreed before asking the judge for an indication.³²⁵ However, the Court did not seem to countenance the professional difficulties *Goodyear* produced for barristers. Some

³²⁴ *Goodyear* [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, 2542-2543. Attorney-General's References are made under section 36 of the Criminal Justice Act 1988.

³²⁵ *Ibid.* 2541.

interviewees believed that *Goodyear* was unlike any other situation, and that it has created potentially serious ethical problems for barristers. Before exploring this further, it is worth outlining exactly what a barrister's ethical duties entail. Under the Code of Conduct of the Bar, 'a barrister must not deceive or knowingly or recklessly mislead the Court.'³²⁶ Furthermore, according to the Code, if a defendant makes a confession to the barrister of guilt it 'imposes very strict limitations on the conduct of the defence. A barrister must not assert as true that which he knows to be false.'³²⁷ Even though not amounting to an outright confession, the Code does also conceive of situations 'where statements are made by the defendant which point almost irresistibly to the conclusion that the defendant is guilty but do not amount to a clear confession.'³²⁸ In both these situations it may arise that a barrister cannot continue to conduct the defence and must withdraw.³²⁹

In asking for a *Goodyear* direction and agreeing a written basis of plea with the prosecution (which is normally signed by the defendant himself) the defence barrister puts forward a basis of guilt that the defendant has told them they agree to, while still maintaining a not guilty plea. This is a distinctly odd position for the barrister. On the one hand they have instructions from the defendant which amount to a denial of the offence, whilst on the other they are assisting the defendant to construct an account which admits guilt. In putting forward a basis of plea the barrister must treat the facts admitted therein as a fantasy. However, if the defendant accepts the indication, and wishes to plead guilty, the barrister may in a moment disregard the previous not guilty account and adopt that which was put forward in the basis of plea. If, on the other hand, the defendant refuses the indication, the basis is disregarded, the not guilty plea is maintained and the defence team proceeds to trial. This is difficult on ethical grounds for a number of reasons. If the defendant accepts the indication and changes their plea, it might be suggested that the barrister is at least at risk of misleading the court unless he

³²⁶ Bar Standards Board 'Code of Conduct of the Bar of England and Wales' (8th edn, 2004) Rule 302.

³²⁷ Ibid. Section 3, para 12.3.

³²⁸ Ibid. Section 3, para. 12.6

³²⁹ For discussion of ethical issues for defence barristers dealing with those who have admitted guilt: A.Ashworth and M. Blake, 'Some ethical issues in prosecuting and defending criminal cases' [1998] Crim LR 16, 19-21.

or she investigates with the defendant why they wished to change their plea. If we are to accept that the basis is purely hypothetical up until the point at which the defendant adopts it as the 'true' account, it is incumbent upon the barrister to investigate the reasons why and explore the prosecution evidence afresh. To not do so, knowing that the defendant has asserted an alternative account to them, may at least be recklessly misleading the court, or, in some cases, failing to protect the defendant's best interests. J1 explained the rather drawn out process that she went through with defendants who want to accept a *Goodyear* indication. J1 found it was always necessary to explore the prosecution case with the defendant again:

J1: ...some people might say I want to be guilty [after an indication], and then if that happens then you have to be very careful to say hang on a minute, I have a set of instructions that are consistent with a not guilty plea, if you tell me that you now want to plead guilty that's fine it's up to you...and you'd have to go through the prosecution case, finding out exactly what they were admitting to. So, it's fine when it's all theoretical but once someone actually says I am now having heard all that I want to plead guilty, then it changes.

JB: And then you have to go back to the evidence again?

J1: Yes, say a robbery, street robbery, mugging or something like that and they said they were never there. Then you would then have to go through well, this was the description of the attacker, and where you actually go through to make sure this person is admitting to something. Because if in the account that they give which contained admissions you might end up thinking well actually they're not admitting to robbery at all...So other things may be thrown up and might actually get you a true position, but which is still consistent with a not guilty plea.

While J1 was able to describe her practice, none of the other interviewees explicitly mentioned investigating the reasons for the change of plea after an indication.

The other possibility is that the defendant rejects the indication and wishes to continue to trial. In that circumstance, some barristers argued, provided that the defendant has maintained a not guilty plea, and has not made any actual admissions, no ethical

difficulties arose. On the other hand a significant minority of interviewees felt very uneasy with discussing alternative accounts with the defendant at all. Commonly these barristers did not ask the defendant to assert any positive account whatsoever, and alternatively took the prosecution's opening of the case as the written basis of plea. N2 believed to do otherwise could cause significant problems leading to professional embarrassment:

What you tend to have to do is turn that basis in terms of a hypothetical...and it's always on the basis of the prosecution evidence. So the prosecution evidence is this, they may be of the view that they can only establish this on their evidence. So, that's how they would open it against you. Would you, if custody could be ruled out, this is how I phrased it, would you, if custody could be ruled out, be prepared to have the case opened against you on basis and accept responsibility for it on that basis. If they say yes to that, you do your *Goodyear*, and the judge says no, its custody, I don't think you are then embarrassed.

This is perhaps the correct approach. If a barrister is to explore in any kind of detail the commission of an offence, even on a hypothetical level, there must soon come a point when that detail begins to sound like an admission of guilt under the Code of Conduct section 3, para 12.6 described above. By adopting the Crown's case and not asking the defendant for any details, the barrister can avoid any admissions and professional embarrassment. This minority of barristers interviewed came from the more junior end of the Bar. No such concerns about professional embarrassment or the method of adopting the Crown's opening were explained by the senior members interviewed. The QCs and Recorders interviewed minimised ethical concerns over *Goodyear* saying, for example:

Well, when I was in my 20s I used to worry myself sick about that, but now I don't.³³⁰

The small number of barristers interviewed here seemed to suggest that more senior members of the Bar were concerned with moving cases along and "pragmatism", and

³³⁰ 12.

worries about misleading the court, or failing the ethical code in *Goodyear* indications were confined to junior barristers of less than 15 years call.

The discussion of *Goodyear*, its use, practical and ethical problems, reveals a diverse, thinking Bar that closely monitors changes in the law and is able to give carefully considered opinions about how their own practice in relation to pleas might be affected. The interviewees demonstrated a wide understanding of the possible impact of a *Goodyear* on a defendant: when and how a *Goodyear* might be sought from a judge; the practical problems with *Goodyear* in terms of serious offending and the approach of judges; as well the ethical dilemmas that *Goodyear* might present in conducting the defence. These interviewees were not focused on guilty pleas, but were careful to weigh up how a defendant might be served by the various courses of action available to them. This research demonstrates that a number of barristers, in this case at the junior end of the Bar, take their ethical duties to the defendant and court very seriously.

4. Advising in strong terms- two different approaches

After considering the various elements which may influence advice on plea it is now necessary to draw together those factors to describe how barristers convey their assessment of the case to the accused. According to the Bar Standards Board Code of Conduct 'a barrister acting for a defendant should advise his lay client generally about his plea. In doing so he may, if necessary, express his advice in strong terms. He must, however, make it clear that the client has complete freedom of choice and that the responsibility for the plea is the client's.'³³¹ No further explanation of the wording used in the Code is given, and neither of the Court of Appeal authorities which specifically mention 'advising in strong in terms', *Turner* and *Goodyear*, give any clarification.³³²

³³¹ *Code of Conduct* (n.326) Written standards for the conduct of professional work, paragraph.11.3.

³³² Peter Tague has previously observed this lacuna: *Tague* (n.245) 25. Tague also found that no explanation of these terms is given during the vocational stage of barristers' training and barristers are reliant on observing their pupil-master at work: *Ibid.* footnote 4.

As barristers had previously been said to “manipulate”³³³ defendants into entering a guilty plea through the manner in which they advised, it was felt to be highly relevant to explore with those interviewed what they felt ‘advising in strong terms’ to mean.³³⁴ This not only involved an exploration of how barristers explained their advice as a simple evaluation of the defendant’s case, but also a general approach as to how they might convince a defendant that a course of action was appropriate.

When asked, all of the barristers agreed that they provided defendants with an overall evaluation of the prospects of a not guilty verdict at trial, although all of the interviewees, except B1, felt that expressing the chances of an acquittal or conviction were best left to linguistic approximations rather than mathematical figures. Phrases deployed by barristers ranged from ‘There is no way in 1 million years that [you] will be acquitted’³³⁵, to ‘the evidence from certain witnesses is very strong and the jury may have difficulty in accepting [your] account’³³⁶ to ‘You can say this is a strong case, or coupled with the defence that you seek to advance [your case] has these problems.’³³⁷ These approximations were widely regarded as sensible as predicting a jury trial was more of an art than a science. Furthermore, figures given to defendants were felt to be dangerous to the barrister’s reputation if later they proved incorrect. The fact that jury trials do occasionally produce odd outcomes informed the overall approach many of the barristers spoken to. As will be discussed below, the difficulty of predicting a trial verdict meant for some of the barristers that certain “robust” styles of advice were to be avoided.

Interviewees were also anxious to ensure that defendants had understood their position and believed that they gave a very thorough explanation of the criminal justice process.

³³³ The word “manipulate” has been placed in inverted commas in an attempt to avoid the pejorative connotation that the use of the word may convey. Manipulation can imply the control of a person which is exerted unscrupulously. Barristers may wish to alter their advice to persuade a defendant of a certain course, but for perfectly scrupulous reasons.

³³⁴ For examples of “manipulation” see *McConville et al* (n.230) 256-61.

³³⁵ L2.

³³⁶ K2.

³³⁷ A1.

A1 explained that a barrister often needed to take great care in communicating their advice to vulnerable defendants or those of low intelligence:

I'd hope that the defence solicitor, myself, we would have to, we communicate. And it is for us to communicate our advice to our lay client, whether they be vulnerable, young, old, maybe from a different culture may be a foreign national, it's part of our duty that they understand...if it was a vulnerable client, say of young years or someone elderly or someone with mental health problems then you would have to tailor your advice accordingly.

Those interviewed felt it was their job to make sure that the defendant has understood fully the case against them as well as the mechanics of the criminal justice process, and many gave anecdotes of the lengths they had gone to explain matters to young or foreign defendants or defendants with learning disabilities to explain their advice. Interviewees recalled how some defendants 'would have done whatever I told him, guilty or not guilty',³³⁸ and therefore great care needed to be exercised to ensure that the plea entered was voluntary.

It is worth noting that almost all of the barristers interviewed thought that it was unprofessional to advise a defendant with the words "I think you should plead guilty." Rather, barristers adopted indirect modes of advice which avoided giving an opinion directly on what the plea should be. On a review of the interview data it became clear that two approaches could be discerned. While it would be incorrect to say that barristers either fell into either one of diametrically opposed camps, the descriptions that barristers gave of their work left a distinct impression of how they viewed their role and how persuasive in their advice they were allowed to be. Two barristers, L1 and H1, have been selected who are felt to best express these two approaches which have been labelled "persuasive" and "facilitative" respectively.³³⁹ The other barristers interviewed in the

³³⁸ L1.

³³⁹ Peter Tague has previously identified 'educative' advisors in his work: *Tague* (n.245) 25. This research has chosen to relabel these advisors as facilitative as a more accurate description of what the barrister is doing. The aim of these advisors, according to Tague, is to inform the defendant about the choice, and to support that decision, whether it is to plead guilty or go to trial: *ibid.* On the other hand persuasive advisors, while implicitly recognised by Tague, were not described in detail.

study tended towards one or the other of the approaches as exemplified by L1 and H1, although the majority could be described as facilitative advisors.

a. The persuasive approach

Put simply, the barristers who advocated the persuasive approach of advising felt it was their duty to convince a defendant who had a poor chance at trial to plead guilty. L1, a senior barrister with extensive experience practising in the Crown Court on the Midlands Circuit, felt that it was his job to ‘stamp his personality’ on a conference with a defendant, assuming control of the situation. Experienced criminals wanted ‘straight talk’ and if he thought ‘that they should plead guilty, I don’t hesitate saying so.’ L1 continued:

If I think pleas are necessary I will tell them. And if they say, for example, “well does that mean you don’t believe me”, I will say to them “I’m not here to pronounce on whether I believe you, I’ve only just met you, I don’t have a view on your veracity, I wouldn’t dream of trying to pronounce on you in any judgemental sense, I’m looking at the evidence. And, on that evidence, I think you stand an overwhelming chance of getting convicted.”

When it was put to L1 that particular evidence could be stressed in a way to persuade a defendant to plead guilty, he replied:

Absolutely. I will readily accept that what I’m doing a lot of time and giving advice is persuading them to my view. I accept that and that is in fact what I’m doing. If I have a view and it’s a strongly held view and I think for example the defendant is going to be his own worst enemy in the witness box or his previous convictions are going to go in, for example, and I have formed the view...But, if I’m in good hands with a good solicitor and he’s said, you’re right, this bloke needs cracking on this, this or other basis, in my opinion, I’ll come at it, on my own view, fortified by what the solicitor said and I will, effectively, yes, I accept that I seek to persuade the client that what I say is right, and give him the reasons. He’s entitled to know exactly what I’m saying and why I am saying it. And I will be totally open with him about it.

L1 was adamant that his role was to persuade defendants to his point-of-view of the case if he felt a guilty plea was necessary. When L1 was asked what he would do with a defendant who stood very little chance at trial who nevertheless wanted to enter a plea of not guilty he explained:

...if somebody is absolutely adamant that they are not guilty and you explain to them the consequences of their bad character going in, and the loss of credit for a plea of a third, and whatever it may be, the IPP ramifications and dangerousness, and they say, “been there, done it, know the score, I’m not guilty gov’ or you can get out and get another barrister” sort of thing. Well, that type you let them plead not guilty. I would still not back off in my advice. I would probably go and see them in prison afterwards or in chambers and I would insist on having a firm session on my terms.

That is not to say that L1 felt that any conduct was acceptable. L1 felt a duty to be ‘professional’ throughout and that his advice had ‘got to be the sort of advice that you would be content with the client leaving the room and going out to the local press and saying do you know what my barrister has just said to me and print it.’

L1 also believed that it was sometimes necessary to take a different approach when advising vulnerable defendants as opposed to more hardened criminals:

...it’s like any situation in life, you have to weigh each client as they are. And there might be a very vulnerable, tearful young woman who has had her fingers in the till and has been stealing and is in tears while in conference with you. You’ve got to treat that person in a very, very different way from your serial rapist, or your child of 12 who may be overwhelmed by the environment.

Despite adopting a highly persuasive style of advising, L1 believed that the defendants he advised entered pleas voluntarily:

...in my case I would never let a person enter plea of guilty unless it was their

own free will, I wouldn't dream of it. But it is of their own free will based on counsel's advice.

To L1 the role of counsel was to convince a defendant to plea guilty, if it was strongly felt to be in his or her best interests. As long as counsel remained 'professional' throughout, all they were doing was ensuring that the defendant understood the reality of his or her position in order for them not to make, as L1 saw it, the wrong choice.

However, the problem with the persuasive approach is that the barristers who adopt it may undermine an essential tenant of common law jurisdictions: that the plea entered by a defendant charged with a criminal offence is informed and *voluntary*.³⁴⁰ While L1 and other barristers insisted that guilty pleas were entered of the defendant's 'own free will' this is difficult to sustain when, by the interviewee's own admission, he sought to persuade the defendant of the fallacy of entering a plea of not guilty. While there is always a tension between giving advice and allowing the defendant complete freedom of choice³⁴¹, there is a significant difference between giving the defendant a clear, unfettered view of the chances of conviction versus the benefits of a guilty plea, and actively persuading the defendant of a particular course of action. The literature on lawyer-client relationships has overwhelmingly found that defendants are highly passive in the relationship and commonly follow the advice they are given.³⁴² Defendants have been described as 'dependants' in the criminal process³⁴³ and because of socio-economic factors combined with the stress of criminal proceedings clients are in a particularly poor position to take control of their own defence.³⁴⁴ This would suggest that while L1 maintained that pleas are entered voluntarily, they are in fact entered at the persuasive

³⁴⁰ For English judicial definition: Lord Chief Justice Parker in *Turner* [1970] 2 Q.B. 321; for American: *Santobello v. New York* 404 U.S. 257 (1971).

³⁴¹ *Ashworth and Blake* (n.329) 25.

³⁴² P. Carlen, *Magistrates' Justice* (Martin Robertson, London 1976); A. Blumberg, *Criminal Justice* (Quadrangle, Chicago 1967); *McConville et al* (n.230); D. Rosenthal, *Lawyers and Clients Who's in Charge?* (Russell Sage Foundation, New York 1974)

³⁴³ R. Ericson and P. Baranek, *The Ordering of Justice: a Study of Accused Persons as Dependants in the Criminal Justice Process* (University of Toronto Press, Toronto 1982).

³⁴⁴ P. Pleasence and H. Quirk, 'The Criminal Case Profiling Study' (Legal Service Research Centre, LSC, 2001); A. Currie, 'The Nature and Extent of Unmet Need in Criminal Aid in Canada' (2004) 11 I.J.L.P. 191.

advisor's bidding. The disempowerment of defendants and the removal of defendant autonomy by persuasive advisors over plea endangers positive perceptions of the legal profession- while a plea remains the defendant's choice it is more difficult to attach sinister motivations to the advice given by their lawyer. More importantly, a commitment to defendant autonomy protects defendants against those legal advisors who would wish to manipulate them to satisfy self-interest. In an environment where the choice of the defendant is promoted, dishonest manipulation by any one individual may become more difficult.

Whether persuasive advisors generally place innocent defendants at risk is a different matter altogether. Those who seek to persuade defendants to enter a guilty plea do not necessarily do so out of 'self interest, convenience, or the desire to foster good working relationships with others.'³⁴⁵ In *Standing Accused* and *Negotiated Justice*, barristers were seen to be using broadly similar techniques to convince defendants to enter a guilty plea.³⁴⁶ Those studies explain the motive of defence lawyers in preferring guilty pleas as based on two common, shared perspectives: that defendants are unworthy, and, undeserving of a trial.³⁴⁷ This criticism is made, and often is repeated³⁴⁸ under the broad description "guilty plea culture", without a formal exploration of why or whether barristers might hold these views. Barristers in the current study expressed a mixture of bafflement, worry and even anger when asked late in the interview whether a guilty plea culture existed at the Bar. Such a culture was not something they recognised and many seemed genuinely horrified that this was an accepted perception in the academic literature. Rather, they reiterated, guilty pleas were advised because it was felt a guilty plea was the appropriate course of action for the defendant based on the available evidence. Barristers were not advising persuasively out of any belief that the defendant was unworthy or because of a courtroom culture of 'it's us against you little man and

³⁴⁵ *Ashworth and Blake* (n.329) 26.

³⁴⁶ *McConville et al* (n.230) Chapter 10. Similar in that "persuasive" advisors in this study counselled heavily in favour of a guilty plea and emphasised the negative consequences of a trial followed by a conviction.

³⁴⁷ *McConville et al* (n.230) 188.

³⁴⁸ For example, *A. Sanders and R. Young* (n.233).

you'll do what we tell you'³⁴⁹, but out of a paternalistic belief that they were advising the defendant in their best interests.³⁵⁰

G1 took this view, explaining that persuading defendants was in their interests, as well as the system as a whole:

G1: I think that in most cases you should advise robustly. That's the whole process. You should advise on what you think. Because no one is advantaged by defendants pleading not guilty and having trials and being convicted and having very long sentences.

JB: What do you mean by that?

G1: Some defence barristers take, don't advise robustly or advise in a different way. And if their clients then have a trial and are convicted then they will serve longer sentences. My view is that doesn't help the system one bit. You should advise on what you think and put it in clear terms.

By advising a defendant 'robustly', persuasive advisors avoided the risks of a longer sentence, plus the system avoided having to go through a lengthy, expensive trial process.

On the basis of these interviews, persuasive advisors did not advise guilty pleas out of a commitment to a guilty plea culture, but out of a paternalistic belief that defendants needed to be convinced of the wisdom of entering a plea. While this may not harm many defendants, a move away from defendant autonomy can harm perceptions of the Bar and encourage those who might use persuasive techniques for their own benefit.

³⁴⁹ A2.

³⁵⁰ As Peter Tague also found: *Tague* (n.245) 23-24.

b. The facilitative approach

H1, a barrister of 11 years call, described a very different approach to advising:

...there are two sorts of approach at the Bar I see. If somebody should plead guilty, you make them plead guilty effectively. You advise in such a strong way that they are left with little or no option to plead guilty and take that advice. The other is to set out what you think their position is, in your view, regarding the evidence and then if someone says, "well, that's all very fine, but no I am going to have a trial", fine, you go along with it. And I tend to subscribe to that second school of thought. So if someone is insistent on maintaining a not guilty stance in the face of pretty strong evidence I'll go along with that.

H1 was very aware of an alternative approach at the Bar, but purposefully avoided advising in that manner:

My approach has always been pretty much the same. I'll sort of put the cards on the table and say "these are what your chances are". And if someone turns round and says, "yeah, but I'm not guilty" I won't take the next step which lots of people do which is get very, very forceful, very, very strong, saying, "this is ridiculous, you've got to plead."

H1's conception of his role was therefore very different to that of L1. H1 as advisor was merely there to educate the defendant about the law and process, give him or her an assessment of acquittal based on experience and facilitate his or her choice. As with other interviewees identified as having the facilitative approach, H1 did not hide the repercussions of a not guilty plea from the defendant. Therefore, as described by many, 'a full and frank assessment' of the case should be given³⁵¹; barristers had a 'duty to be straight' with the defendant³⁵² and 'not pull any punches.'³⁵³ However, once H1 was satisfied that the defendant was making an informed decision and had had time to consider their plea he was content to run the case to trial whether he believed it to be a

³⁵¹ L3.

³⁵² D1.

³⁵³ L3.

poor decision or not. Two particular reasons informed this approach to advising defendants. Firstly, H1 was interpreting his role as advisor according to his own, personal understanding of what a barrister's ethical and professional obligations were. Several barristers whom this research has identified as facilitators wanted to make clear that the choice over plea belonged to the defendant, and they were obliged to respect the defendant's autonomy in making that choice, as A1 explained:

If the defendant wishes to contest what is a strong case against him or her then that is their perfect right. I just advise them as to the strength of the case, I may well advise them to plead guilty, if they say no, I'll say fine. These are the points we will develop, and this is the defence preparation we need, and will do the best.

Secondly, facilitators pointed out the difficulty of predicting the outcome of a Crown Court trial, and several gave examples of defendants who had been advised in favour of a guilty plea being acquitted.³⁵⁴ The experience of being incorrect in assessing the evidence had taught these barristers the value of allowing a defendant to make their own choice.

A facilitative approach is not without its difficulties. As Tague points out, encouraging more defendants to go to trial, rather than deferring to the defendant on the plea decision, could be exceedingly beneficial to the defendant.³⁵⁵ There appears to be a danger that risk averse defendants might avoid the uncertainties of trial and prefer a plea of guilty. Allowing vulnerable defendants, especially those on the custody threshold, to make their own choice without a more partisan approach by the barrister, could be to their detriment in the long run. E2 reported that some defendants who have a good shot on the papers may plead for some other reason which she did not appear willing to explore:

³⁵⁴ These accounts are very similar to those given to Peter Tague by barristers at the London Bar in 2006, *Tague*, (n.245) 24-25.

³⁵⁵ *Ibid.*

I've had that when they want to plead even though they've got a good shot on the papers. And, I'll have to say to them "well, it's your choice, but I think you've got a run." They quite often do that if example their wife will get out if they plead.

A barrister who gives advice, but emphasises the defendant's choice knowing that they are acting irrationally or in an overly risk adverse manner, may in the long run fail their client's best interests. As described in this chapter already, the pressures placed on a defendant by, for example, the possibility of staying out of prison can be overwhelming. It is certainly arguable that a barrister who can take a more realistic view of the risks of trial must attempt to shield the defendant from the pressures of the discount or third parties, and reassure the defendant so that they may take a sensible and reasoned decision. If Tague's analysis is correct, and defendants and barristers are too often too easily frightened away from trial by the prospect of heavier sentences, perhaps barristers should more readily advocate a not guilty plea as a sensible choice. As Tague argues, there are often tactical reasons to prefer a not guilty plea. The chances of acquittal are often not outweighed by the small sentencing discount available, and a trial preserves the right to appeal on conviction.³⁵⁶ Perhaps those with a 'decent shot on the papers' should be encouraged to go to trial by a barrister who takes a partisan view, and does not simply concede to the defendant's choice in every case.

5. Conclusion

This chapter has set out the interview data given by barristers about how they approach advice on plea in the Crown Court. As has been shown, this data suggests that they do not adopt the view that defendants are 'unworthy, and, undeserving of a trial', but rather examine carefully the merits of each case on the basis of the prosecution case and the defendant's account. All of the interviewees explained that they were open to alternative explanations from the defendant and did not treat the Crown's evidence uncritically.

³⁵⁶ Ibid. 37. Tague, citing R. Nobles and D. Schiff, 'Due Process and Dirty Harry Dilemmas: Criminal Appeals and the Human Rights Act' (2001) 64 MLR 911, pointing out that guilty pleas tend to foreclose appeals based on procedural irregularities.

Although some barristers adopted robust styles of advising, this was to test the defendant's account within the context of an adversarial trial. In this setting the barrister's approach was a projection of whether the defendant and his or her case would withstand cross-examination, and ultimately result in an acquittal or conviction.

In assessing the case against the defendant, these interviewees set out a complex set of considerations that included various matters of evidence and procedural rules, as well as tactical choices that affect sentence. These highly detailed discussions strongly suggest that "guilty plea culture" does not account for the sophisticated decision-making processes that these interviewees exhibited. These interviewees were able to talk knowledgeably about developments in the law and how those changes have affected how they approach advice on plea. This included an overall awareness of ethics and their professional relationship with the defendant. Those who subscribed to a guilty plea culture would not have engaged, as these interviewees did, with problems such as *Goodyear* indications, or concern for the defendant's reaction to character evidence, or an appreciation for when plea should be entered after receiving advice. All of the interviewees appeared to have given careful consideration to the position of the defendant, and how his or her outcome could be optimised in terms of acquittal or conviction and sentence.

This chapter has shown that there is no uniform approach to how advice on plea is conveyed to the defendant. There is a danger that the literature treats the criminal bar as a homogenous group capable of singular approaches to defendants and cases. To do so risks hiding the diversity of opinion within the profession as to how cases should be handled. As revealed here by the different styles of advising, there are a range of approaches that require careful scrutiny. As was implicit in Tague's research, there appear to be two advising styles that have been described as persuasive and facilitative. It is suggested here that persuasive advisors, although advising robustly, do not seek to manipulate the defendant to conform to a standardised expectation of a guilty plea. Rather, these advisors are motivated by a paternalistic desire to seek the best outcome for the defendant. While such advising styles undermine defendant autonomy, and create

the potential for misuse, these advisors do not necessarily place defendants in jeopardy of wrongful conviction. The conflation of *de facto* innocent defendants with those likely to gain an acquittal at trial has stymied proper discussion of the basis of a barrister's advice. These advisors adopt a persuasive style on the basis of the probable result of a trial and out of recognition that some defendants entering a not guilty plea may almost certainly risk imprisonment, or an unnecessarily longer sentence. Furthermore, the facilitative approach at the Bar is in common usage. Those who take this approach appear to give full and frank advice to the defendant on the merits of their case, but withhold firmer recommendations on plea, which they leave entirely to the accused. Facilitative advisors stand in marked contrast to those barristers observed at the time of the research in *Standing Accused*. On this basis, a re-evaluation of the critical view of the criminal bar is necessary. As described, however, such facilitative advisors may insufficiently protect the defendant from overestimating the risks of trial. A barrister who does not provide a thorough, reasoned judgement on the various options available to the defendant may invite those who should go to trial, by virtue of the merits of the case, to plead guilty.

Chapter 5: Plea bargaining

1. The extent of bargaining in English Courts

When compared with American courts, the scope for bargaining over plea in the Crown Court is restricted. Because an English prosecutor cannot recommend a sentence to the court, he or she cannot bargain with the defendant for their guilty plea in return for a sentence of imprisonment of a particular length, or a non-custodial punishment of a particular form.³⁵⁷ An English prosecutor has two tools available to them to negotiate with the defendant in order to produce a guilty plea and avoid a trial, both of which are potentially just as powerful as formal plea bargaining.³⁵⁸ Firstly, a prosecutor in the Crown Court may reduce the charges on the indictment, or agree not to proceed on one or several of multiple charges, in return for a guilty plea (“charge bargaining”). Secondly, the prosecution and defence may agree a basis of plea (“fact bargaining”). A basis of plea agrees a written factual basis for the offence and restricts the judge’s view of aggravating and mitigating circumstances on sentence. This highly potent form of bargaining has been somewhat neglected in the literature,³⁵⁹ but was explored with the interviewees in this research and is discussed here.

In the current literature, very little appears to be known about how and why barristers initiate plea bargaining. With regards to defending barristers, Sanders and Young attribute plea bargaining to a mixture of economic and cultural incentives, combined

³⁵⁷ *Atkinson* [1978] 2 All ER 460. The system of diversion through cautioning may lead to pre-court negotiation where a police officer may recommend a particular form of non-judicial disposal.

³⁵⁸ Other writers also include the sentence discount as a form of plea bargaining: M. McConville, ‘Plea Bargaining’ in M. McConville and G. Wilson (eds), *The Handbook of the Criminal Justice Process* (OUP, Oxford 2002) 368; A. Ashworth and M. Redmayne, *The Criminal Justice Process* (3rd edn OUP, Oxford 2005) 275. While the difference in sentence caused by the discount can place pressure on the accused to plead guilty, in this research the discount was not considered plea bargaining as it cannot be affected by an agreement between the parties and therefore is not subject to negotiation as bargaining must necessarily be.

³⁵⁹ A. Sanders and R. Young, *Criminal Justice* (3rd edn OUP, Oxford 2007) 429-430; *Ashworth and Redmayne* (n.358) 274.

with being a way of managing caseload.³⁶⁰ Accordingly, barristers take on too much work and, while running some cases as trials, attempt to persuade defendants in others to accept pleas to lesser offences as a way of keeping the brief.³⁶¹ However, the reasoning given is based on older studies of the Bar, or on contestable assumptions about the poor quality of young barristers choosing to practice criminal law.³⁶² A further limitation of these conclusions is that they do not include interviews with defending barristers themselves to discover why they engage in plea bargaining.

The role of prosecuting counsel has been explained with reference to the contradictory guidelines and sentencing law on when pleas may be accepted to alternative offences³⁶³, and the various incentives and disincentives of settling cases before trial. Studies conducted before the CPS determined charge at the police station demonstrated a reluctance by barristers to contradict the instructing CPS officers and a tendency to maintain charges when the case should either have been discontinued or the charges downgraded.³⁶⁴ Here too the available research has, on the whole, not sought to understand prosecution barristers' motivation in settling case by reference to barristers themselves.

2. Charge and fact bargaining

The phenomenon of charge and fact bargaining is extremely common in the Crown Court, however the exact extent of its occurrence is difficult to quantify.³⁶⁵ Prosecutors in the Crown Court are given wide discretion as to what charges should appear on the

³⁶⁰ *Sanders and Young* (n.359) 417-421.

³⁶¹ *Ibid.* 418-419. As will be discussed in Chapter 6, this is a highly inaccurate picture of the current criminal bar, which has significant problems with maintaining sufficient work loads at the junior end.

³⁶² *Ibid.* 419-420. See Chapter 7 for discussion of barristers' financial incentives.

³⁶³ *Ibid.* 421-423; *Ashworth and Redmayne* (n.359) 271.

³⁶⁴ J. Baldwin, 'Understanding Judge Ordered Acquittals in the Crown Court' [1997] Crim LR 536.

³⁶⁵ It should be noted that many of the barristers primarily mistook charge bargaining to refer to charges at the police station not at court. "Charge bargaining", while a common phrase in the academic literature, does not appear to be an expression in general currency at the Bar.

indictment and may vary them in order to agree a plea of guilty.³⁶⁶ It is not necessary for a prosecutor to invite the approval of the judge in accepting a guilty plea to a lesser charge, however, the judge may now adjourn proceedings until the prosecutor has consulted with the Chief Crown Prosecutor, the Director of Public Prosecutions, or, in certain cases, the Attorney-General regarding the change in charge.³⁶⁷ The barristers interviewed described their regular involvement in bargaining over the charges on the indictment. As A2 said of the regularity of negotiation: ‘...you do it all the time. In fact I was doing it this morning. Yes, yes, everyday.’ Two studies have confirmed that many assault cases are settled by downgrading charges to less serious offences or removing charges from the indictment. Elaine Genders found that only 19% of her sample of those charged with section 18 of the Offences Against the Person Act 1861 were eventually convicted of the same.³⁶⁸ Ralph Henham also found 62% of those charged under section 18 eventually pleaded to a lesser offence.³⁶⁹ Several categories of offences seem particularly prone to downgrading at court given that some offences contain the elements of less serious offences.³⁷⁰ Research conducted on the charging of racially aggravated offences found downgrading to the non-racially aggravated offence in between one-fifth and one-third of cases.³⁷¹ Equally, several sexual offences and

³⁶⁶ The term prosecutor is used here to denote the prosecution barrister. He or she is instructed, in most cases, by the Crown Prosecution Service’s Crown Prosecutors. In selecting charges, Crown Prosecutors and prosecution barristers are subject to Crown Prosecution Service, ‘Code for Crown Prosecutors’ (2004), Section 7 Selection of Charges. The prosecution barrister is also subject to the Crown Prosecution Service, ‘The Farquharson Guidelines: The Role and Responsibilities of the Prosecution Advocate’ (2001) <<http://www.cps.gov.uk/Publications/prosecution/farqbooklet.html>> and The Attorney-General, ‘Attorney-General’s Guidance on Accepting Pleas and the Prosecutor’s Role in the Sentencing Exercise’ (2005) <http://www.attorneygeneral.gov.uk/sub_publications_guidelines.htm>

³⁶⁷ *Amendment No. 22 to the Consolidated Criminal Practice Direction (Criminal Proceedings: Victim Personal Statements; Pleas of Guilty in the Crown Court; Forms)* [2009] EWHC 1072, IV.45.8. This practice direction was not in force at the time of the interviews conducted for the present research. Under the previous authority of *Grafton* [1993] QB 101 it was entirely within the prosecution advocate’s discretion whether to discontinue a case or accept lesser charges until the end of the prosecution case at trial.

³⁶⁸ E. Genders, ‘Reform of the Offences Against the Person Act: Lessons from Law in Action’ [1999] *Crim LR* 689, 691-93.

³⁶⁹ R. Henham, ‘Further Evidence on the Significance of Plea in the Crown Court’ (2002) 41 *Howard Journal* 151, 153.

³⁷⁰ For many offences juries may find guilt on a “lesser included” offence where the elements of another offence are part of a more serious charge.

³⁷¹ Her Majesty’s Crown Prosecution Service Inspectorate, ‘A Follow Up Review of CPS Casework with a Minority Ethnic Dimension’ (2004), para. 6.52. Sections 28-32 of the Crime and Disorder Act 1998 introduced several forms of racially aggravated offences including assault and criminal damage. The CPS has since reiterated guidance on prosecutions of racially aggravated offences to prevent attrition of charges: Crown Prosecution Service, ‘Guidance on prosecuting cases of racist and religious crime’ (2nd

property offences differ from one another on the basis of a ladder of seriousness, where the difference between offences is a matter of *mens rea* or slight changes to the *actus reus*. It is reasonable to assume that these offences remain as open to negotiation as historic data suggests.³⁷²

Whether the downgrading of charges is brought about by bargaining is not revealed in much of the literature, but given the wide reporting of plea bargaining it is possible to say that a number of the reductions in charge are probably brought about by negotiation between prosecution and defence. The difficulty in assessing the extent to which charge bargaining takes place lies in using methods that only evaluate the facts of the case or a statistical analysis of cases, but do not observe the interaction of prosecution and defence advocates. For example, a defendant may plead to a lesser offence because of complex negotiation between the Crown and defendant (which would not be apparent on the papers), whereas another defendant may plead to a lesser offence simply because the prosecutor downgrades the offence because it is a more accurate reflection of the facts of the case. This research makes no quantitative assessment of charge bargaining, however, the reports of negotiation by the interviewees leads to the conclusion that negotiation relating to charge occurs extremely frequently.

Interviewees also discussed fact bargaining, whereby the defence agreed with the prosecution a suitable written basis of plea that described the offence for the purposes of sentencing. Such bargains were described as very important as a defendant could avoid aggravating features that were otherwise apparent on the basis of the prosecution evidence.

This chapter considers three different elements of plea bargaining. Firstly, it reviews the

edn, 2008) < http://www.cps.gov.uk/Publications/prosecution/rpbcropol.html#_23>

³⁷² At least four older studies found indirect evidence of charge bargaining: S. McCabe and R. Purves, *By-Passing the Jury* (University of London Penal Research Unit, Oxford 1972); A.E. Bottoms and J.D. McClean, *Defendants in the Criminal Process* (Routledge, London 1976); J. Baldwin and M. McConville, *Negotiated Justice* (Martin Robertson, Oxford 1977); and C. Hedderman and D. Moxon, *Magistrates' Court or Crown Court? Mode of Trial Decisions and Sentencing* (Home Office Research Study 125, HMSO, London 1992).

guidance given to barristers on when and how they should initiate negotiations over plea, and whether the ethical codes provide sufficient direction to barristers' practices. The present research findings suggest that they do not, and where guidance is provided it is poorly suited to the reality of accepting lesser pleas. As will be seen, only one of the barristers interviewed made reference to any explicit guidance. Secondly, it explores the question of how bargains are entered into and how the decision to enter negotiations is made. Thirdly, the literature on plea bargaining and interview responses will be considered together to form an assessment of plea bargaining in English courts. This chapter will argue that under the current system, plea bargaining is both inevitable and in many cases beneficial to the defendant.

a. Ethical guidance on when plea negotiation may take place

In evaluating charge bargaining it is necessary to look at the ethical rules set down for barristers about how and when they may initiate negotiation. Remarkably, there is no ethical guidance whatsoever given to barristers in the Code of Conduct when they may seek a negotiated plea. During the Bar Vocational Course, little or no mention is made of plea bargaining, and a pupil barrister is entirely dependant on his or her pupil master to learn how charges may be bargained over.³⁷³ Defending barristers are therefore left to observe the plea negotiation culture of their chambers and of the few barristers they encounter as opponents.³⁷⁴ Of course the existence of ethical codes does not necessarily translate into ethical conduct. Numerous studies on lawyer behaviour have discovered that ethical codes regularly fail to address the complexity of real cases, and other drivers may act upon lawyer behaviour so that strict compliance is impossible.³⁷⁵ However, ethical guidance does provide lawyers with an important sense of perspective and work within a range of synergistic influences.³⁷⁶ The lack of ethical guidance from the Bar

³⁷³ See observations: P. Tague, 'Tactical reasons for recommending trials rather than guilty pleas in Crown Court' [2006] Crim LR 23, 24.

³⁷⁴ Ibid.

³⁷⁵ L. Bridges, 'The Ethics of Representation on Guilty Pleas' (2006) 9 Legal Ethics 80; and, E. Cape, 'Rebalancing Criminal Justice Process: ethical challenges for criminal defence lawyers' (2006) 9 Legal Ethics 56.

³⁷⁶ C. Tata, 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and 'Ethical

provides no reference point as to what is or is not acceptable professional behaviour other than by inference from ethics rules relating to other conduct. This lacuna arguably creates inconsistency in how defendants are treated and prevents proper oversight by the Bar Standards Board of a significant part of criminal barristers' work. As is argued below, the timing of when a bargained plea is sought may be crucial in ensuring defendant autonomy.

The approach of prosecutors to plea bargaining and accepting pleas is regulated by several guidelines. These are discussed below in sub-section g.

b. How plea bargaining takes place

One of the fundamental objections to plea bargaining is that it is a feature of barrister collusion to produce a convenient guilty plea. A crude critique would be that barristers treat all defendants as feckless and dishonest, and adopt strategies to extract a guilty plea, which includes bargaining over plea.³⁷⁷ This guilty plea culture, critics allege, prevails amongst members of the Bar and explains the high plea rate in the Crown Court. The difficulty with this criticism is that none of the literature has observed or discussed with barristers how plea negotiation takes place.³⁷⁸ The present research therefore asked the interviewees how they approached plea bargaining and their reasons for initiating the process. Although it is accepted as a methodological limitation that the present research only discussed plea bargaining with barristers, the data strongly suggests that a guilty plea culture as described by McConville et al is not a sufficient explanation of current practice.

Indeterminacy' in Criminal Defence Work' (2007) 34 *Journal of Law and Society* 489, 516 n.87

³⁷⁷ M. McConville, 'Plea Bargaining: Ethics and Politics' (1998) 25 *Journal of Law and Society* 562, 572

³⁷⁸ The Bar refused to participate in the research for *Negotiated Justice: Baldwin and McConville* (n.372) 8. The role of the researcher was often unexplained to the barristers observed in *Standing Accused* and barristers were not observed negotiating directly: M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press, Oxford 1994) 246.

i. Initiating negotiation

During the interviews conducted for this research, each barrister was asked how charge bargaining was initiated. Primarily, initiating negotiation over plea appeared to rest with the defence, rather than the prosecutor, although a prosecutor might, on occasion, approach the defending barrister. The defence barristers interviewed, described the process on a simple level as involving looking at the papers in combination with the defendant's account (although not always) and then making a decision as to whether the case was "over charged":

I look at the papers, it seems to me that it is over indicted and I, sometimes before, sometimes after discussing it with my junior and solicitor, ring up the prosecuting barrister and say what about it?³⁷⁹

Therefore, in some cases the interviewees made a simple evaluation of the evidence, decided that the current charge could not be proved (or there were significant evidentiary obstacles to proving the charge), but could see on the papers that there was a much more realistic chance of conviction on a lesser offence. The defence barrister would therefore contact the prosecution to see whether the Crown might reduce the charge. Barristers commonly approached their opponent in the robing room or telephoned them in chambers to discuss matters informally. This ability to approach one another in a relationship of trust was seen as a significant feature in favour of the independent Bar by those interviewed.

According to those interviewed charge bargains involved making precise judgements about the strength of the evidence and using their experience to assess what could or could not be proven. The defendant's instructions on what occurred did not always amount to a straight denial or admission of the offence. In many of the circumstances described by interviewees it was not that the defendant denied, for example, striking the complainant, or being in possession of the complainant's property, or being involved in

³⁷⁹ D1.

sexual activity with the complainant. Rather, the defendant presented an alternative account that, although might provide a reasonable doubt to the most serious offence charged, would not provide a defence to an alternative lesser offence:

...if you are defending you may say to your client, “well, I think there are difficulties with charge X, but charge Y is made out and on your instructions you are guilty of it...” Typical examples would be a robbery or is it an assault followed by theft...or is somebody guilty of a section 18, or section 20, or ABH, that kind of thing.³⁸⁰

As Genders discovered in her research, those cases downgraded from section 18 to section 20 of the Offences Against the Person Act 1861 shared common factual characteristics which meant that intent was difficult to prove. Similarly with the interviewees in the current research, the cases that were downgraded had evidentiary problems if charged as section 18, but not necessarily under section 20:

...a number of the features which emerged as being influential in court outcome were closely related to the requirements of evidential sufficiency. That is to say, certain features which might clearly be used to denote the *mens rea* of intent were more evident in those cases which were convicted on a charge of section 18, and less frequently present in those cases which were relabelled and convicted on a lesser charge.³⁸¹

From this interview data, it would appear that charges are often negotiated over because the facts of the case, in the assessment of the defence barrister, provided difficulties for the prosecution to prove the offence on the indictment, but did reveal guilt on a lesser charge. A defence barrister who enters into negotiation does so with an aim of convincing the prosecution that the current charge would be difficult to prove, and that the lesser offence is a more realistic reflection of the facts, at least on paper.

³⁸⁰ F1

³⁸¹ Genders (n.368) 695.

ii. Fundamental differences in how bargaining is approached

A crucial difference between interviewees' practices emerged from the interview data. This revealed a split in opinion as to whether the idea of approaching the prosecution to negotiate charges should be canvassed with the defendant prior to speaking with the prosecutor about the charges on the indictment. Some of interviewees said that they would never approach the prosecution without getting instructions from the defendant first. As J1 explained:

It would only be on instructions that I would approach a prosecutor. You know, the defendant would have to have given permission to the solicitor for me to make an approach...

In those circumstances negotiations would only be entered into once the barrister has already received instructions from the defendant on their case, including the defendant's account of the events surrounding the offence. If the defendant's account was very weak, or the prosecution case together with the defendant's instructions pointed towards a lesser offence, the defence barrister could advise them of their position and the prosecution could be approached with the defendant's permission. In that situation, the decision to ask the prosecutor to downgrade the charge is reached by mutual agreement about how the case should be handled.

However, many of those interviewed said they had no difficulty with speaking to the prosecuting barrister first, shortly after receiving the brief, if the papers looked weaker on the charged offence but contained the elements of a less serious offence. A2 described the general process:

You certainly couldn't embark on any serious negotiation without your client's permission. But, without meeting your client you can read the papers and take a view. Often barristers will ring each other up or send an e-mail to each other saying I understand you're in the case of x. Blah, blah, here is some further evidence or something. And, the prosecutor may say to me would you take a plea

to theft? And then I would then say I've not seen him. My own view is that he should plead [to the lesser offence], counsel to counsel. But I haven't seen him so we'll see what happens.

This raises a significant point about the pressure exerted on defendants and the advice process as a whole, and illustrates a difference between advising styles. The impression created was that at least a number of the barristers interviewed were looking for a potential way of convincing the defendant to plead guilty. Although some might ask the prosecutor informally so that they could advise the defendant should their account appear weak or amount to a lesser offence, other barristers admitted that they used the negotiated plea to persuade the defendant to plead guilty. As A2 continued, referring to how the benefits of a negotiated plea are made plain to a defendant:

Every barrister does it differently. Some barristers shy away from giving very strong advice about pleading guilty. Because it's not in their nature to do so. This is the evidence, that's your instructions, thank you very much. And won't say a word. Others are much more robust about it. I'm very robust and I think that someone should plead guilty, I'll tell them so.

Therefore, instead of the possibility of a negotiated plea coming out of a discussion with the defendant, these barristers could counter a defendant's choice of pleading not guilty with the prospect of an already informally agreed negotiated plea with a relatively mild sentence as opposed to going to trial and being convicted on the current charge.

The difference in advising styles raises fundamental questions about the role of the barrister in giving advice on plea, and the role of the barrister within the criminal justice system. If an agreement is reached between the defendant and barrister that their case might have certain weaknesses, and a plea to a lesser offence appropriate, the defendant retains some control over their case. Here the defending barrister remains a partisan advocate on the side of the defendant, only entering into negotiation once both are agreed that the defendant's position in fighting a trial is untenable or might be better served with a plea to a lesser offence. The view expressed by those barristers who used the negotiated plea to convince defendants that a guilty plea was a sensible course of

action is based on an alternative conception of the purpose of the Bar. These barristers appeared to argue that a key function of the Bar was to ensure that the defence and prosecution could work alongside one another in a relationship of trust, settling cases where necessary to save both the defendant and the public purse the cost of a trial. As A2 succinctly argued against poor pay under legal aid and the elevation of Higher Court Advocates:

An unforeseen consequence, or foreseen but as far as the government's concerned an irrelevant consequence, is that good advocates oil the criminal justice process. They advise their clients on pleas, they make admissions, they take decisions during the course of cases which shorten them, or run more smoothly. And experience and ability allows them to do that properly. If you start to pay people really badly, good people won't come to the Bar, the legal aid criminal bar, and you won't get that. So you might save a bit of money in pot A, but trials will go on longer, be very much more complicated, because the people conducting them won't be terribly competent. So there'll be more appeals, so the whole process is very short sighted.

In A2's description, barristers 'oiled' the criminal justice system by taking the right decisions over charge so that cases could be resolved without an unnecessary trial where defendants would undoubtedly be convicted and serve longer sentences. A2 was not the only barrister to perceive his role as barrister in this manner. Both F1 and G1 made comments after the interview had concluded, after the tape recorder had been turned off, that it was their role to convince defendants of the benefits of a guilty plea if a conviction was likely and a trial a waste of money. It should be emphasised that these interviewees did not have unscrupulous reasons for using the negotiations to weaken the defendant's resolve in favour of a trial. As discussed in the previous chapter, these barristers gave advice in this way because they strongly believed a guilty plea was in the defendant's best interests. As E1 explained of her motivation to convince a defendant that a plea to an offered charge under section 20 of the Offences Against the Person Act 1861 was necessary:

E1:...as much as I say I never tell them to plead, I never tell them what to do, which I don't in so many words, of course, I manipulate my knowledge to get them to do what I think is right for them. And I think all barristers do. And I

don't think actually you would be doing your job if you didn't do that, and the longer I do it the more confident I am about doing it. The more faith I have in my own judgment about sentence, like the conviction, etc, so the more confident I am about giving very strong advice.

JB: That that is actually in their best interest?

E1: Yes. And saying look you've really got to plead, it really is in your best interests.

In common with the difference between barristers adopting persuasive or facilitative styles this difference is equally significant in how advice is approached. As in the previous chapter, these contrasting views about what is and is not appropriate in how a defendant is advised raise fundamental questions about defendant autonomy and how best defendants can be protected from unscrupulous barristers. It will be recalled from Chapter 2 that the scholarship on lawyer-client relationships indicates that clients are highly passive dependents who, particularly in criminal cases, fail to take control of their own cases.³⁸² Barristers who adopt persuasive styles of advising and pre-empt guilty pleas by engaging in informal negotiation disempower defendants, and create potential opportunities for misuse. Although these barristers may seek to improve the defendant's overall sentence based on paternalistic motives, removing defendant choice exposes them to other dangers. It is reiterated here that seeking a negotiated plea outside the defendant's instructions is not the same as guilty plea culture, as described by McConville et al. The current research found no evidence of any such culture amongst the members of the Bar interviewed. These interviewees rejected suggestions that early negotiations were entered into for anything other than to promote the defendant's best interests. Early reduction or dropping of charges was aimed to produce the best possible outcome for the defendant.

³⁸² Chapter 2:5

3. Assessing English plea bargaining

In common law jurisdictions, plea bargaining has been widely criticised by academics addressing the issue from a socio-legal perspective, while at the same time embraced by legal practitioners. This section will sketch out the main objections to plea bargaining, and consider the justifications of barristers who engage in the practice. This explanation arises out of economic or consequentialist conceptions of the law and is described below. Together with each criticism the responses of the interviewees will be discussed. As will be seen, those interviewed were highly result focused, and few mentioned any of the concerns raised in the literature. This chapter does not necessarily seek to defend plea bargaining as such, rather it seeks to partially explain the motives behind barristers' behaviour and to argue for a more nuanced understanding of that behaviour. It is argued that the debate over plea bargaining in English courts has often confused plea bargaining itself with the potential for manipulation by dishonest or unscrupulous lawyers.

a. Agency costs

That a plea is voluntarily and made on an informed basis is highly dependent on the defence barrister. The defence barrister, with expert understanding of the trial process and sentence, should be in a position to more effectively evaluate the risks posed to the defendant and advise on the best course of action. If the defence barrister is a perfect agent of the accused the relationship has benefits for the accused- he or she is given accurate advice in accordance with a precise knowledge of the law and facts. On this basis the defendant is equipped to make a well informed choice about plea to any particular charge. In a world where the barrister's and defendant's interests were perfectly aligned, this might be a fair summary of their relationship, however, the literature on the conduct of the Bar in criminal cases concludes that they are not. The critics therefore allege in economic terms that there are significant agency costs in the defendant-barrister relationship. If true this would pose significant difficulties for plea bargaining and the advice process generally.

This criticism that plea bargaining can be and is misused for unscrupulous reasons is perhaps the leading objection to the system according to McConville et al. Defendants are highly dependent on their legal advisors to provide an accurate description of the risks and outcomes dependant on plea.³⁸³ According to McConville et al's conception of the role of the Bar in Crown Court cases, barristers regularly undermine the confidence of the defendant in their case through a combination of psychological techniques including defeatism, adopting the prosecution case as the true account, fear and manipulating the defendant's trust in them.³⁸⁴ Barristers are said to purposefully manipulate defendants so that they plead guilty in the face of overwhelming pressure. Through this manipulation, defence barristers are able to 'extract' guilty pleas to lower offences, even though the defendant may be innocent or, more pertinently, have an entirely arguable defence.³⁸⁵ Plea bargaining therefore represents a huge potential for miscarriages of justice.

The current research does not seek to minimise the potential for misuse in plea bargaining. If barristers, conforming to a guilty plea culture at the Bar or manipulating cases for financial gain, altered their advice and misrepresented risks to defendants, the consequence might be that defendants who should (by virtue of the evidence and sentence) contest their case at trial would not. However, as previously argued, the literature has not identified a current and continuing misuse of plea bargaining, and, on the basis of the present research, barristers themselves do not believe that there is widespread abuse of plea bargaining. It is worth reiterating the main arguments presented in this thesis. Firstly, the studies of the behaviour of the Bar in England in Wales in criminal cases are out-dated. *Negotiated Justice*, the only piece of research where the authors concentrated on studying the Bar, is over 30 years old. The membership of the Bar and its underlying culture has therefore had ample time to change and requires reappraisal. Furthermore, the structure of the criminal justice system has been radically changed by successive governments. The second main work on the

³⁸³ *Ashworth and Redmayne* (n.358) 273.

³⁸⁴ *McConville et al* (n.378) 256-61.

³⁸⁵ *Ibid.*

behaviour of the Bar, *Standing Accused*, is also out of date and does not necessarily reflect current practices because of the same reasons. Secondly, *Standing Accused* may have misinterpreted the behaviour of those barristers observed in conference with clients. A limitation of that research was that the barristers were not interviewed as to why they gave particular advice or adopted the advising strategies detailed. While it is recognised that the present research relies on barristers' interpretations of their own behaviour and is subject to their own favourable biases, there is sufficient evidence in the data, primarily presented in Chapter 4, to suggest that a more complex decision-making process is taking place about what advice to give and how that advice should be given. This includes the decision to seek a bargained plea on behalf of the defendant. As detailed, this decision is often made on the basis of an assessment of evidence and potential sentence. In these circumstances the barrister does not misuse plea bargaining, but seeks the best possible outcome for the defendant. As will be discussed in the following chapters, the question of what is "the best possible outcome" is sometimes a vexed one, and barristers may often make decisions that take into account a range of competing incentives, including ethical, cultural and financial considerations.

That said, the current form of plea bargaining in English courts creates a potential for misuse that should not be overlooked. Although K2 was very insistent that from a prosecutor's point of view, the Attorney-General's Guidelines should be followed in accepting guilty pleas, the fact that none of the other prosecuting barristers interviewed mentioned them is telling. The descriptions of plea bargaining given by interviewees of deals in the robing room or over the phone, while not necessarily unethical, lack public oversight. Judges may refuse to accept a basis of plea and order a *Newton* hearing³⁸⁶, but the extent to which judges scrutinise bargained pleas for fairness is unknown. Only A3 mentioned a judge going behind a fact bargain, but that was, as in *Beswick*, an example of the prosecution accepting a basis that did not meet the seriousness of the offending. Although a judge could not be privy to the conference between defendant and barrister, he or she could assess the case on the basis of the disclosure and investigate apparently odd agreements thoroughly. However, the current environment of court targets and

³⁸⁶ *Beswick* [1996] 1 Cr App R (S) 343; *Underwood* [2004] EWCA Crim 2256.

government initiatives aimed at increasing the guilty plea rate make it unlikely for judges to be encouraged to do so.³⁸⁷ Furthermore, in adversarial systems it is not the judge's role to seek the truth.

It is also suggested that ethical rules on plea bargaining need to be implemented and taught at the vocational stage of training for the Bar. Defence barristers are currently without any official guidance on what constitutes the correct way of seeking a bargain or conveying that to the accused. The decision to seek a plea bargain should originate from discussions between counsel and the accused rather than a pre-emptive measure by the defence barrister. Only once it has been agreed with the defendant that on the basis of the prosecution evidence and his or her account that a plea to a lesser charge might be appropriate should a plea bargain be sought. Informal plea bargaining disempowers defendants who have not yet given proper consideration to their position, and entails a risk to defendant autonomy. Reducing defendant autonomy increases the prospect of using plea bargaining for reasons other than the defendant's interests.

This chapter does not deal with agency costs directly but discusses other important arguments related to plea bargaining. Agency costs relating to guilty plea culture have already been dealt with in Chapter 4. As was well rehearsed in that chapter, barristers are accused of being part of a courtroom culture that promotes guilty pleas at the expense of good advice. The current research disputes both these claims, and argues that the reality of what and why advice is given is far more complicated. In the previous chapter it was demonstrated that the interviewees believed that they gave advice which was in the best interests of the defendant and did so on the basis of a careful consideration of evidence and sentence. To the extent that the interviewees were able to relate accurately and impartially their own experiences, there does not appear to be a guilty plea culture that conforms to McConville et al's description. Financial incentives represent another potential source of agency costs. Again these are not discussed in this chapter but are dealt with in detail in Chapter 6. The issues discussed below are therefore not classically

³⁸⁷ Her Majesty's Court Service, 'Her Majesty's Court Service Business Plan 2006/7' (2006) <http://www.hmcourts-service.gov.uk/publications/business_plans/index.htm>

agency problems as they arise out of plea bargaining itself rather than as a feature of the defendant-barrister relationship, however, the possibility of agency costs should always be considered. As will be seen in Chapter 6, while financial incentives may not be completely determinative of what advice a barrister gives, these incentives do distort advice to some extent and can create agency costs.

This chapter will now deal with each of the leading objections to plea bargaining. They are presented in the heading to each sub-section and discussed beneath.

b. The risk to innocent defendants

Plea bargaining has been heavily criticised because of the perceived effect on innocent defendants. Barristers, it is argued, place innocent defendants in an impossible position of having to choose between going to trial and being convicted on a more serious charge, and pleading guilty to a less serious offence where the potential sentence is lower. Innocent defendants are unable to withstand the pressure created by the differential in sentencing and thus plead guilty in order to escape the more severe punishment. A brief illustration typifies the critics' argument on how plea bargaining acts upon an innocent defendant to plead guilty. A defence barrister representing a defendant charged under section 18 of the Offences Against the Persons Act 1861 may seek a reduction of charge from the prosecutor to section 20 of the same Act in return for a guilty plea. The difference to the defendant is made plain: he or she avoids the risks of being convicted of an offence where life imprisonment or, probably more importantly, indeterminate imprisonment for the public protection (IPP) is available³⁸⁸, and is instead sentenced for an offence where the judge is limited to a sentence of imprisonment of no more than 5 years.³⁸⁹ Not only will the defendant avoid the IPP sentencing laws, but they will also gain credit for their guilty plea, reducing their sentence further.³⁹⁰ The

³⁸⁸ Criminal Justice Act 2003, section 225(3)(3A).

³⁸⁹ Offences against the Person Act 1861 section 47 (as amended).

³⁹⁰ The defendant may come under the 'extended sentence' provisions of the Criminal Justice Act 2003, section 227, although the court is still confined to a maximum sentence of 5 years.

defendant is therefore faced with pleading guilty to an offence where they may receive, with credit, a maximum of 40 months, or risk a trial and conviction with an indeterminate sentence imposed. Furthermore, although not convicted of the more serious offence, a defendant may still be convicted by the jury under section 20 as a lesser included offence or because the prosecutor puts section 20 on the indictment as an alternative charge.³⁹¹ In that case, the defendant could still be convicted under section 20, but lose credit for a guilty plea. In the face of the differential in sentences, the innocent defendant's resolve to contest his or her case crumbles. The inducement to plead, it is argued, is so great that even those who are not guilty change their plea.³⁹²

The classic argument against plea bargaining therefore poses the defendant's free choice as being vitiated by the pressure of the sentence differential.³⁹³ However, this oversimplifies the nature of choice and the meaning of innocence. Just because a decision is unpalatable does not necessarily mean that it is coerced and involuntary.³⁹⁴ Scott and Stuntz in their analysis of American plea bargaining conceive the issue as akin to contract. In their analysis defendants are informed, voluntary participants who bargain with the prosecutor for a reduced sentence. In doing so, both prosecutor and defendant trade risk- the risk of acquittal or conviction respectively- for a more certain outcome with benefits for both.³⁹⁵ The defendant no longer faces a charge with a longer sentence, and, because of an agreed basis of plea, has limited the factual basis upon which he or she can be sentenced. Equally, the prosecuting barrister no longer faces the reciprocal prospect of losing the case, and can save the tax payer the cost of a potentially expensive trial. This provides a social value in that prosecutors can obtain a larger return from criminal convictions, while defendants reduce the risk of maximum sanctions.³⁹⁶ The choice to plead guilty, however, is not rendered involuntary by the bargain. Rather, in

³⁹¹ Under *Savage and Parmenter* [1991] 4 All E.R. 698 a jury may return a guilty verdict under section 20 of the Offences Against the Person Act 1861 when the charge on the indictment is under section 18, if the evidence so warrants.

³⁹² A. Ashworth and M. Redmayne, *The Criminal Process* (OUP, Oxford 2005) 285. One American author has even gone so far as to compare plea bargaining to torture: J. Langbein, 'Torture and Plea Bargaining' 46 U.Chi.L.Rev. 3 (1978).

³⁹³ M. Blake and A. Ashworth, 'Ethics and the Criminal Defence Lawyer' (2004) 7 Legal Ethics 168.

³⁹⁴ R. Scott and W. Stuntz, 'Plea Bargaining as Contract' (1992) 101 Yale LJ 1909, 1920-21.

³⁹⁵ *Ibid.* 1914.

³⁹⁶ *Ibid.* 1915.

pleading guilty the defendant and his or her barrister are properly assessing the risk of conviction against the benefits of pleading guilty, and that assessment is a calculation based on evidence and potential sentence. As discussed previously in Chapter 4, there are no innocent defendants as such- those who are innocent are those whom the trial process determines to be not guilty. If the defendant and his or her barrister do not think that jury will acquit on the basis of the evidence (or do not believe the likelihood is sufficiently high), and the penalty is sufficiently high, then a defendant acts rationally in pleading guilty. This chapter will now consider the two elements that make up the choice on plea in more detail. Firstly, the evidentiary element of the decision will be considered, followed by the potential sentence faced by the defendant. These two elements can be thought of as risk and outcome respectively. It should be stressed that the mathematical representations used here are not necessarily illustrative of defendant and barrister thinking. As indicated already, barristers rarely convert their assessment of cases into mathematical probability. Numbers and percentages are used here as a method of easy comparison; barristers (and probably defendants too) do articulate risk, however, linguistic formulations of “very likely” or “possible” or “more likely than not” are cumbersome and imprecise. The present research prefers using percentages as a way of showing how individuals might compare risk and outcome for the sake of clarity, even though in reality they are expressed as words or feelings.

i. Evidence

The barristers participating in this research were asked whether they believed that an offer of a lesser offence placed unfair pressure on a defendant to such an extent that an innocent defendant might plead guilty. Overwhelmingly the interviewees rejected the idea that innocent defendants plead as a result of plea bargaining. As mentioned in the previous chapter, the view of defending barristers about the strength and weakness of cases is dependent on the papers and what the defendant tells them about what happened. To the interviewees there were no guilty, or not guilty defendants, only those facing a case along a spectrum of strong to weak. Sanders and Young have argued that the recommendations by the Auld Review in favour of sentencing discounts were

‘adopted on the self-serving assumption that one can increase pressure on the guilty to plead guilty without increasing pressure on the innocent to do the same.’³⁹⁷ This however repeats the mistake of confusing *de facto* innocent defendants with those who would be likely to be found not guilty at trial. Defending barristers are blind to *de facto* innocence or guilt in their advice-giving role. In pursuing a negotiated plea, these barristers felt they were getting the best deal for the defendant who looked, on the basis of the papers and their account, to stand a strong chance of conviction, at least on a lesser charge. Barristers therefore felt it was right to approach a prosecutor over a reduction in charge, if they felt that the defendant had a reasonable chance of acquittal on the offence charged, but a poor defence to a lesser offence. In such circumstances, the barristers interviewed believed that an agreement to reduce the charge was a logical and sensible outcome to the case and the pressure created by such a deal was, in these terms, perfectly reasonable. As G1 explained about the pressures faced by a defendant:

...in the sense that anybody who is facing a criminal charge would be encouraged to plead guilty to an offence to generate a lesser sentence, yes it’s pressure of a kind. Whether it is unfair or undue pressure depends how it is placed. If the reality is that there is a strong case against him [on the lesser charge] then it may be a pressure of a kind, but not an unfair one or one that is likely to lead to an unfair result.

The pressure on defendants, at least according to these interviewees, was created by the strength of the case against them; an innocent defendant in their view was one who would have a good defence to the charges. If an offer from the prosecution were to occur, the defendant’s resolution to go to trial would be supported by the advice given by barrister and solicitor.

Equally, prosecution barristers felt that the pressures created by charge bargains were entirely legitimate. N2 summed up the position of the prosecutor in charging the defendant:

³⁹⁷ *Sanders and Young* (n.359) 436.

I'll tell you why [charging a defendant with section 18 and offering section 20] doesn't cause me any difficulty as a prosecutor. Because if a jury, having heard all the facts are satisfied that they are sure that he intended to cause much harm then so be it. So be it...If everything has been done properly and in accordance with the law properly directed by the judge, who are we to say that that prosecutor was wrong in laying a section 18 and laid the charge to high? How did I lay the charge too high, if the jury had just found him guilty of it?

This summation of the prosecutor's position by N2 seems entirely justifiable. If to the defendant and her barrister the charge of section 18 seems to have a real possibility of success, it is right for the defendant to give a guilty plea to section 20 serious consideration. The literature has commonly accused the police and prosecutors of overcharging offences to unfairly create a sentence differential that places pressure on the accused to plead.³⁹⁸ This claim seems overstated in the context of a proper consideration of the evidence. A prosecutor may try and bluff a defendant to plead guilty to a lower charge by maintaining the higher charge on the indictment, however, the basis of the prosecution case is known by the defence as a consequence of disclosure laws.³⁹⁹ If the defence barrister is confident that the case is overcharged then a plea will be accepted to the lower offence (when the prosecutor realises her bluff has been called) or the defendant will go to trial and have some confidence of acquittal. If the defendant pleads to the lower charge in the face of the higher charge, he or she does so out of an acknowledgement of the risk of being convicted. By the standards the system sets for itself to determine guilt, the charge is not 'too high'. Although this creates pressure on the defendant to plead, the pressure comes from the likelihood of conviction in a trial. Of course, if the defence barrister expects a guilty plea and is part of a guilty plea culture, then the unrealistic charging of cases does pose a threat to those defendants who should contest their guilt. However, as discussed in the previous chapter, the interview evidence indicates that barristers are committed to making a proper assessment of the chances of acquittal and conveying that risk to the defendant.

³⁹⁸ M. McConville, R. Sanders and R. Leng, *The Case For The Prosecution* (Routledge, London 1991) 146.

³⁹⁹ In a case sent to the Crown Court under section 51 of the Crime and Disorder Act 1998, the prosecution must 'disclose copies of the documents containing the evidence on which the charge or charges are based...': Crime and Disorder Act 1998 (Service of Prosecution Evidence) Regulations 2005. Cases triable either-way are subject to Rule 21 'Initial details of the prosecution case' of the Criminal Procedure Rules 2005.

There seems therefore little reason for barristers to try to protect from a charge bargain defendants who have a poor chance of acquittal but, nevertheless, protest their innocence. It may be that some of these defendants would be acquitted, however, as Frank Easterbrook has in the American context argued persuasively, where a system of guilt determination is imperfect and the conviction of innocent persons possible, such defendants should be allowed plead guilty:

Sometimes the evidence may point to guilt despite the defendant's factual innocence. It would do defendants no favor from preventing them from striking the best deals they could in such sorry circumstances.⁴⁰⁰

If plea negotiation allows an innocent defendant to plead to a lesser offence, barristers are perhaps right to advise in favour of a guilty plea, especially when, according to their experience, a particular defendant is likely to be convicted. Unfortunately, the choice is not between factually innocent defendants pleading guilty and the same defendants securing acquittals at trial.⁴⁰¹ As E1 explained:

...that may well be true what you're telling me, but I'm not here to decide the truth, I'm here to tell you that the evidence is this. And, if that evidence goes before a jury and they hear it, they are likely, they are more than likely to find [you guilty] and you've got to decide.

Evidence is therefore a risk indicator to both defendant and his or her barrister. It is accepted here that this risk has the potential to be misstated by unscrupulous or inexperienced barristers, however, that is an argument relating to regulation of plea bargaining rather than bargaining itself.

⁴⁰⁰ F. Easterbrook, 'Criminal Procedure as a Market System' (1983) 12 *Journal of Legal Studies* 289, 320.

⁴⁰¹ R. Scott and W. Stuntz, 'A Reply: Imperfect Bargains, Imperfect Trials and Innocent Defendants' (1992) 101 *Yale LJ* 2011, 2013.

ii. Sentence

In deciding whether to accept a bargained plea, the defendant and their barrister must also consider sentence. As explained, evidence relates to risk of conviction while sentence is the outcome for the defendant. By combining risk and outcome, the barrister may advise the defendant about the different possible expected results from various pleas. The differential of sentence between pleas can therefore have a significant effect on the defendant's plea. M1 discussed the type of pressure facing a defendant, who must come to a difficult decision, even though the defence barrister believes that there is a chance of acquittal on three rape charges:

...where a defendant is facing, if he has a trial on the example I've given of the rape of a six-year-old... there were three rapes on the indictment, several alleged incidences of rape...And he's...offered a plea to sexual assaults and they would effectively not have a trial on the rapes. I think it's a very difficult to advise the defendant. I mean obviously your advice will be, if he didn't do it, he can't accept that he did it...but I think you are under a duty to say, look, I can't guarantee you that if you have a trial on everything that you will be acquitted on the rapes, which I think are quite weak. You are effectively in a position where you are saying to the client, look, you've got to make the decision, I hear what you say, that you didn't do any of these things, but you've got to consider whether you want to take the risk of having a trial on everything and going down on everything, but ultimately it's up to you, you've got to decide.

In the case where a defendant confronts the choice of three counts of rape or three counts of sexual assault, not only does the defendant face a moderate sentence differential⁴⁰², but by accepting a negotiated plea the defendant avoids the social stigma of being called a rapist. It is self-evident that such negotiations may expose some factually innocent defendants to a pressure to plead guilty they cannot withstand. However, the barrister is placed in a similar situation as they are when advising a

⁴⁰² As a multiple sexual offender, this defendant might be considered dangerous according to the Criminal Justice Act 2003 section 25(3)(3A) and (3B). The likely indeterminate sentence on several rapes would be around 6 to 8 years: Sentencing Guidelines Council, 'Sexual Offences Act 2003 Definitive Guideline' (Sentencing Guidelines Secretariat, 2007) Part 2A. The same "dangerous" defendant pleading guilty to several sexual assaults would likely be given an indeterminate sentence in the region of 3 to 4 years: *ibid.* Part 2B. Although the defendant may appear like they are halving the sentence by pleading guilty, it should be remembered that these are minimum terms only.

defendant on evidence. An innocent defendant who pleads guilty to sexual assault instead of going to trial on “weak” rape charges is arguably making the correct decision that should be supported by the barrister. The defendant by pleading guilty to sexual assault limits the sentence they potentially face, and avoids the real risk of conviction on a rape charge. In other words by pleading guilty, on average, the defendant may face a lesser sentence than going to trial, even though potentially innocent. An individual defendant may object to being advised in such a manner as they are unconcerned by average outcomes- they are concerned with the outcome in their particular case rather than the spread of convictions and acquittals over many cases. For the barrister, however, this approach is perfectly justifiable and necessary. In properly advising a defendant they cannot evaluate the risk of conviction and sentence on the basis that this case might be produce an out of the ordinary result.

The problem for innocent defendants therefore does not lie in the barrister’s advice or even the defence barrister’s seeking of a plea bargain. Provided that a barrister is competent in assessing the risk of conviction on the papers, fully explores the defendant’s account, and can accurately predict sentence, the barrister is providing the defendant with a proper analysis of the risks he or she is taking. Rather, the problem is the reliability of the trial process itself. If the factually innocent defendant cannot rely on the trial to find him or her not guilty of the offence, it is better for that defendant to be able to plead to a lesser offence and receive a reduced sentence. As Scott and Stuntz argue in favour of bargained pleas in American courts:

...The defendant is much better off with the offer than without it: a murder defendant who has a fifty percent chance of winning at trial *wants* a regime that allows the prosecutor to offer a ten year sentence with plea.⁴⁰³

The same is true of an English defendant facing a GBH charge, albeit with a different sentencing system. If the section 20 charge represents a greater than 50% reduction in sentence, a guilty plea benefits the defendant, and his interests are served in pleading

⁴⁰³ *Scott and Stuntz* (n.394)1960-61.

guilty rather than going to trial.⁴⁰⁴ B1 gave an example of the importance of advice on plea in relation to a group of defendants who were not told about the advantages of pleading to a reduced charge:

I know from a recent case at the Bailey, in the court next door to the one I was in, where I heard very good plea had been offered to a section 18 instead of attempted murder. And I do know that at least one of the barristers in a five handed case did not go and see their client in the cell and advise them...that they should seriously think about pleading guilty to section 18....and they all fought it and they all went down and they all got 18 years...They would have got maybe 10 years on GBH.

In that circumstance, if the defendants' chances of conviction were greater than 55%, then their barristers should have advised in favour of a guilty plea.⁴⁰⁵ While a difficult choice to make, from the defendants' perspective they should have been given the option of pleading to the lesser offence. By pleading to a lesser offence, they trade the risk of high sentences with a much reduced term of imprisonment. The barrister is therefore acting in the defendant's best interests if they seek a bargain believing that a guilty plea and sentence outweigh the risks of trial and conviction. If the barrister did not seek or convey to the defendant a negotiated lesser charge (as in B1's example), the defendant faces a trial or guilty plea on the more serious charge only. In those circumstances, the defendant is exposed to the risk of conviction on the more serious charge, and forgoes the mediated course of risk and sentence through negotiation. As Easterbrook succinctly states the argument:

Persons at risk of unjust conviction may prefer a certain (but low) punishment in a plea bargain to the risk of conviction and high punishment after trial. Forcing these persons to trial against their wishes does them great injury-it is bad enough

⁴⁰⁴ That is not to argue that a 50% discount should be offered, as a defendant who has a less than 50% chance of conviction should not be taken to trial at all: see paragraph c below. Nevertheless, the defendant's interests are served if the prosecutor gives him or her no option other than a trial on the higher charge.

⁴⁰⁵ If the barrister assessed the risk of conviction at, for example, 60%, the average sentence on going to trial given the probability of conviction would be just over 129 months (0.6 x 216 months). The sentence offered on a guilty plea is 120 months and is therefore a better choice. The significance of this calculation should not be overstated, however, all of the barristers involved would have made at least equivalent linguistic approximations of risk.

to be unjustly convicted, and worse yet to be unjustly convicted and receive a sentence higher than one could have obtained.⁴⁰⁶

A defendant whose barrister fails to seek a bargain faces a trial, potential conviction and a potentially much more severe sentence. If the defendant lacks confidence in the court to find him not guilty of the more serious charge, and the differential in sentence is large enough, it is perhaps right that he and his barrister seek a bargained plea. Arguably, the literature written by socio-legal scholars places too great an emphasis on the risk to *de facto* innocent defendants of accepting a plea bargain but ignores the very real risk of the same defendants' conviction after a trial. In the example given by M1, it is one thing for an innocent defendant to plead guilty to sexual assault, but quite another for them to be found guilty of rape.

Some of those interviewed repeatedly criticised members of the Bar who put forward an image of the fearless advocate who fights everything and is unwilling to negotiate. Such barristers may appeal to clients, solicitors and indeed members of the public as 'knights of justice', however, in the opinion of some of those interviewed, these barristers often acted to the detriment of the defendant. According to the analysis above, this assessment is justified. A barrister who advises a trial in all circumstances acts against the interest of the defendant in any case where a plea to a lesser offence would be advisable. Barristers who fight cases regardless of the evidence against the accused do their defendant clients a disservice. Although they may occasionally win high profile cases, the average sentence given to the defendants whom they represent may be higher.

c. A 50% rule?

As discussed above, barristers and defendants may make sensible assessments of the probability of conviction and sentence when coming to a decision over plea. In many cases this reflects relatively small differentials in sentence which are traded for the risk

⁴⁰⁶ F. Easterbrook, 'Plea Bargaining as Compromise' (1992) 101 Yale LJ 1969.

of conviction on the higher charge. As in the example given by B1, the defendant trades say a 60% chance of conviction on the higher charge at 18 years for a 10 year sentence on guilty plea. Here the defendant gains by reducing the average sentence he or she can expect to be given. The question remains, however, as to what extent a prosecutor should be allowed to bargain with a defendant. In *ad absurdum* cases, any person could be accused of a crime and be persuaded into pleading guilty to a lesser offence by virtue of the large sentencing differential. Another example will assist in understanding this difficulty. Defendant (D) is charged on the indictment with one count of murder. In the jurisdiction within which D is charged, the sentence after trial and conviction is 100 years imprisonment. The chances of D's conviction, however, are extremely low indeed. In fact in conference with D's barrister, the weakness of the evidence is so apparent that the barrister assesses the risk of conviction at 1%. On approaching the prosecutor with a proposal to dismiss the charge altogether, the prosecutor proposes an alternative: the prosecution will drop the murder charge only if D pleads guilty to a charge of assault carrying a sentence of 6 months. In calculating the average sentence faced by D, the defence barrister realises that D's average sentence on the murder charge at trial would be 1 year. On the basis of this calculation, the defence barrister recommends to D that she plead guilty to the assault charge and receive the 6 months imprisonment instead. In the face of the sentence differential D accepts the advice given and enters a guilty plea to the assault.

The example given here is obviously outside the normal range of possibility of cases in England and Wales, however, other less extraordinary examples which nevertheless carry a wide disparity of sentence between charges can be imagined. If a system of criminal justice is to accept a practice of plea bargaining at certain levels, but not to any extent possible, it must set out what range of behaviour is acceptable. While there is some guidance in English law to prosecuting authorities, the extent to which plea bargaining can take place has not been properly articulated by the government and the courts.

In *McKinnon v. United States of America*⁴⁰⁷ the House of Lords concluded that the extent of discount offered by the American prosecuting authorities to the defendant in return for not contesting his extradition and a guilty plea did not create sufficient pressure to amount to unlawful pressure. In that case the defendant had been offered 3-4 years imprisonment on a guilty plea, whereas at trial he could expect to receive 8-10 years. In the judgment given by Lord Brown, the House of Lords recognised that a discount that was ‘very substantially more generous’ might be sufficient to ‘constitute unlawful pressure such as to vitiate the process’ of extradition.⁴⁰⁸ How large a discount would need to be to vitiate the process was, however, not discussed.

The House of Lords in determining the level of acceptable discount between charges could have had direct reference to the guidance given to Crown Prosecutors on whether to proceed with a prosecution. The test provided there represents a fair assessment of when society believes that a prosecution is worth the cost to the tax payer of a trial, and that there is sufficient reason to charge the defendant with the alleged offence. Under the test, a prosecutor should only proceed with a prosecution if there is a ‘realistic prospect of conviction’.⁴⁰⁹ The High Court has recently rejected ‘a bookmaker’s approach’ to the test, preferring prosecutors to adopt a less predictive approach and to ask whether on balance, the evidence is sufficient to merit a conviction.⁴¹⁰ The court suggests that in some types of cases, such as “date rape”, convictions are harder to obtain, and therefore a looser approach to the test can be adopted than one of mathematical rigidity. This approach can be criticised as it implies that a lower evidentiary burden must be overcome in the prosecutor’s view in certain types of cases. However, even without a consistent application of the test across all types of cases, the realistic prospect of conviction test probably represents a linguistic approximation of at least a 50% chance of conviction in the prosecutor’s assessment in the majority of cases.⁴¹¹ Therefore any charge bargain that represents a greater than 50% reduction in sentence could be said,

⁴⁰⁷ [2008] UKHL 59; [2008] 1 WLR 1739; [2008] 4 All ER 1012.

⁴⁰⁸ [2008] 4 All ER 1012, 1025.

⁴⁰⁹ Crown Prosecution Service, ‘Code for Crown Prosecutors’ (2004) Part 5.3.

⁴¹⁰ *B v Director of Public Prosecutions* [2009] EWHC 106 (Admin) [2009] 1 WLR 2072, 2086.

⁴¹¹ The test according to the Code means ‘that a jury or bench of magistrates or judge hearing a case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.’ *Ibid.*

prima facie, to fall outside acceptable limits of a bargained plea. In offering a bargained plea to a charge with a greater than 50% discount the prosecutor might imply that he or she does not have sufficient confidence in a conviction on the higher charge for it to be indicted at all. A greater than 50% reduction in the sentence undermines the evidentiary test- the point below which society (in the guise of the CPS charging standards) has determined that prosecutions should not proceed. An example may assist in understanding the logic behind this argument. Again D is charged with an offence. In this case she is charged with section 18 of the Offences Against the Person Act. According to the sentencing authorities, D faces 96 months (8 years) imprisonment on conviction. However, the prosecution evidence against D is relatively weak, with the prospect of a conviction at around 40%. D's barrister therefore approaches the prosecution barrister with a view to reducing the charge to section 47 of the same Act together with a favourable basis of plea to D, while dropping the section 18 charge from the indictment completely. On this basis and on a plea of guilty to a charge of section 47, D can expect to be sentenced to 24 months imprisonment- a 75% discount on the original charge. The prosecution barrister agrees, but insists that if D fails to take up the offer of the section 47, he will continue to trial with the section 18. On the basis of average sentences, D's barrister calculates that the defendant will receive an average sentence of just over 38 months after a trial.⁴¹² Pleading to the offered section 47 charge is obviously the rational choice for D in this situation, but the prosecution barrister has possibly made this offer because the chances of conviction on the section 18 charge are low- too low to satisfy the realistic prospect of conviction test. The prosecution barrister knows however that the offer is likely to be accepted given the different average sentencing outcomes. If the prospect of success on the section 18 were higher, for example 80%, there would be few reasons for the prosecution barrister to offer a plea to the charge of section 47 (subject to the efficiency arguments explained below).

On the basis of consistency, the starting place for bargained pleas in English courts could be suggest to be no greater than a reduction of 50%. The House of Lords in *McKinnon*, however, appeared to suggest that the acceptable discounted sentence for a

⁴¹² D's probability of conviction is 40%, therefore the average sentence is 0.4×96 months, or 38.4 months.

bargained plea is greater than 50%. The defendant in *McKinnon* was offered a bargained plea that was around 50%, but in the judgment of Lord Brown, a discount would have to be ‘very substantially more generous’ before it was considered unlawful. The effect of the House of Lords decision is to allow prosecutors to negotiate cases when the prospect of conviction is less than 50% which may undermine the real prospect of conviction test, and circumvents the charging standards. As Baldwin’s research has shown, prosecutors can be reluctant to review charges against the test, especially when the offence is of greater seriousness.⁴¹³

Of course, a prosecutor could offer a lesser charge with a larger than 50% discount, even when he or she assesses the chance of conviction as greater than 50%, however, there are significant incentives for prosecuting barristers not to undercharge cases in this manner. A prosecuting barrister who regularly offered lower charges to defendants who had higher chances of conviction would lose the respect of judges, their peers, and most importantly the Crown Prosecution Service. The CPS has strong incentives to pursue the highest charges available against defendants, and might sensibly decline to instruct barristers known as “a soft touch”. A prosecuting barrister may offer a charge bargain to protect a witness from undergoing the ordeal giving evidence against the defendant, however, in most cases prosecutors has little to gain by making offers that do not reflect the good chances of conviction on a higher charge.

That said, there may be efficiency or witness related reasons for why a prosecutor is willing to offer a defendant a bargained plea, even when the chances of conviction are relatively high. Large discounts may now be offered under the Serious Organised Crime and Police Act 2005 section 73 for co-operation with the police in conducting their investigations. In *P and Blackburn*⁴¹⁴ the Court of Appeal held that the reduction given to the defendant under this section would normally be somewhere between one half and two thirds of the expected sentence, but no more than three-quarters. This suggests that the courts are willing to forgo punishing the defendant to the normal extent with a

⁴¹³ J. Baldwin, ‘Understanding Judge Ordered and Acquittals in the Crown Court’ [1997] Crim LR 536.

⁴¹⁴ [2007] EWCA Crim 2290.

greater than 50% discount, if he or she can provide useful information in the prosecution of another. Furthermore, the government's proposals under 'The Introduction of a Plea Negotiation Framework for Fraud Cases in England and Wales: a Consultation' argue that pre-charge negotiations should include an agreed, non-binding, specific sentence or sentencing range.⁴¹⁵ Although the proposals are not specific on this point, this may include a discount that is far greater than 50%. As the proposals indicate as their aim to 'avoid a contested trial, at the earliest possible stage'⁴¹⁶ it is likely that this means that current charges and the accompanying sentences are often laid too high to encourage an early guilty plea. Flowing from this aim, it might be concluded that plea discounts offered in pursuit of 'potentially large savings to the public purse'⁴¹⁷ are given precisely for efficiency reasons. The danger remains however, that the realistic prospect of conviction test on a higher, threatened charge, is not applied properly and not reviewed by the court. These negotiations will take place pre-charge, and thus only subject to any kind of scrutiny well after negotiations have been concluded.

d. The innocence problem and risk-aversion.

It has been argued that a significant problem posed by plea bargaining is the attitude of the factually innocent defendant towards trial and the possibility of conviction. It is said that *de facto* innocent defendants are more risk-averse than guilty defendants and are more likely to accept an offer of a reduced charge in a similar situation when in fact they should go to trial on the merits of their case.⁴¹⁸ Accordingly, plea bargaining acts against the interests of the *de facto* innocent who have better chances of acquittal, but who nevertheless choose to plead guilty. Furthermore, *de facto* innocent defendants are pooled with *de facto* guilty defendants, but because each cannot disclose what he or she truly thought and knows about the alleged crime- in other words, the actual nature of his

⁴¹⁵ The Attorney-General, 'The Introduction of a Plea Negotiation Framework for Fraud Cases in England and Wales: a Consultation' (2008) Framework for Negotiation, paragraph 8.2
<http://www.attorneygeneral.gov.uk/the_fraud_review_page.html>

⁴¹⁶ Ibid. Foreword.

⁴¹⁷ Ibid.

⁴¹⁸ R. Scott and W. Stuntz, 'A Reply: Imperfect Bargains, Imperfect Trials and Innocent Defendants' (1992) 101 Yale LJ 2011, 2012.

or her guilt or their “private information”- the prosecutor cannot properly evaluate the chances of acquittal or conviction and decide whether to press ahead with the trial, drop certain charges, or dismiss the case entirely.⁴¹⁹ *De facto* guilty defendants will regularly try to mimic *de facto* innocent defendants by concocting alibis or explanations which are broadly similar to those claims made by *de facto* innocent or less culpable defendants. Prosecutors must treat each claim with similar scepticism, and will offer a defendant with a lower chance of conviction the same deal as a defendant whose chances of conviction are higher.⁴²⁰ Without this information, the prosecutor cannot offer varying pleas on the basis of the information received from defendants which would accurately reflect the costs to the prosecutor of going to trial against the risks of acquittal.⁴²¹ *De facto* innocent defendants are therefore treated as *de facto* guilty defendants, and because of risk aversion are more likely to accept an offer made, even though their risk of conviction is the same or reduced. Scott and Stuntz have framed this difficulty as the ‘innocence problem’.

This results in inefficiency in the system, distorting the plea offers made so that the bargains offered by the prosecution are disproportionately more serious in terms of charge and the accepted basis of plea than they would be if they reflected the accurate information that the defendant with a lower chance of conviction had given.⁴²² Scott and Stuntz argue that there are few solutions to this failure by the criminal justice system to take into account the defendant’s private information about the alleged offence. While it is probable that innocent defendants or less culpable defendants can distinguish themselves on the basis of the evidence, and by giving a credible, consistent account, making use of the defendant’s private information is extremely difficult given the absence of a reliable pre-trial method of screening the defendant’s account of the offence. It is difficult to think of any system where there is a reliable way of testing the credibility of the defendant’s pre-trial claims. By definition, the more effective, but

⁴¹⁹ It is assumed that the prosecutor is bound by codes of ethics that require them to act in the interests of justice, and that they wish to avoid the adjudication costs to the court of a full trial.

⁴²⁰ R. Scott and W. Stuntz, ‘Plea Bargaining as Contract’ (1992) 101 Yale Law Review 1909, 1947.

⁴²¹ Ibid. 1941. When parties to a transaction do not possess all the relevant information to make a decision it is termed by economists as an information deficit.

⁴²² Ibid. 1947-48.

costly means of screening defendants is the trial itself.

The information deficit regarding the defendant's private information is perhaps less problematic when considering the efficiency of the system with respect to the pleas offered to English defendants.⁴²³ The Fifth Amendment of the United States Constitution and the law in England and Wales do not provide the same protection to the defendant against self-incrimination. Although Article 6 of the European Convention on Human Rights does not explicitly mention the right of the defendant of freedom from self-incrimination, the European Court of Human Rights, as well as English courts, have recognised that the privilege is contained within the presumption of innocence and concepts of fairness within Article 6.⁴²⁴ However, that right is not absolute, and the British government has provided statutory exceptions to the right which have been held to be compatible with the Convention.⁴²⁵

In the case of a criminal defendant in English procedural law, the privilege against self-incrimination does not apply in several areas. Under the Criminal Justice and Public Order Act 1994 sections 34, 35, 36 and 37 the jury may 'draw such inferences...that appear proper' from: the defendant's failure to mention a fact relied upon in their defence when questioned by the police, and could reasonably have been expected to mention; the failure of the defendant to give evidence or answer a question when asked in court; the failure of the defendant to account for objects, substances or marks on their person when arrested; and, the failure of the defendant to account for their presence at a particular place. Furthermore, in order to avoid 'appropriate' comments by the judge to

⁴²³ The disclosure laws in English law partially meet the first best solutions put forward by Scott and Stuntz: *ibid.* 1951

⁴²⁴ *Funke v France* (1993) 16 EHRR 297; *Saunders v United Kingdom* (1996) 23 EHRR 313.

⁴²⁵ See: *Murray v. United Kingdom* (1996) 22 EHRR 29 (holding adverse inferences from accused silence lawful under the Criminal Evidence (Northern Ireland) Order 1988); *R. v Hertfordshire County Council, ex p Green Environmental Industries Ltd* [2000] 2 AC 412 (holding that the privilege could not be relied upon to refuse to answer questions under section 71(2) of the Environmental Protection Act 1990); *A-G's Reference (No 7 of 2000)* [2001] EWCA Crim 888 (holding that the defendant could not rely upon the privilege in the compulsory production of pre-existing incriminating documents under section 291(1)(a) and (b) of the Insolvency Act 1986); *Brown v. Stott* [2003] 1 AC 681 (holding that the privilege was not absolute and the answer to a simple question under section 172 of the Road Traffic Act of whether the defendant was driving was not incriminating in itself).

the jury, or the jury drawing adverse inferences from their failure to do so, a defendant must set out in a defence case statement the nature of their defence, the matters of the prosecution case that he or she takes issue with and why, set out the particular matters of fact upon which she or he will seek to rely upon and the details of any alibi, including the names and addresses of witness whom they will call in support.⁴²⁶ In the recent case of *S and L* the Court of Appeal was extremely critical of the defence for failing to disclose the exact details of the defence of necessity on which they wished to rely.⁴²⁷ By contrast the interpretation of the Fifth Amendment of the United States Constitution has prevented the judge or prosecutor from commenting on the accused's silence in the trial.⁴²⁸ In fact there is a positive duty place on the prosecuting body to remind the jury not to draw an adverse inference from a defendant's failure to testify.⁴²⁹ Moreover, the post-arrest silence of the accused in the police station after being given a *Miranda*⁴³⁰ warning cannot be used against him or her as this would violate the due process clause of the Fourteenth Amendment.⁴³¹ This limits the disclosure of the defence to the prosecution and makes it difficult for the prosecutor to assess whether the case against the defendant is particularly strong or weak.⁴³²

The law in England and Wales on the other hand means that a defendant who considers pleading not guilty and going to trial must put forward to the prosecution a consistent, affirmative defence at an early stage, which is then continually updated as the defence become aware of the exact nature of the case against the defendant. The fact that the defendant must disclose his or her defence at a pre-trial stage allows both prosecution

⁴²⁶ Criminal Procedure and Investigations Act 1996 sections 6 and 11 as amended by the Criminal Justice Act 2003 and Criminal Justice and Immigration Act 2008. The defence statement witness disclosure provisions were widened from 1 May 2010 to include the details of witnesses to be called in all cases.

⁴²⁷ *S and L* [2009] EWCA Crim 85. Although the case was not subject to the amended requirements, the ruling strongly suggests that the courts will not allow defendants to rely on defences and limit cross-examination where the defence case statement is not highly specific.

⁴²⁸ *Griffin v. California*, 380 U.S. 609 (1965).

⁴²⁹ *Carter v. Kentucky*, 450 U.S. 288 (1981).

⁴³⁰ *Miranda v. Arizona*, 384 U. S. 436 (1966).

⁴³¹ *Doyle v Ohio*, 426 U.S. 610 (1976). However, the accused pre-arrest silence can be used to impeach trial testimony: *Jenkins v. Anderson*, 447 U.S. 231 (1980). For discussion of whether the principles of section 34 and 35 of the Criminal Justice and Public Order Act 1994 could be exported to the United States: M. Redmayne, 'English Warnings' (2008) 30 *Cardozo L. Rev.* 1047.

⁴³² For a brief summary of objections and literature on *Miranda* warnings and impediment of police questioning: *Ibid.* Redmayne.

and defence lawyers to project forward to trial the realistic probability of conviction with improved accuracy. A lying defendant whose account is pinned down before trial can be more readily shown to be false by the prosecution.⁴³³ It is highly unlikely that the defendant will change their defence without a good explanation, or else they will suffer the harm to their defence that the adverse inference provisions create. Therefore, the defence contained within the interview at the police station and the defence case statement are good indicators of the defence at trial. This, in many respects, reduces the information deficit as posed by Scott and Stuntz. The disclosure regime of English courts assists negotiation by allowing prosecutors to know the defence case before trial. Defendants with a low chance of conviction can more readily signal the veracity of their account as the one presented at the pre-trial stage is the one most likely to be advanced at trial. An unlikely account gives a higher chance of conviction and a reduced willingness of the prosecutor to reduce charges.

Scott and Stuntz believe that defence lawyers do not assist the accurate disclosure of the defendant's private information as prosecutors can no more trust the defence lawyer's assertion of the "true" facts as, although the defence lawyer themselves may not lie to the prosecutor, the defendant could have lied to their own counsel.⁴³⁴ This is probably often the case. Guilty defendants will try to imitate an innocent defendant by producing a version of the facts which is entirely or partially false but which mimics an innocent defendant's account. However, to the defence and prosecution barrister themselves, whether the defendant is lying or not is irrelevant. What concerns the barristers of both sides is the credibility of the defendant's account and how that may conclude in front of a jury given the other evidence and witnesses. Therefore, the innocence problem, the inability to test the veracity of information given by *de facto* innocent defendants, is unimportant to the prosecution and defence barristers at a pre-trial stage. Of central concern is: given this defendant's account and the evidence against them, what is the probability of conviction and potential sentence? There seems little else a defence barrister could do to assist defendant who may or may not be factually innocent other

⁴³³ M. Redmayne, 'Rethinking the privilege against self-incrimination' [2007] OJLS 209, 221. Redmayne disputes, however, the usefulness of silence to 'ensnare the guilty.'

⁴³⁴ *Scott and Stuntz* (n.420) 1945.

than carefully analyse the case against the defendant and the defendant's account so that the chances of conviction and acquittal are clear. A *de facto* innocent defendant who wishes to plead cannot be readily helped to reassess the situation as the defence barrister simply cannot know the facts. It will be recalled from the previous chapter that barristers are only looking at the case from the point of view of the evidence and 'don't know the factors that may influence somebody.'⁴³⁵

It would seem for this reason, beyond advising defendants about the strength of the case against them, and the sentencing options available to the judge, few of the interviewees described trying to protect defendants from the pressures created by an offer to plead to a lesser offence. The view held by I1, was typical:

When defending...again, I'm confident that...most defendants have the wherewithal to know what they're doing and to make their own decisions about whether they are guilty of this particular offence. And you're just putting your, finding out all the options to them and putting them on the table and saying, "are you interested in this? Again, entirely your decision."

In the view of the majority of those interviewed, it was their role to present the defendant with the options and allow them to make their own choice. As discussed, however, this may encourage risk-averse defendants to plead to offences they might be better contesting. This does not mean that all bargained pleas result in injustice, where risk-averse innocent defendants plead guilty. Most bargained for pleas may reflect culpability and the realistic chances of conviction of the defendant. As has been discussed, English law promotes an early, consistent disclosure of the defence to be relied upon, which in many cases may be of benefit to *de facto* innocent defendants. The inability of barristers to assess why a defendant pleads guilty, however, does pose some difficulties for plea bargaining in general, and reinforces the need for barristers to fully apprise defendants of the merit of their case and give adequate time for the defendant to consider their plea.

⁴³⁵ K1. Chapter 4:b.iii.

e. Plea bargaining undermines rights that the defendant should not be able to derogate from

In response to consequentialist and economic justifications in defence of plea bargaining, critics of the practice have attempted to reposition the problem in relation to rights.⁴³⁶ Consequentialist theories that promote plea bargaining are said to override rights in pursuit of other values.⁴³⁷ These authors have claimed that plea bargaining undermines the presumption of innocence, the privilege against self-incrimination and the right to a full and public hearing. These rights are at the core of western conceptions of criminal justice, however, access to these rights is currently dependent on the defendant being produced in a full trial hearing. Plea bargaining by its nature takes place before these rights are properly realised in front of a jury in an adversarial trial. Defendants who do exercise their right to put the prosecution to proof are penalised by heavier sentences.⁴³⁸ By implication, it would therefore appear that critics would prefer more trials and less bargaining to occur.

However, the answer advanced of putting more defendants through trials by scrapping or reducing the scope of bargaining is extremely problematic. Removing choice and incentives from the defendant within the present system of trial could potentially result in more *de facto* innocent defendants being given longer sentences. Stephen Schulhofer has argued that promoting these rights is of more important social value than the inconvenience to the individual defendant of requiring her to stand trial.⁴³⁹ This argument seems at odds with the right of the innocent not to be punished when the overall sentencing of the innocent is considered in aggregate.⁴⁴⁰ Although some *de facto* innocent defendants might be acquitted who would otherwise have pleaded guilty, the total of *de facto* innocent defendants serving longer sentences could increase. As was

⁴³⁶ Ashworth and Redmayne (n.359) 43-45; 287-92.

⁴³⁷ Ibid. 45.

⁴³⁸ Sanders and Young (n.359) 434.

⁴³⁹ S. Schulhofer, 'Plea Bargaining as Disaster' (1992) 101 Yale LJ 1979, 1986

⁴⁴⁰ Scott and Stuntz (n.418) 2013.

discussed above, some *de facto* innocent defendants are advised to plead guilty as there is a strong prospect of their conviction. There seems little purpose in giving defendants more rights but yet punishing the innocent on a larger scale.

Other arguments which promote trials ignore the real problem of resources. Ashworth and Redmayne believe that the discount should be reduced to 10% and to allow defendants to contest their guilt at no significant cost in terms of sentence.⁴⁴¹ Similarly, guilty defendants are said to be unjustly rewarded for pleading guilty and both discount and bargaining should be scrapped. However, this does not take into account the increased cost to the system of removing incentives to plead and the effect that might have on the overall accuracy of trials. Darbyshire disputes the fact that removing system incentives would result in an increase in trials⁴⁴², but then goes on to argue that innocent individuals plead guilty as a result of the same incentives. This is evidently self-contradictory and in any case probably incorrect.⁴⁴³ Furthermore, there seems little reason why guilty defendants should react to sentencing incentives in a dramatically different way to innocent defendants.⁴⁴⁴ Both *de facto* innocent defendants and guilty defendants almost certainly plead guilty on the basis of the incentives offered to them. While the current research does not pass judgment on the fact-finding ability of the current jury trial, it is presumed that its ability to do so is constrained by the resources at its disposal.⁴⁴⁵ With resources constant, more defendants going through the trial system could degrade its performance.⁴⁴⁶ Trials could be curtailed with evidence insufficiently examined. In such circumstances more innocent defendants could be convicted (or more guilty defendants acquitted, or both). In any society there is a correlation between the resources expended on the system of trials and fact-finding, and the risk of convicting the innocent. One answer might be therefore to spend more money on trials (including

⁴⁴¹ Ashworth and Redmayne (n.392) 292-93.

⁴⁴² P. Darbyshire, 'The mischief of plea bargaining and sentencing rewards' (2000) Crim LR 895, 905.

⁴⁴³ Schulhofer (n.439) 2005. Schulhofer estimated that trials in Philadelphia courts would increase from 10-15% to 75% of all felony cases if system incentives to plead guilty were removed.

⁴⁴⁴ Other than perception of risk amongst the *de facto* innocent as discussed above.

⁴⁴⁵ For thorough analysis of adversarial trials and truth-finding ability see: T. Weigend, 'Why have a trial when you can have a bargain?' in A. Duff, L. Farmer, S. Marshall and V. Tadros (eds), *The Trial on Trial: Judgment and Calling to Account* (Vol. 2, Hart Publishing, Oxford 2006).

⁴⁴⁶ Scott and Stuntz (n.418) 2013-14.

increasing the resources of prosecution and defence) to improve their ability to separate *de facto* and guilty defendants. However, this would increase the tax burden and associated problems.

Stephen Schulhofer has suggested that jury trials could be replaced with bench trials (trials with a panel of judges rather than a jury) as they are less expensive.⁴⁴⁷ Such trials would allow all defendants to put the prosecution to proof at an acceptable cost. While bench trials may be cheaper per case, the effectiveness of judges to make accurate findings of guilt is open to doubt. Critics such as Darbyshire dismiss the problem that although bench trials might give more defendants access to trials and therefore access to certain rights, they undermine the protections given to the defendant by a jury.⁴⁴⁸ Different systems of trial may keep resources constant and remove the need for plea bargaining, however any system must be assessed on its resource to truth-finding abilities.⁴⁴⁹ Removing bargaining altogether may improve overall access to trials and accompanying rights, but it is the innocent who may be harmed in the process as the effectiveness of trials is degraded.

f. Negotiation over charge undermines due process.

By removing the defendant from the trial process and into negotiation, critics maintain that the barrister fails to thoroughly test the fairness of the procedures used to arrest, detain, question and bring the defendant to trial.⁴⁵⁰ Instead, it is said, the advocate concentrates on the charge itself and resolving the case at a pre-trial stage. Due process at the trial stage has systemic value in that it requires all levels of criminal investigation and prosecution to comply in order to gain convictions and prevents the misuse of state prosecutorial power by either the police or other investigatory bodies. In a pre-trial

⁴⁴⁷ S. Schulhofer, 'Is Plea Bargaining Inevitable?' (1984) 97 Harv LR 1037.

⁴⁴⁸ *Darbyshire* (n.442) 910.

⁴⁴⁹ Alschuler has argued that the adversarial trial can be made cheaper while remaining 'fair': A. Alschuler 'Implementing the Criminal Defendant's Right to Trial' (1983) 50 Uni.Chi.LR 931.

⁴⁵⁰ *Sanders and Young* (n.359) 433.

settlement setting, due process principles are not strictly enforced and miscarriages of justice increase.

The critics' allegation, if true, would require defence barristers to fail to spot procedural weakness or irregularities in the prosecution and instead to be focused on resolving the case through bargaining. This implies that either defence barristers do not fully apprise themselves of cases or, if they do spot irregularities, are unwilling to take forward legal issues for the judge to decide. As has already been discussed in Chapter 4, contrary to the description given by McConville et al, the interview data revealed that these barristers were highly alert to potential problems with the prosecution case and thoroughly analysed the evidence against the accused. Many described times when they had stood-up for the defendant on "technical" points and taken up legal issues if they felt there was a reasonable chance of succeeding. In this sense, according to the data from the current research, the interviewees were interested in upholding due process values, especially if they felt that the defendant would be acquitted on that basis. Issues such as abuse of process or excluding evidence under sections 76 and 78 of the Police and Criminal Evidence Act 1984 were, according to the interviewees, brought into open court if the defending barrister felt they were meritorious. There is no evidence in any of the literature, besides generalised allegations of laziness or a commitment to guilty plea culture, that defending barristers regularly fail to take legal points if possible.

Although in cases where a plea bargain occurs the arrest and questioning of the suspect are not scrutinised in detail in a public hearing, it is unlikely that a trial itself would reveal any further irregularity by chance. Even though police officers are routinely cross-examined in trials, they are rarely questioned at length about whether the Police and Criminal Evidence Act, for example, has been complied with unless there are apparent concerns raised by disclosure or the defendant themselves. While police officers might be more wary of behaving improperly if subject to cross-examination in all cases, the courts have stated that abuse of process cases are not to be used to punish

investigatory bodies or discipline the police.⁴⁵¹ Generalised misbehaviour by the police does not therefore lead to a failure of prosecution unless it would be impossible to give the accused a fair trial, or it would amount to a manipulation of process and offend the court's sense of justice and propriety to be asked to try the accused in the circumstances.⁴⁵² When the procedural law does not strictly enforce exclusionary principles it is improbable that more trials would reinvigorate due process throughout the criminal justice system. Any argument likely to succeed under the exclusionary rules may well be picked up by a barrister at a pre-trial stage.

g. Plea bargains represent a poor deal for society

As well as agency costs for defendants, agency costs exist for society in general too. Prosecutors represent the interests of the public in taking cases to court and therefore should not bargain over pleas at a lower level than that desired by the society on whose behalf they act. Judging what constitutes society's interests is difficult and the law and guidance to prosecutors provides a confused basis for judging what that might be. It is suggested that the Director of Public Prosecution (DPP) represents society's interests as he or she is appointed by the Attorney-General, the government's legal advisor. The guidelines produced by the DPP might give a good idea about how society would like prosecutions to proceed. According to the Code for Crown Prosecutors, issued by the DPP, there is a Full Code Test to apply to all prospective prosecutions.⁴⁵³ Prosecutors should take forward cases where 'there is enough evidence to provide a "realistic prospect of conviction"' (the realistic prospect of conviction test) and if the prosecution is 'in the public interest' (the public interest test). However, these tests are combined with other authoritative guidelines on the acceptance of pleas. As will be explained these considerations mix-up a desire to see offending punished and victims consulted, with the probability of the success of conviction.

⁴⁵¹ *R v Crown Court at Norwich ex parte Belsham* (1992) 94 Cr. App. R. 382.

⁴⁵² *Bennett v Horseferry Road Magistrates Court and Another* [1993] 3 All ER 138.

⁴⁵³ *Code for Crown Prosecutors* (n.366) part 5.

As well as the Full Code test, prosecutors must comply with other guidelines relating to accepting guilty pleas from defendants when appropriate. For prosecutions in the Crown Court there are three sets of guidelines that apply.⁴⁵⁴ The first is part of the Code for Crown Prosecutors, which outlines the circumstances in which a plea may be accepted to a less serious offence.⁴⁵⁵ In accepting guilty pleas a Crown Prosecutor should:

...only accept the defendant's plea if they think the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features. Crown Prosecutors must never accept a guilty plea just because it is convenient.⁴⁵⁶

As Ashworth and Redmayne point out, this guidance is somewhat difficult to apply in practice.⁴⁵⁷ Sentences are rarely given at the maxima provided in the statute, therefore a Crown Prosecutor must be satisfied that the seriousness of the offending is met by mid-range sentence on the lesser charge. This can be problematic where the sentencing available cannot take into account of the most serious reading of the facts.

Furthermore, this guidance recognises seriousness of the offending only, not the likelihood of conviction as in the realistic prospect of conviction test. This creates a conflict between the test and matching the charge to the alleged, albeit unsubstantiated, seriousness of offending. Prosecutors may generally wish to offer a lower charge to a defendant because of the difficulty in proving a higher charge, for example where it is the defendant's word against a single witness. For example, on a rape charge it may be possible to prove the defendant's contact with the victim through forensic science, but not necessarily contact amounting to rape itself. Although the prosecutor wishes to offer the defendant a plea to sexual assault, this clearly does not meet the alleged 'seriousness

⁴⁵⁴ In considering the acceptance of pleas a prosecutor must have regard to the Code for Crown Prosecutors; The Farquharson Guidelines: The Role and Responsibilities of the Prosecution Advocate; and, the Attorney-General's Guidance on Accepting Pleas and the Prosecutor's Role in the Sentencing Exercise (n.366 above).

⁴⁵⁵ Crown Prosecutors instruct members of the independent Bar as prosecutors. Any bargained plea formulated by the prosecution barrister must be accepted by the instructing Crown Prosecutor.

⁴⁵⁶ *Code for Crown Prosecutors* (n.366) part 10.1.

⁴⁵⁷ *Ashworth and Redmayne* (n.358) 272.

of offending'. The precise reason why the prosecutor wishes to accept a plea to a lesser offence is because it is convenient to do so- he or she does not have confidence in a conviction on the more serious charge.⁴⁵⁸ Rarely will the lesser charge meet the seriousness of the offending as alleged, unless the CPS overcharged the indictment originally, or the allegation is so vague as to take into account a range of criminal conduct.

The idea of matching plea with the seriousness of offending is reiterated in the Attorney-General's Guidelines on the Acceptance of Pleas.⁴⁵⁹ There the formally agreed factual basis of plea, normally drawn up by the defence advocate in writing, must:

...not be agreed on a misleading or untrue set of facts and must take proper account of the victim's interests. An illogical or insupportable basis of plea will inevitably result in the imposition of an inappropriate sentence and is capable of damaging public confidence in the criminal justice system.⁴⁶⁰

This represents the same tension of taking a plea to a lesser offence. Ensuring the court receives a logical and supportable, or true basis is practically impossible, if what the victim or police evidence alleges amounts to a more serious offence than that which the defendant is pleading guilty to. A basis of plea cannot include admissions that amount to a higher offence (as this is illogical) but at the same time will not reflect the original prosecution case, and must involve compromises. A judge may refuse to sentence on an 'unrealistic' basis of plea, but at the cost of a full trial or a *Newton* hearing.⁴⁶¹ In some cases this has resulted in appeals where the sentencing judge has been unwilling to challenge the basis, but gone beyond the facts as admitted by the defence.⁴⁶² All bargained bases of pleas involve a degradation of the original seriousness of offending. The question is therefore not whether this should be allowed to take place, but to what

⁴⁵⁸ Even if linked by forensics to the complainant, the defendant may still deny the charge on the basis of consent. However, if the prosecution has other compelling evidence, the defendant might be more willing to plead guilty to the sexual assault charge.

⁴⁵⁹ *The Attorney General* (n.366).

⁴⁶⁰ *Ibid.* para. C1.

⁴⁶¹ *Beswick* [1996] 1 Cr App R (S) 343; *Underwood* [2004] EWCA Crim 2256.

⁴⁶² See a recent example in *Guy* [2006] EWCA Crim 1806.

extent. Any guidelines on bargaining should be reformulated to take account of this fact. Unfortunately, the government seems committed to these opposing goals of giving full account and satisfaction to the victim and the ‘seriousness of offending’, and allowing bargaining to take place for the sake of efficiency. The proposals contained within ‘The Introduction of a Plea Negotiation Framework for Fraud Cases in England and Wales: a Consultation’ reiterate that same phrasing for introducing negotiations in fraud cases at a pre-charge stage.⁴⁶³

It is difficult to say on the basis of the current research whether prosecutors accept pleas to offences that are too low according to these confusing standards. Some interviewees did however provide a comparative perspective of the work of the Bar with that of the Crown Prosecution Service. Under amendments introduced by the Criminal Justice Act 2003, section 28 and Schedule 2, the Crown Prosecution Service is now responsible for charging defendants at the police station. Furthermore, the CPS has recently undergone an expansion of in-house advocates to conduct Crown Court prosecutions, rather than briefing independent counsel. As a result, some of the interviewees believed that cases were now routinely undercharged and accused CPS Higher Court Advocates (HCAs) of ‘strangling cases at birth’⁴⁶⁴ and of ‘situations where [HCAs] were giving in to senior barristers on the basis of pleas that were just ridiculous.’⁴⁶⁵ The suggestion is that the Bar employs a wider definition of the reasonable prospect of conviction test, and more stringent standards to the acceptable basis of plea. The CPS advocates were accused of being too soft on defendants so that cases collapsed too readily. It might be reasoned on the basis of this limited evidence that the CPS has undermined prosecutions and are settling cases at too low a level. However, more evidence is required before definitive conclusion can be drawn.

⁴⁶³ *The Attorney-General* (n.415).

⁴⁶⁴ N2.

⁴⁶⁵ N1.

h. Third party effects

This chapter has focused on the effects of plea bargaining on the defendant and the potential motivations of barristers who engage in the practice. It should be acknowledged for the sake of completeness that plea bargaining can have negative effects for third parties outside of the prosecution and defence. Firstly, the curtailment of the trial process may reduce the scope for an assessment in every case of the quality of the investigation of crime, and could hide the level of effectiveness of the work of the police. This relates not to conviction or acquittal but rather a public airing of the methods and abilities of police officers in carrying out their investigation. In a trial these methods are brought to scrutiny and can be seen by the judiciary and the public. If a prosecution fails through want of effective policing, subsequent public and political pressure may bring about positive effects on the competency of the police and their organisation. Similar arguments in favour of trials can be made for assessing the work of prosecuting bodies, such as the CPS, and defence lawyers themselves. When a case is resolved with a bargained plea, no public scrutiny of these processes is possible. Secondly, those who are victims of crime arguably have a real interest in the prosecution and the public recognition of what happened to them. Trials allow victims to confront the perpetrator, the defendant, and explain what happened to them; plea bargains do not. Although victim impact statements are now available at sentencing⁴⁶⁶, and victims should be consulted before accepting guilty pleas according to the Attorney General Guidelines⁴⁶⁷, they may feel left out and disregarded by the bargaining process. Even though the adversarial trial system is poorly suited to addressing the consequences of offending on victims (the effect on the victim of an offence is not relevant evidence at the trial stage), allowing a victim to give evidence is potentially an important role of the trial.

⁴⁶⁶ The Victim Personal Statement Scheme was introduced on 1 October 2001: The Consolidated Criminal Practice Direction, Part III.28

⁴⁶⁷ *The Attorney General* (n.415) para. B3.

4. Conclusion

This chapter has sought to show that the arguments around how and why plea bargains are entered into by barristers are not necessarily a consequence of a guilty plea culture. Often barristers on assessing the available evidence against the defendant in combination with the defendant's account, decide that a lower charge is more appropriate to the facts of the case. The charge or basis agreed with the prosecution, while labelled charge or fact bargaining, is a practical decision. In these circumstances, the bargain represents the advisor's assessment of the defendant's culpability in the light of the evidence. In other bargains, barristers try to make a prediction based on the strength of the prospective cases about the chances of acquittal on the higher charge against the benefits of a lower sentence on a plea of guilty. In these cases the defence barrister is trying to optimise the outcome for defendant who may deny the charges, but has a weaker case and a higher chance of conviction.

Difficulties are created because of the ways in which bargains are presented to defendants. As was discussed, there appear to be two different ways in which plea bargains are produced. The first method in common use at the Bar seems to be a discussion and agreement between defence counsel and defendant on how best the case might proceed. In this approach, the defendant's decision-making remains central to how his or her case is run and is a result of a collaborative meeting between them and their lawyers. The second method of bargaining, however, is fundamentally different. Under this approach, informal discussions between prosecutor and defence barrister as to what pleas might be appropriate are initiated before the defendant is consulted; in some cases, before the defence barrister has met the defendant at all. The concern outlined above, is that this undermines defendant autonomy as decisions about his or her case are pre-empted by their representative. This in turn creates opportunities for misuse by the defence barrister as the role of the defendant in the choice on plea is diminished. As yet, no formal ethical guidance is provided to defence barristers on how they should approach plea bargaining and they are reliant on observed negotiation in pupillage or

early practice.

The role of plea bargaining in English law must be carefully considered as it allows many cases to be determined without a trial. Although critics claim that excessive pressure is placed on defendants by barristers, there is a failure in the literature to consider whether plea bargains are actually in the interests of the defendant in terms of optimal outcome. Plea bargaining as a facet of adversarial justice is often considered as a tool used by manipulative lawyers, but its potential for misuse should be considered separately to the effects of plea bargaining by itself. Doing so allows each of the arguments surrounding negotiation to be considered in turn and provides a more thorough investigation of why barristers bargain over plea. The empirical research findings from this research suggest that barristers often make decisions on the appropriate plea based on the projected risks of conviction and sentence.

In order to understand the factors that affect barristers' advice it is important to distinguish between those defendants who are likely to be acquitted, and *de facto* innocent defendants. It is not possible for defending barristers and prosecutors to identify the latter and their focus must inevitably be on the former. While it is desirable that *de facto* innocent defendants be protected from conviction, the trial does not and cannot represent a fail-safe mechanism. In these circumstances those factually innocent defendants who are likely to be convicted are likely to be best served by a negotiated plea. It is, of course, a matter of concern if some *de facto* innocent defendants may be particularly risk averse and so more likely to accept a poorer bargain. However, this is possibly a reduced problem given the level of defence disclosure under English law. As defendants must set up an affirmative defence early in the process, prosecutors, police and defence lawyers can more readily test pre-trial claims of innocence. Barristers are not in a position to protect risk-averse defendants from accepting poor bargains, other than to give the defendant sufficient time and advice on their position before a decision is made.

Any reduction in charge is not acceptable. As was illustrated, charges can be reduced to such an extent that anyone accused of an offence would plead guilty on the basis of probable outcomes. Huge discounts may encourage even those with a low chance of conviction to plead guilty to offences. In that analysis it was argued that the House of Lords in *McKinnon* failed to understand the important relationship between the probability of conviction and charging standards. As a general rule a 50% reduction is the largest discount that should be offered. Larger discounts might indicate that prosecutors do not have sufficient faith in the prosecution to meet the realistic prospect of success test. While larger discounts may be justified in return for the defendant's co-operation or to save the cost of an expensive trial, or to spare victims the ordeal of trial, these negotiations must be monitored by the court to ensure that the initial charge meets the charging standards.

It has also been argued that enforcing "the right to a trial" for a greater number of defendants might harm *de facto* innocent defendants in the long run, and that discounted sentences might, in fact, reduce the aggregate sentence served by all *de facto* innocent defendants. As was pointed out above, discounts and bargains do encourage pleas, without which the number of trials would increase. Unless the courts use their resources more effectively or resources are increased, the increased numbers of trials within the present system may reduce its accuracy and convict greater numbers of *de facto* innocent defendants. Any alterations to the current system of plea bargaining may have profound consequences for defendants - it is not simply a question of scrapping plea bargaining with a concomitant rise in acquittals for factually innocent defendants. Although due process is not given full exposure during negotiation, the interview evidence suggests that barristers do take legal points where a successful argument might affect the continued prosecution of the accused.

Finally, this chapter has put forward the argument that the current guidance on when and how bargains are entered into is exceedingly poor. The guidance given to barristers pursues contradictory aims - of ensuring charges reflect the 'seriousness of offending' while trying to encourage bargaining to take place. The guidelines should be redrafted to

reflect the probability of conviction on the various charges available.

Chapter 6: Fees and advice

Critics of the criminal bar and criminal lawyers have alleged that barristers advise on “a fees basis”, manipulating and dominating defendant decision-making on the basis of financial self-interest.⁴⁶⁸ Barristers are said to seek to maximise their incomes by advising defendants to plead in a manner that resolves the case at a point when the opportunity cost of not taking up another case becomes greater than continuing the representation of the present defendant. This research does not necessarily disagree with this analysis. However, certain important caveats are placed in the way of this reasoning as a complete explanation of barristers’ behaviour. Firstly, before assessing barristers’ incentives, the climate and flows of work and income into the Bar must be considered. With an understanding of barristers’ working environment in terms of pay and conditions, any analysis of the incentives created by fee will be enriched. Secondly, this research will examine the theoretical and empirical research on economic incentives for lawyers in general and barristers in particular. Recent changes in fees for legal aid cases have important implications for how lawyers work generally and how they approach cases.

This chapter will examine whether lawyers are susceptible to financial incentives, and if they are, explore how those incentives in the form of legal aid payments express themselves in their behaviour in relation to advice on pleas. Much of the literature agrees that financial incentives in aggregate play an important part in determining how cases are resolved, however, it is unclear how this manifests itself on an individual case level. This chapter will discuss the emerging idea of ethical indeterminacy and argue that while barristers’ behaviour is inevitably affected by financial incentives, it does not necessarily manifest itself in overt manipulation of defendants’ pleas.⁴⁶⁹ Ethical indeterminacy argues that lawyers do not overtly manipulate cases to maximise fees in

⁴⁶⁸ A. Sanders and R. Young, *Criminal Justice* (3rd edn OUP, Oxford 2007) 399-400; 418-420.

⁴⁶⁹ Ethical indeterminacy is more thoroughly defined by Tata: C. Tata, ‘In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and “Ethical Indeterminacy” in Criminal Defence Work’ (2007) 34 *Journal of Law and Society* 489.

determining their strategy on a case, but rather take decisions in their own financial interest where the defendant's "best-interests" are plausibly served by selecting that choice of action. As will be discussed, decision-making that is in the best interests of the defendant, including what advice to give on plea, is not always inherently obvious and two practitioners, unaware of the financial incentives, might genuinely disagree as to the best choice of action. Furthermore, this chapter will attempt to show that financial incentives are not the only incentives that bear upon the advice given to defendants. By including an analysis of the data from interviews with barristers, this chapter will explore how barristers themselves assess the financial incentives that drive their behaviour. As will be seen, although financial incentives remain important, other factors can counter these, by acting as a disincentive to barristers who seek to resolve cases on a solely financial basis. It will be shown that a wider more contextualised view needs to be taken of barrister behaviour, and that acting for short term financial gain may be highly prejudicial to a barrister's long term career. Lastly, the Advocate Graduated Fee Scheme will be modelled, with particular focus on how different case outcomes are remunerated. Critics of the criminal bar have generally not properly analysed the financial incentives put in place by the Graduated Fee Scheme and misstated the financial incentives for barristers in criminal cases, suggesting that barristers are better off "cracking" Crown Court cases close to trial.⁴⁷⁰ This research shows that that fees and incentives are complicated, dependent on the number of cases in which the barrister is briefed and trials can be more lucrative to barristers.

1. The current climate at the Bar

It is well known that the legal aid Bar⁴⁷¹ is undergoing a dramatic period of change in both its size and function. Newspapers regularly report dissatisfaction amongst members of the Bar with pay rates as well as disputes with the government over initiatives to

⁴⁷⁰ *Sanders and Young* (n.468) 399; 418-420.

⁴⁷¹ The phrase "legal aid Bar" is taken to mean those working at the Bar whose primary source of income comes from those whose representation is funded from government sources.

reduce legal aid expenditure in England and Wales.⁴⁷² Before considering the financial incentives that may affect barristers' decision-making on how they advise on plea, it is necessary to understand the context in which members of the Bar are working. Only with a thorough understanding of the current climate at the Bar in relation to pay and conditions can an informed judgement be made about barrister decision-making on a case-by-case basis. Interviewees were therefore asked questions about their current pay rates and their workload. Questions in this area were particularly open and intended for barristers to raise any concerns or points that they felt to be relevant to the subject. Three particular areas were raised by interviewees: the low rates of pay for prosecution work and the reformed pay scales for defence work under the Carter Reforms; the use of Higher Court Advocates; and pay under the Very High Cost Case (VHCC) pay scheme. These areas were discussed in most interviews prior to discussing whether financial incentives had an effect on case outcome. The relationship with solicitors is also vital to a barristers work, but is explored more thoroughly in the next chapter. Solicitors have experienced a dramatic change in how their fees are calculated and play a role in understanding the environment in which barristers advise. Where relevant these changes are examined.

a. Prosecution and defence work for trials up to and including 40 days

Since April 2007, barristers undertaking defence work in the Crown Court have been paid according to an enhanced pay scale under the Advocate Graduated Fee Scheme (AGFS) created by the Criminal Defence Service (Funding) Order 2007. This pay rise was broadly welcomed by the Bar and the scheme was supported by the Bar Council.⁴⁷³ The details of the AGFS and its background are discussed more thoroughly below, however, it is sufficient to say here that new pay scheme amounted to an on average 16% pay rise for defending barristers.⁴⁷⁴ In contrast the pay rates for prosecution work

⁴⁷² See n.478 below

⁴⁷³ The General Council of The Bar, 'The General Council of the Bar's response to the joint DCA and LSC Consultation Paper: Legal Aid: a Sustainable Future' (October 2006)

⁴⁷⁴ See observations: *Ibid.* para. 12. Junior barristers received a greater pay rise than Queen's Counsel under the AGFS for standard cases.

have remained static under the Crown Prosecution Service Graduated Fee Scheme since 2005.⁴⁷⁵ These fees, based on the original Graduated Fee Scheme introduced for barristers in 1997⁴⁷⁶, are much lower than the fees paid under the AGFS meaning that barristers instructed to prosecute a case can be paid between a third and half as much their defending counterpart.⁴⁷⁷ This discrepancy in pay means that those barristers who conduct prosecution work have not seen the equivalent pay rises for defence work and contributed to the generally low morale at the criminal bar.⁴⁷⁸ The government has recently proposed that defence barristers have their pay cut to be equal with that of prosecuting barristers.⁴⁷⁹ This would effectively remove the pay increases given under the AGFS, and has provoked consternation from members of the Bar.⁴⁸⁰

b. Very High Cost Cases

Very High Cost Cases (VHCC) are not subject to the statutory pay scheme of the AGFS.⁴⁸¹ These cases have been targeted for savings because although they represent

⁴⁷⁵ Crown Prosecution Service Graduated Fee Scheme (Issued November 2005, Amended July 2008) <http://www.cps.gov.uk/publications/finance/mog_index.html>

⁴⁷⁶ The legislative basis for the fees are found in Criminal Defence Service (Funding) Order 2001 (SI 2001/855), as amended by Criminal Defence Service (Funding) (Amendment) Order 2005 (SI 2005/2621).

⁴⁷⁷ For example, a Class C Offence lasting 2 days. Under the Criminal Defence Service (Funding) Order 2007 Part 2, section 5 and the accompanying table, defence counsel would be paid £1,038 basic fee. Under the CPS Graduated Fee Scheme, paragraph 8 and accompanying tables at Annex 2, the prosecutor's basic fee is £250 with an additional refresher of £136, and a trial uplift of £143, totalling £529. The prosecutor's fee for the case may be higher than £529 as he or she may claim extra payments for additional hearings, such as the PCMH, whereas under the AGFS a defence barrister may not. However, a prosecutor's fee is highly unlikely to ever match that of his or her defence counterpart.

⁴⁷⁸ As reported in the newspapers of barristers' attitudes towards pay: C. Dyer, 'Lawyers threaten strike over low pay' *The Guardian* (London, 6 June 2005) <<http://www.guardian.co.uk/uk/2005/jun/06/claredyer>>; F. Gibb, 'How healthy is the Bar?' *The Times* (London, 31 October 2008) <<http://business.timesonline.co.uk/tol/business/law/article5053519.ece>>

⁴⁷⁹ 'Legal aid: funding reforms - consultation paper' (CP 18/09, Ministry of Justice 2009) <<http://www.justice.gov.uk/consultations/legal-aid-funding-reforms.htm>>

⁴⁸⁰ R. Ford, 'Barristers' fees slashed in Government squeeze on legal aid bill' *The Times* (London 21 August 2009) <<http://business.timesonline.co.uk/tol/business/law/article6804621.ece?&EMC-Bltn=GDPC51F>>

⁴⁸¹ Under the Criminal Defence Service (Funding) Order 2007 as amended by Criminal Defence Service (Funding) (Amendment) Order 2007, VHCC are defined as cases that, in the opinion of the Legal Services Commission, would be likely to last in trial for more than 40 days (and the Commission considers that there are no exceptional circumstances which make it unsuitable to fund the cases under VHCC provisions), or, if the case is likely to last no fewer than 25 and no more than 40 days, and the Commission considers that there are circumstances which make it suitable to be dealt with under the

only a fractionally small number of defendants in the criminal justice system, the cost of VHCCs represented 10% of the £1.2 billion legal aid expenditure in 2007.⁴⁸² Fees for cases that are classified as VHCC are subject to contractual arrangements between the Legal Services Commission (LSC) and members of an advocates panel- pre-approved advocates who may undertake VHCC work.⁴⁸³ Under the design of the VHCC scheme, advocates listed on the panel can be selected for VHCC cases and instructed by solicitors who are members of an approved solicitor panel. During the ‘planning stage’ for a VHCC, schedules of tasks are identified by the defence team together with the LSC, with various categories of work listed and hours agreed upon in three month blocks.⁴⁸⁴ Hourly pay rates for advocates are listed in the scheme, with those of greater seniority being paid increased amounts.⁴⁸⁵ Advocates are also paid per day or half day in court.

In this way, the government has tried to keep spending on complex cases under control, however, the VHCC scheme has been greeted by the Bar with dismay. Labelling the pay rates as ‘derisory’, the former Chairman of the Criminal Bar Association, Peter Lodder QC, argued that the actual amount received by barristers after tax and deductions would only be around half the £91 per hour given to QCs and £70 given to juniors for preparation.⁴⁸⁶ This, together with other concerns over the operation of the scheme, resulted in a boycott by barristers, with few advocates signing the contract.⁴⁸⁷ At various stages, the refusal of barristers to work under the scheme has created severe difficulties in finding representation for defendants.⁴⁸⁸ This pressure has been eased with an interim

VHCC provisions.

⁴⁸² Legal Services Commission, ‘The future development of Very High Cost Criminal Cases’ (December 2008) <http://www.legalservices.gov.uk/aboutus/press_releases_9129.asp>

⁴⁸³ Advocates are contracted to the LSC under the Very High Cost Case (Crime) Panel Contract for Panel Advocates <http://www.legalservices.gov.uk/criminal/contracting/panel_membership.asp>

⁴⁸⁴ Very High Cost Case (Crime) Panel Contract for Panel Advocates, Annex 2.

⁴⁸⁵ Ibid. Annex 7.

⁴⁸⁶ *BBC News*, ‘Legal fees row “could hit trials”’ (London, 11 September 2008) <<http://news.bbc.co.uk/1/hi/uk/7610089.stm>>

⁴⁸⁷ Of the 2,300 barristers invited to sign the panel contract before February 2008, only 130 did so: Legal Services Commission, ‘Very High Cost Criminal Cases: the future’ (February 2008) <http://www.legalservices.gov.uk/aboutus/press_releases_7721.asp>

⁴⁸⁸ C. Hope, ‘Rhys Jones murder trial “threatened by legal aid reforms”’ *The Telegraph* (London, 15 August 2008) <<http://www.telegraph.co.uk/news/newstopping/politics/lawandorder/2566280/Rhys-Jones->

pay rise being introduced in November 2008⁴⁸⁹, and negotiations over a new scheme are being conducted by a Working Group involving the Bar Council, Law Society, Ministry of Justice and Legal Services Commission. The interim scheme also makes it easier for non-panel advocates to be instructed if no panel advocates with the requisite experience can be found. In December 2008 the LSC published new proposals for VHCC, with the aim that they be consulted upon and implemented by July 2009.⁴⁹⁰ However, no agreement has been reached and the interim scheme has been extended for another 12 months.⁴⁹¹

c. Higher Court Advocates

As well as controversy over pay, the once traditionally exclusive domain of the Bar in the Crown Court has been opened to solicitors. Under the Courts and Legal Services Act 1990, solicitors have been able to gain higher rights of audience and conduct the prosecution or defence of cases in the Crown Court. While the impact of these provisions was initially muted⁴⁹², the CPS has recently begun to employ both barristers and Higher Court Advocates (HCAs) to conduct Crown Court prosecutions in-house on a large scale. Ostensibly a cost-saving device, by March 2008 945 in-house advocates were employed by the CPS, dealing with 6,083 cases listed for trial in the year 2007-08.⁴⁹³ The CPS has estimated that it saved £17.1 million in 2007-8 through employing in-house advocates instead of using members of the self-employed Bar.⁴⁹⁴ It is the goal of the CPS management to 'transform the CPS into a service that routinely conducts its

[murder-trial-threatened-by-legal-aid-reforms.html](#)>

⁴⁸⁹ Criminal Defence Service (Funding) (Amendment No 2) Order 2008

⁴⁹⁰ Legal Services Commission, 'The Future of Very High Cost Cases: A Consultation' (December 2008) <<https://consult.legalservices.gov.uk/inovem/consult.ti/VHCCProject08/listdocuments>>

⁴⁹¹ Legal Services Commission, 'The Future of Very High Cost Cases - A Response to Consultation' (March 2009) <<https://consult.legalservices.gov.uk/inovem/consult.ti/VHCCProject08/listdocuments>>

⁴⁹² See discussion of solicitors failing to take advantage of higher rights: M. Zander, 'Rights of audience in the higher courts in England and Wales since the 1990 Act: what happened?' (1997) 4 International Journal of the Legal Profession 167

⁴⁹³ Crown Prosecution Service, 'Annual Report and Resource Accounts 2007-2008' (2008) 14.

⁴⁹⁴ Ibid. The basis for these figures are not provided in the report.

own high quality advocacy in all courts, and across the full range of cases' by 2011⁴⁹⁵, with each CPS area set an 'HCA generated counsel fee savings target' to be achieved by instructing fewer self-employed barristers and keeping more case work in-house.⁴⁹⁶ The use of in-house advocates directly reduces the amount of prosecution work available to the self-employed Bar and the income available to barristers. According to senior members of the Bar, the problem has been reportedly exacerbated by the use of in-house advocates by defence solicitors who, as well as handling their own cases, improperly look to generate higher fees by representing defendants in hearings for which they do not have the requisite advocacy experience.⁴⁹⁷ They argue further that where counsel would normally be instructed, solicitors have kept cases in-house until a not guilty plea has been entered, leading to poor and disjointed representation. Because advocacy in the Crown Court is paid on a fixed fee basis, barristers' pay is reduced by solicitors representing defendants in the PCMH or one-off hearings despite the barrister doing all the preparatory work for the case to trial. The argument between the Law Society and Bar Council over the quality of HCAs seems to have grown in intensity in recent months after the Inns of Court President wrote and then withdrew a letter to resident and presiding judges seeking evidence about the quality of work done by HCAs.⁴⁹⁸ The Bar Council has also set up a working group on Higher Court Advocates in order to represent their concerns about the quality of advocacy and unfair competition. According to a report by the Chairman of the Bar, Desmond Browne QC, the common practice of referral fees paid by solicitor-advocates to solicitors' firms represents unfair competition as solicitors use independent advocates to top up their income on cases in the Crown Court.⁴⁹⁹ Under the Code of Conduct, barristers are not allowed to share their advocacy fee with solicitors, and would be disbarred for doing so. Solicitor-advocates are not subject to a ban on referral fees and can therefore undercut barristers by making

⁴⁹⁵ Crown Prosecution Service, 'Strategy and Business Plan 2008-11' (2008) 24.

⁴⁹⁶ Ibid 62.

⁴⁹⁷ T. Dutton, 'Is there a future for the Criminal Bar after Carter?' *Criminal Bar Quarterly* (London September 2007) 3; Minutes of the Bar Council Meeting, Parliament Chamber, Inner Temple (Saturday 27 September 2008) <<http://www.barcouncil.org.uk/aboutthebarcouncil/meetings/BarCouncilMeeting27September2008/>>

⁴⁹⁸ P. Rogerson, 'Inns of Court president withdraws letter on solicitor-advocates' *Law Society Gazette* 21 May 2009 <<http://www.lawgazette.co.uk/news/inns-court-president-withdraws-letter-solicitor-advocates/>>

⁴⁹⁹ D. Browne, 'Unfair Terms' Chairman's Report (The Bar Council, June 2009) <<http://www.barcouncil.org.uk/news/chairmans-search/detail.php?id=156>>

themselves more attractive to solicitors' firms.⁵⁰⁰ The Bar Council is currently considering whether to ask for the PCMH form to be amended so that a defendant is informed of his or her right to choose to be represented by a barrister, and whether the client care letter from solicitors should be amended so that defendants understand that they can be represented by a barrister if they wish.

Although there are no studies which quantify the extent to which barristers have been affected by HCAs, the CPS figures, the minutes of Bar Council Meetings, together with expression of disquiet in the media⁵⁰¹, strongly suggests that members of the criminal Bar have faced substantial falls in work load and income, particularly at the junior end.

d. The Crown Court Litigators' Graduated Fee Scheme

As part of understanding the background to barristers' incentives, the incentives of their instructing solicitors should be mentioned. Because barristers undertake work in the Crown Court under the instruction of solicitors, the preference of solicitors for trials or guilty pleas as determined by their financial incentives is important. The relationship with solicitors is explored in detail in the next chapter, as is the pay scheme under which they are currently paid. It is sufficient to say here that under the Litigators' Graduated Fee Scheme, introduced by the Criminal Defence Service (Funding) (Amendment) Order 2007, a strong preference for trials has been created.

⁵⁰⁰ The Solicitors Regulatory Authority decided in January 2009 against a ban on referral fees <<http://www.sra.org.uk/sra/news/sra-update/1866.article>>

⁵⁰¹ F. Gibb, 'Too many solicitors are no good in court, say barristers' *The Times* (London, 3 November 2008) <<http://business.timesonline.co.uk/tol/business/law/article5068635.ece>>; 'Is the Bar becoming a two-tier profession?' *The Times* (London, 30 October 2008) <<http://business.timesonline.co.uk/tol/business/law/article5041464.ece>>

e. Interviewees' comments

Against this environment of uncertainty over pay and diminishing available case work, the responses of the interviewees who participated in this research may be evaluated. Interviewees appeared to be extremely frank about how they felt about pay rates and most were happy to talk at length about their fees. While all interviewees were negative about the future of the Bar, and were generally 'very seriously concerned about what's happening within the profession'⁵⁰², there was a noticeable split in the optimism of the interviewees about their own future and earning potential. More senior members of bar when asked about workload said that they were 'very, very busy'⁵⁰³, or had 'fairly tightly packed'⁵⁰⁴ diaries. However, junior members in London seemed extremely worried about their workload and current earnings. The assessment of the Carter Reforms to the defence graduated fee scheme was generally positive with many interviewees remarking that pay rates were now fairer than they used to be, however there appeared to be additional worries about the distribution of work and the use of Higher Court Advocates (HCAs) in Crown Court cases. Those interviewed were able to describe the effect on the junior end of the Bar of the employment and use of in-house advocates by the Crown Prosecution Service. E1 and E2, of the same chambers, both admitted to problems with money and workload. E2 explained:

I can't pay my tax bill this year, and I've had some really slim months...Hours and hours of work, and then my 70 quid or whatever, of which as we all know £15 goes to the rent for here. My clerks take 10% so that's, that's 15 plus 7, is 22, plus my train fare to get there is say 30, so maybe I earned 35, 40 quid for the day. And it's just, that's poxy.

E1 was equally concerned about the sufficiency of work around:

I must admit I don't have a great workload. Not like many senior tenants who are snowed under with back to back Crown Court trials by any stretch of the

⁵⁰² A2.

⁵⁰³ A3.

⁵⁰⁴ B1.

imagination.

These concerns reflected the reduction in available work prosecuting less serious offences. I1 explained the effect of Higher Court Advocates on those of 5 years call or less:

I1: Yes. I've seen a significant reduction in work. Certainly a significant reduction in the lower quality work. They [HCAs] are taking on the stuff that would fill in between better trials. And a significant reduction in administrative hearings that I would do. For example, if I had a trial going on over a period of several days in the past I would often have other mentions and PDHs or PCMHS to do as well which would add to the income...

JB: In the same court?

I1: In the same court, in the same courtroom. But, now they are covered by the in-house advocates and we're not getting that kind of extra bonus work...it particularly affects the most junior people because they are not getting the junior trials. What I say is that, say I have a trial that might finish, go for a week and a day, I would then often have a three-day trial, a very small trial, to fill in that extra gap. There aren't as many small trials because the CPS are not briefing out to counsel on the minor stuff.

JB: And do you think that is going to affect you personally very much or do you think you'll be able to work round it?

I1: I think, I hope that I'm just about senior enough to, for it not to cripple me. I think if I was much more junior it's a disaster.

Such fears were not confined to London. N2, a barrister on the Midlands Circuit reported a dramatic fall in prosecution work:

JB: Have you found your prosecution work has gone down recently because of the HCAs?

N2: Horrendously.

JB: Really?

N2: I intend later today to have a meeting with my head clerk to discuss the fact that I haven't had a trial brief, a PCMH brief from CPS Derby for about four weeks now. Bearing in mind that, say before Christmas, before and after Christmas of '07 I was probably getting one, possibly more, two briefs in a week. So I'm worried.

HCAAs came in for particularly vehement criticism, particularly those working in the CPS. Many more junior barristers commented that low level criminal prosecution work was both poorly paid and reduced in volume. Cases were 'strangled at birth'⁵⁰⁵ by HCAAs who settled cases too easily or only 'farmed out' prosecutions to counsel once a case had passed the PCMH stage. Defence solicitors were also reported to be conducting cases up to and including the PCMH, only handing cases over to counsel once the preliminary hearings had been completed. Interviewees repeated the same fears as those more widely reported by the Bar Council. They were particularly concerned about solicitors being paid from their fixed fee for doing preparatory hearings. As N2 regarded such solicitors:

I think it's nothing short of a disgrace that the actual fee can just be pinched by a solicitor advocate, you know. There are things on the bottom of my shoe that have more professional pride, acumen and ability than some of these HCAAs playing barrister in the Crown Court.

Interviewees at the junior end of the Bar argued that this not only deprived them of income but made case preparation very difficult. Furthermore, interviewees commented that HCAAs did not have the incentives to deal with cases properly as they did not have the strong community pressures created by the Bar.⁵⁰⁶ As salaried lawyers, HCAAs could afford to make mistakes and not suffer the ignominy of having to face the robing room and their head of chambers after making serious errors in the handling of a case. It is

⁵⁰⁵ N2

⁵⁰⁶ N1.

impossible for this researcher to make an objective assessment of the quality of the work of HCAs and how confused an issue of quality may become with barristers' fear of loss of work, however, as noted above senior members of the Bar and members of the judiciary have commented that the quality of HCAs' work is commonly poor. In some cases these comments appear to have been extraordinarily critical and made in open court.⁵⁰⁷

These reports depict a fall in morale at the criminal bar and strongly suggest that incomes at the junior end are reduced. There are no accurate figures on the earnings of barristers available as samples often include barristers across all ranges of year of call, and fail to distinguish those in full time criminal work from those who have mixed practices.⁵⁰⁸ It is against this reported backdrop of rising fees but falling case load at the junior end of the Bar that incentives to barristers should be measured.

2. Economics based descriptions of lawyer behaviour

a. Supplier induced demand

The work of lawyers has been the subject of study on both a theoretical and empirical basis by economists applying utility theory to lawyer advice and decision-making. The amount of literature on lawyers and fees in the United Kingdom has increased dramatically over the past 10 years in response to the perceived crisis in legal aid funding.⁵⁰⁹ A number of economists have identified two problems in the relationship

⁵⁰⁷ In *Qiu Yeu and others*, Southwark Crown Court (2009) (unreported), HHJ Gledhill criticised the HCAs representing four defendants, commenting that they mislead the jury 'about one of the defendant's bad character...had little or no understanding of hearsay...[and] neither the experience or competency to adequately represent [the] client.' The firm employing three of the HCAs involved has denied that the judge's criticisms are valid and been equally critical of HHJ Gledhill's general attitude towards the HCAs throughout the trial: Response to HHJ Gledhill's Comments, Bullivant and Partners (20 April 2009).

⁵⁰⁸ See similar problems encountered by Lord Carter's Review of Legal Aid Procurement, 'Legal Aid: A market-based approach to reform' ("The Carter Review") (2006) 47.

⁵⁰⁹ Expenditure on criminal legal aid reached nearly £1.2 billion in the year 2003-4: E. Cape and R. Moorhead, 'Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work' (Legal

between the government, lawyer, and defendant under the thesis of supplier induced demand.⁵¹⁰ Supplier induced demand describes a multiple agency problem where the lawyer acts as agent on behalf of both government (in supplying a legal service which they pay for) and the defendant (where the lawyer acts and advises on behalf of the defendant). Firstly, if the government pays lawyers *ex post facto*, the government relies on them to determine the level of work done creating a “moral hazard”. Acting as rational economic actors, with no stake in cost of the service provided, lawyers can continue to inflate their supply of legal services beyond socially desired levels. Secondly, a conflict of interest between the defendant and lawyer may be created where particular courses of action are in the lawyer’s interest but run counter to that of the defendant. This would normally occur where one choice is more financially remunerative for the lawyer than another, but not necessarily in the defendant’s interests. Because the defendant relies on the lawyer’s expertise for assessment and direction of the case there is “asymmetry of information” and they can be persuaded to take decisions against their own interest. Some theorists have challenged this view, arguing that more recent governmental changes to criminal justice itself has created significant demand, and that a focus on supply induced demand disregards other ‘system incentives’ to increase the supply of legal services.⁵¹¹

Successive governments have largely chosen to view the supplier induced demand thesis as proof that lawyers exploit both the system and their clients for financial gain, ignoring the more tempered view of the literature as a whole. Recent reforms of legal aid, such as the recommendations made by Lord Carter have concentrated on addressing the first

Services Research Centre, Legal Services Commission July 2005) 4. Most of the increases in legal aid funding come from Crown Court cases.

⁵¹⁰ See academic support for the potential for supplier induced demand in criminal justice: A. Gray, P. Fenn, N. Rickman, ‘An Empirical Analysis of Standard Fees in Magistrates’ Court Cases’ (London: LCD Research Series, 1999); A. Gray, P. Fenn, N. Rickman, ‘Controlling Lawyers Costs through Standard Fees: an economic analysis’ in *Access to Criminal Justice*, eds. D. Wall and R. Young (1999) 192; A. Gray, N. Rickman, P. Fenn, ‘Professional autonomy and the cost of legal aid’ (1999) 51 *Oxford Economic Papers* 545-58; A. Gray, ‘The Reform of Legal Aid’ (1994) 10 *Oxford Review of Economic Policy* 57. For civil legal aid see: G. Bevan, ‘Has There Been Supplier-induced Demand for Legal Aid?’ (1996) 5 *CJQ* 98.

⁵¹¹ E. Samuel, ‘Criminal Legal Aid Expenditure: Supplier or System Driven?’ in R. Young and D. Wall (eds), *Access to Criminal Justice* (Blackstone Press, London 1996) 227; E. Cape and R. Moorhead, ‘Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work’ (Legal Services Research Centre, Legal Services Commission July 2005).

problem of supplier induced demand with respect to government spending, rather than the second agency problem in relation to defendants.⁵¹² The answer to ever increasing legal aid expenditure has been to cap the legal aid budget and introduced fixed fee schemes that are a set payment for a particular type of case or work. Rather than relying on hours or volumes of work done on a case, lawyers are remunerated the same amount regardless of effort expended case-by-case. The argument behind introducing fixed fees was that lawyers would lose money on more complicated cases where they were required to expend more work, but gain on other, more simple cases where less effort was required- the so called “swings and roundabouts” effect. The effect of the introduction of fixed fees has also been the subject of research and is of particular interest in studying barrister behaviour. As noted, barristers, through the AGFS are paid on an *ex ante*, fixed fee basis, as are their solicitor clients in the Crown Court. These reforms may have successfully brought government spending on legal aid under control, however, as discussed below, in focusing on supplier induced demand in provision of legal services to the government, reforms may have exacerbated the lawyer/defendant agency problem.

b. Supplier induced demand control- fixed fees in practice

All legally aided criminal defence work in England and Wales, and summary courts in Scotland is now paid on a fixed fee or standard fee basis.⁵¹³ The effect of fixed fee schemes has been the subject of empirical studies, which have examined the lawyer/defendant agency problem.

The introduction of standard fees in 1993 for solicitors work in the magistrates’ court

⁵¹² *The Carter Review* (n.508).

⁵¹³ Magistrates’ court work in England and Wales is paid under a standard fee arrangement introduced by Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989. Due to disputes between the government and solicitors, standard fees were not fully implemented until 1993. Both litigators and advocates are paid according to fixed fees in the Crown Court under the Criminal Defence Service (Funding) Order 2007 SI 2007/1174 and the Criminal Defence Service (Funding) (Amendment) Order 2007 SI 2007/3552

has been researched by Fenn et al.⁵¹⁴ Standard fees changed the way in which solicitors were paid so that whereas previously solicitors presented an itemised bill for payment based on piece rates at the end of the case, the system of standard fees paid a prospectively fixed payment for a large part of their work on the case, while retaining piece rates for a selection of inputs.⁵¹⁵ Fenn et al discovered that solicitors:

...reacted to the withdrawal of a fee for service arrangement on some inputs by, on average, reducing the supply of these inputs, whereas for those inputs which continued to be reimbursed retrospectively solicitors either did not significantly change their supply...or substituted more of the input for others that had been reduced...⁵¹⁶

In other words, those activities which were covered by the core standard fee were reduced by solicitors, whereas non-core 'inputs', extra activities remunerated separately, were increased. This minimisation of effort on a case under a fixed-payment regime has been called the 'fixed price effect' and has been supported by the study of the introduction of fixed fees for cases in summary proceedings in Scotland by Stephen et al.⁵¹⁷ Stephen et al discovered a 'reduced professional input' into cases by solicitors with fewer cases reaching the trial stage.⁵¹⁸ They also found a corresponding increase in case load by solicitors who took on more legally aided work (the 'volume effect'). As solicitors reduced the amount of work they were putting into cases, they freed time and resources to take on more cases.⁵¹⁹ In another article, Tata and Stephen explained that the theory that solicitors would adjust the amount of work necessary according to the difficulty of the case, making money in some and losing money in others was not

⁵¹⁴ P. Fenn, A. Gray and N. Rickman, 'Standard fees for legal aid: an empirical analysis of incentives and contracts' (2007) 59 Oxford Economic Papers 662.

⁵¹⁵ Ibid. 663.

⁵¹⁶ Ibid. 677.

⁵¹⁷ Stephen et al conducted a detailed study of Scottish solicitors' work in a number of different articles developing different parts of their analysis. For a statistical analysis of solicitor behaviour, see F. Stephen, G. Fazio, and C. Tata, 'Incentives, criminal defence lawyers and plea bargaining' (2008) 28 International Review of Law and Economics 212. For a socio-economic analysis, see C. Tata and F. Stephen, "'Swings and roundabouts': do changes to the structure of legal aid remuneration make a real difference to criminal case management and case outcomes?" [2006] Crim LR 722. Fixed fees for summary work in Scottish courts were introduced by Criminal Legal Aid Fixed Payments (Scotland) Regulations 1999 as amended by the Criminal Aid (Fixed Payments) (Scotland) Amendment Regulations 2002.

⁵¹⁸ Stephen et al (2008) (n.517) 217.

⁵¹⁹ Ibid.

occurring in practice. Their close analysis of solicitor behaviour found that:

...the system of fixed payments seems to have led to a reduction in client contact and a decline in the overall levels of preparation and case investigation.⁵²⁰

Solicitors were not investing the extra time needed in more complex cases and were in fact reducing the level of service covered by the fixed fee and increasing case volume. Therefore the quality of representation is likely to be reduced where extra professional inputs are required to prepare the case for trial under a fix fee regime. Tata and Stephen also found that the point at which the majority of cases concluded shifted to later in the process, towards a more profitable point for solicitors under the fix fee scheme. This strongly implies not only a change in the timing of advice given to defendants, but also the content of the advice. While the number of trials reduced slightly, earlier guilty pleas also reduced, with increases in later guilty pleading at a point where solicitors could expect much greater payment.⁵²¹

The clear conclusion from these studies is that following the introduction of fixed fees criminal defence lawyers respond in an economically rational manner to changes to their financial incentives.⁵²² According to this body of research, the timing and content of advice given to a defendant can be dependent on the fee that their lawyer receives. In particular, lawyers will attempt to maximise their fees while reducing inputs into individual cases if they are not paid specifically for them (as under fixed fee regimes) and resolve cases at more financially remunerative stages. Lawyers will only supply legal services up to a minimum level in order to satisfy minimum standards. While fixed payment schemes:

...substantially reduce the agency problem between the lawyer and the funder,

⁵²⁰ *Tata and Stephen* (2006) (n.517) 739.

⁵²¹ Under the Scottish system of fixed payments, the scheme does not remunerated lawyers until the intermediate diet- the mid-stage of the process towards trial. Those representing defendants at an earlier stage are not paid under the fixed fee scheme and receive a much reduced fee: *Ibid.* 738.

⁵²² *Stephen et al* (2008) (n.517) 218.

they exacerbate the agency problem between lawyer and accused. By, essentially, paying a fixed fee for each case or block of cases there is an incentive for the lawyer to reduce effort on individual cases to the minimum necessary to satisfy any externally set quality standard.⁵²³

These findings therefore have important implications for the advice giving process by barristers, and highlight the potentially serious agency problems between the barrister and defendant.⁵²⁴ These findings have particular significance for plea bargaining and whether a barrister properly advises a defendant of the risks and benefits of particular courses of action. Barristers are paid on the basis of fixed fees under the AGFS and probably respond to financial incentives in a similar manner to solicitors in both England and Wales and Scotland. By drawing an analogy with solicitors it might be predicted that barristers too reduce inputs covered by the fix fee and advise defendants to pursue courses of action which are more financial lucrative. However, some of those who conducted the study of English and Scottish lawyers reject the notion that lawyers make decisions that are signally against their clients' interests. Tata, amongst others, has described the concept of ethical indeterminacy as a way of explaining lawyer behaviour in relation to financial incentives.

3. Ethical indeterminacy

If then, the financial interest of the lawyer diverges from that of the defendant, is the lawyer likely to act in a manner detrimental to that of his client's interest? If the economic analysis of lawyers' incentives is correct, the conclusion might be that lawyers will pursue financial gain at the cost of the defendant's best interests, if they do not coincide in the same course of action. The difficulty with this reasoning lies in the terms 'best interests' and it is the idea of ethical indeterminacy which is now explored. Tata has argued persuasively that many decisions made by lawyers in relation to cases,

⁵²³ N. Garoupa and F. Stephen, 'Law and Economics of Plea Bargaining' Working Paper Series, Social Science Research Network (July 2006) para. 4.2.1 <<http://ssrn.com/abstract=917922>>

⁵²⁴ *Stephen et al* (2008) (n.517) 218. See also N. Garoupa and F. Stephen, 'Why plea bargaining fails to achieve results in so many criminal justice systems: A new framework for assessment' (2008) *Maastricht Journal of European and Comparative Law* 15; and, 'Law and Economics of Plea Bargaining' (n.523 above).

including advice on plea, are not necessarily clear-cut judgements where the client's best interests can be clearly discerned.⁵²⁵ As Tata points out, much of the criticism of defending lawyer behaviour:

...relies on an implicit conception of quality. To evaluate the conduct of defence lawyers requires some answer to the question of what else the lawyer could have done *and ought to have done in order to meet the client's best interests*.⁵²⁶

However, the construction of cases is an indeterminate and shifting task. What amounts to the defendant's best interests in a constantly changing set of perspectives relies on the lawyer's legal expertise, understanding of the case, and the time at which the decision is to be made. As Tata explains:

...it may be practically impossible to state any definitive advantage or disadvantage to pleading guilty at any particular point in the process since such a decision is contingent on an almost infinite assortment of variables- variables which are themselves elusive and indeterminate...I do not mean to suggest that it is impossible in the abstract to arrive at the 'best interests' of clients but, rather, that because lawyers are the daily custodians of legal knowledge, practical experience, and the keepers and masons of individual case 'facts', the search to define and fix a pure conception of best interests (and thus 'need') which is free of and 'uncontaminated' by other influences (not least the lawyer) may be empirically unrealizable.

This ambiguity of the best interests of the defendant creates ethical indeterminacy in choosing between different courses of action, where a lawyer may select one action over another because, out of one reason of many, the result will be financially favourable. Ethical indeterminacy rejects the idea that 'dedicated and professional people, such as defence solicitors, abandon basic values for simple financial gain.'⁵²⁷ Goriely et al, who studied the introduction of public defenders in Scotland suggested that while financial incentives create changes in lawyers' advice, these changes occurred in areas where it would be difficult to label one choice of action "best". Modifications in behaviour:

⁵²⁵ Tata (n.469).

⁵²⁶ Ibid. 495.

⁵²⁷ Tata and Stephen (2006) (n.517) 740.

...will be greatest in areas of 'ethical indeterminacy': where there is a choice between two courses of action, both of which have advantages and disadvantages and where ethical practitioners genuinely differ about which is the better. In making difficult and evenly balanced judgements, greater weight is placed on the advantages that flow from a course of action that is in one's own interests. Less weight is placed on those that flow from actions that run contrary to one's interests.

Furthermore, one should not expect the relationship between payment and behaviour to be simple or direct. Solicitors rely on various forms of social capital to be able to practice- most obviously a client base and credibility with the courts, [prosecution] service and colleagues. They would be loath to jeopardise either clients or credibility. [. . .] One might also expect that the relationship between financial incentive and behaviour would be mediated through values.⁵²⁸

Lawyers do not abandon ethical codes and consciously act against the defendant's interest, rather changes in financial incentives create subtle changes in lawyer working behaviour, where more finely poised decisions may be decided in favour of both the lawyer's financial interests and a potentially beneficial position for the defendant. Financial considerations 'mesh' with other considerations when advising a defendant in a choice between two decisions with no starkly obvious preference:

...it can be regarded as a realistic option in many cases, where the accused is unsure how to plead, to advise the accused to maintain a plea of not guilty until the day of trial...the multiplicity of ways of conceiving of the client's best interests allows a plea of guilty at the intermediate diet [stage] to be equally 'ethical' as a plea on the morning of the day of trial.⁵²⁹

In this example, on the one hand, a defendant may benefit from an early plea and a discount to his or sentence. However, the benefits of postponing a plea may include the collapse of the prosecution case on the day of trial as witnesses fail to show up at court, resulting in a complete acquittal. In the intricacies of a criminal trial, a lawyer may

⁵²⁸ T. Goriely, P. McCrone, P. Duff, C. Tata, A. Henry, M. Knapp, B. Lancaster and A. Sherr, *The Public Defence Solicitors' Office in Edinburgh: an Independent Evaluation* (Scottish Executive, 2001) 68-69.

⁵²⁹ *Tata* (n.469) 514.

receive information that the prosecution witnesses are highly reluctant to testify. If there is financial incentive for the lawyer to prefer a cracked trial, they may favour advising postponing the plea to see what the witness do. Furthermore, a delayed plea might encourage an offer of a lesser charge from the prosecution as the trial approaches.⁵³⁰ In this way, where ambiguity and indeterminacy surrounds the decision, the net effect of financial incentives is to turn lawyers' advice in favour of more remunerative courses of action, however, the lawyer's advice may still constitute a "proper" choice.

More overt forms of manipulation for financial gain are restrained by other drivers, and meshed together to form the advice itself. Peter Tague has detailed other incentives that may drive a barrister's approach to advice. Tague identified three areas where a barrister might act self-interestedly: reputation (to attract briefs), avoid sanction and maximise remuneration.⁵³¹ Although Tague's analysis of fees is no longer applicable to defence barristers⁵³², his arguments relating to reputation and sanction are still pertinent. These incentives come primarily from the instructing solicitor and are dealt with in more detail in the next chapter, however, they are discussed briefly here in relation to financial incentives. Firstly, in attracting briefs a barrister must build a reputation as a good advocate rather than a good negotiator. Tague argues that solicitors want barristers with adversarial prowess. A good trial advocate ensures a good result for their client either in the courtroom or by convincing a prosecutor to accept a lesser plea who will know that the defence barrister will exploit weaknesses in their case at trial.⁵³³ Secondly, a barrister wishes to avoid sanction. Although theoretically open to sanction by being sued in a negligence claim⁵³⁴, or having the conviction overturned in the Court of Appeal (with their behaviour explored and criticised), or being sanctioned by the Bar Standards Board, barristers in Tague's research were more concerned about upsetting solicitors who might then withhold future briefs.⁵³⁵ Barristers could not behave with impunity, as

⁵³⁰ P. Tague, 'Barristers' selfish incentives in counselling defendants over the choice of plea' [2007] Crim LR 3, 20-1.

⁵³¹ Ibid. 4.

⁵³² Ibid. 11-23. Tague's analysis of fees is under the old GFS.

⁵³³ Ibid. 7.

⁵³⁴ Barristers have been open to professional negligence claims since the House of Lords decision in *Arthur J S Hall & Co (a firm) v Simons* [2000] 3 All ER 673.

⁵³⁵ Ibid. 10.

those observed in *Negotiated Justice*, as solicitors would suffer damage to their own reputation in instructing bullying or manipulative counsel. A barrister who did behave in such a manner would soon lose briefs and possibly be embarrassed by a solicitor's complaint to their head of chambers. There are therefore significant incentives for barristers not to overtly manipulate defendants into pleading guilty. Indeed one might argue that a barrister protects his or her financial interest by responding to the other two incentives.

Tague's analysis relies heavily on the incentives created by the barrister's reputation amongst his or her instructing solicitors. It is argued here however, that a broader view of incentives should be taken. As the interviewees disclosed, considerations such as the opinion of the judge and colleagues at the local Bar are also important, as well as a commitment to professional standards. These are combined with matter of fact reasons such as what decision might result in a lower sentence for the defendant, or how the defendant might avoid conviction on a higher charge. This chapter will now discuss how interviewees viewed the incentives created by fees. As will be seen, they did not believe that direct manipulation of cases for fees was generally either possible or desirable.

4. Interviewees' views on their incentives

a. Fee awareness and clerks

After discussing with interviewees the general climate at the Bar in relation to pay, they were asked more direct questions about the incentives that the fees structure provided. Perhaps surprisingly, many of those interviewed confessed to not understanding the way in which they were paid. Only L2 professed to having somewhat of an expertise in fees, recognising that most barristers did not know the 'ins and outs' of the AGFS:

...this can sound like I'm blowing my own trumpet, but I'm actually the

exception to the rule. And lots of people approach me because I actually do take an interest in [fees] and I've liaised with the court taxing officer on various things, and I ring him on various things to try and resolve them because I've taken an interest. Most counsel, I don't think, have a bloody clue.

Other barristers commented that they were unsure as to how exactly the AGFS worked and had a 'sketchy, confused'⁵³⁶ overview of how fees depend on different case outcomes:

JB:...Do you know the difference in fee you would receive in a case that resolved at PCMH, one of the thirds, a cracked trial and the trial itself? Do you know the difference in the fee you would receive?

I2: No. PCMH I think it's a plea fee, is it?

JB: Under Carter.

I2: I don't know what the difference is. You get more for a cracked trial I know than a plea, otherwise I don't know how much more.

This may of course simply reflect the sample of barristers who volunteered to be interviewed, however, it may demonstrate a naivety at the Bar about fees and case outcomes. Tague observed that from his interview sample many had not bothered to analyse the GFS closely enough to work out the financial outcomes of different choices over plea.⁵³⁷ A general lack of awareness of how cases were paid would mitigate the effect of financial incentives and make other drivers, such as reputation and sanction, more important in decision-making. It may also highlight the importance of the barrister's clerk in case outcome.⁵³⁸ Many interviewees described leaving the matter of fee to their more knowledgeable clerk who dealt with the distribution of briefs and was the primary point of contact for solicitors. Although not explored with the interviewees,

⁵³⁶ K1.

⁵³⁷ Tague (n.530) 4.

⁵³⁸ Barristers' clerks have various traditional roles and are responsible for a huge range of administrative activities within chambers including liaising with solicitors, distributing briefs and calculating fees.

the role of the clerk may be relevant to how cases are dealt with. Clerks have previously been described as having the power to accelerate or curtail a barrister's career, and as perceiving their 'governors' as economic units to be hired out on a profitable basis.⁵³⁹ Clerks are often paid on a percentage basis from the brief fee and therefore have a direct interest in when cases are resolved. It may be that they manipulate the distribution of cases within chambers in order to maximise their income, or at least manipulate the barristers in chambers in order to satisfy solicitors who brief chambers on a regular basis. Clerks in their role as powerful practice managers, are the first point of contact with solicitors and court listing officers, and have a greater role in determining when cases are resolved than previously accounted for. They are in a position to withhold work from those barristers who do not deal with cases in a way that satisfies them or instructing solicitors, arrange the diaries of the barristers in chambers, and any barrister who fails live up to expectations on a regular basis might find themselves out of briefs. Exactly how clerks might manage barristers in relation to fees is not described in detail here, however, a greater understanding of fees by clerks, their direct remuneration, plus their relatively powerful position within chambers places them in a unique position to control barrister behaviour with regard to case outcomes.

b. Constraining factors

Although some barristers acknowledged that different pay rates could inevitably have an effect on advice, all of the interviewees highlighted other important considerations that made pursuing a purely financially motivated course extremely difficult. The interviewees revealed a complex working world where not only pay rates played a role in case decision-making. Relationships between them, other counsel, judges, solicitors and defendants played a crucial role in how barristers approached their work. N2 gave a clear order of those whose respect he had to gain and maintain in developing a good Crown Court practice:

⁵³⁹ J. Flood, *Barristers' Clerks: The law's middlemen* (Manchester University Press, Manchester 1983) 59.

Three people if you are to have a good practice, three people that have to respect you and like you and regard you as a good operator. Judge, opponents, you know, the Bar, your colleagues and the person sat behind you. The importance of those three is in this order: the person sat behind you comes first, then your opponent, then the judge in that order. You with me? And people who are doing things like that to make money, they are going to lose the respect of the person behind them so they won't get any briefs.

According to N2, a barrister motivated solely by case-by-case financial considerations would have an extremely short career as briefs ran-out and solicitors no longer instructed them, and would not climb the career ladder as they lost the respect of their colleagues and judges. This view was supported by K2 who felt that far too many third party constraints worked on a barrister and made financially motivated decisions difficult to get away with even in the short term.

K2: I really don't think that most of the time defendants, barristers are advising out of self-interest to the barrister... the other thing to remember about all this is that there are a lot of people involved in the case, not only on the defence team. You've got the solicitor, the client, maybe the client's family, their friends, and then on the prosecution team you've got the officer in the case, the CPS lawyer, the barrister, you've got a victim and of course, you know, they have some but not a lot of impact now, but they have to be considered, so no decision is ever made by one person alone. And many defendants will say, "I'll think about what you've said miss, but I want to go and talk to my missus about it." There are all sorts of checks and balances built in throughout the system. And then ultimately there's the judge. The judge can't get into the arena, he can't say to the prosecutor you shouldn't have accepted that plea, I'm not going to allow it, we will have a trial on the murder, but he can make his views very well known to either side. He can say to the defence "have you considered the strength of the case", etc, etc. So there is the judge too, so there are a lot of people involved here...It will be quite hard to manipulate the system...and no barrister wants to get a reputation of being in any way dishonest or sharp or self interested.

JB: A good way to lose work?

K2: And reputation with the judges and your colleagues.

Previous analysis has perhaps not given proper emphasis to other important actors in

what advice is given. Defendants are not isolated from other parties, alone with the defence barrister who dictates to them the necessary plea. As discussed in the next chapter, solicitors are interested parties in what decision is made⁵⁴⁰ as are, in some cases, the defendant's family members, and the judge. It should also be remembered that the prosecuting counsel also acts according to their own incentives in determining how a case might be resolved that may not match with those of the defending barrister. Under the current schemes of pay, prosecuting counsel do not have the same financial and practical interests in negotiating charge bargains as they may have previously.⁵⁴¹ Prosecuting barristers are paid under a different Graduate Fee Scheme and are instructed by the CPS who have different interests from defence solicitors in how cases are resolved.⁵⁴² While a defence barrister might wish to resolve a case with a bargained plea to a lesser charge, prosecuting counsel may believe that his or her interests are served by running the case to trial in order to maximise their reputation with the CPS or increase their own fee. In this sense the defence barrister does not have free rein over when and what plea is entered and is restricted by their opposite counsel in making a plea more favourable to the defendant.

c. Reduced fixed price and volume effects

Other factors suggest that barristers might not be subject to fixed price or volume effects to the same extent as that observed in studies of solicitors. As barristers are paid according to a fixed fee one might assume that they increase volumes of work and reduce inputs that are not accounted for in the fixed fee. This is, however, not necessarily the case with the majority of barristers. To discuss the fixed price effect a good example might be that of unused material. Unused material is evidence disclosed to the defence that 'might reasonably be considered capable of undermining the case for

⁵⁴⁰ Cf. *Sanders and Young* (n.468) 418.

⁵⁴¹ For analysis under previous GFS: Ibid. 422.

⁵⁴² Prosecuting counsel are paid according to the Crown Prosecution Service Graduated Fee Scheme (Issued November 2005, Amended July 2008).

<http://www.cps.gov.uk/publications/finance/mog_index.html>

the prosecution against the accused or of assisting the case for the accused.⁵⁴³ Barristers under the AGFS are not paid for looking at unused material and therefore have no financial incentive to read it. However, barristers' work is placed in a far more public setting than the work of solicitors. Barristers must continually attend court and provide advocacy in front of a judge and jury. This places a strong incentive on them to prepare properly for hearings. As M1 commented on his work: 'we have to stay up preparing cases, you know, sometimes into the early hours of the morning in order to satisfy judges, preparing skeleton arguments, doing this that and the other.' Moreover, barristers, as discussed above, probably desire to build a reputation as a good advocate amongst their peers and instructing solicitors. A competent prosecutor or solicitor would soon realise that a barrister they instructed or were against was not reading the unused properly, and he or she would risk losing their respect. It is therefore in a barrister's interests to examine the unused to promote a professional image and build their career.

Furthermore, barristers are not subject to the volume effect to the same extent. Firstly, as a self-employed practitioner, with no legally qualified support staff, a barrister cannot take on more employees and use economies of scale to increase the profitability of their case load. Barristers can only practically take on a limited number of cases and are confined by their own personal ability to work. A barrister cannot respond to a fixed fee regime by increasing capacity. Solicitors' firms are not subject to such constraints and can expand to increase work load and case turn over as was observed in the Scottish studies. Secondly, the volume effect is also limited by the quantities of work available to barristers. Although barristers might be able to turn cases over more quickly in response to a fixed fee regime, they have a limited source of cases- their instructing solicitors. Solicitors can increase their police station presence to increase the number of cases they have coming in to their practice and have greater opportunities to source defendants. Barristers on the other hand are confined to what their solicitors can provide and cannot contact defendants directly.⁵⁴⁴ The opportunities for them to increase case load in response to fixed fees is very restricted. It is therefore argued that the volume effect of a

⁵⁴³ Criminal Procedure and Investigations Act 1996, section 7A.

⁵⁴⁴ 'Code of Conduct of the Bar of England and Wales' (8th Edition, Bar Standards Board 2004) Rule 401(a).

fixed fee regime on barristers is small when compared to their solicitor counterparts.

d. Limited evidence of fee manipulation

Some barristers interviewed believed that a minority of members of the Bar might make financial inclined decisions when defendants could be advised to “string the case out” a little longer. In that situation, a number of barristers gave examples of fellow counsel withholding advice on plea until later on, after PCMH, towards trial when they might pick up a cracked trial fee instead of the smaller “plea fee”. L1 described barristers withholding advice at PCMH to enhance their fee:

I think some cases crack later than they should because counsel want a cracked trial fee. No question about it, I’m sure that’s right.

Such behaviour was admonished by the interviewees who felt that advising defendants to withhold their plea diminished the credit given by the sentencing judge. Any expressed belief that other counsel withheld advice was generally based on unconfirmed suspicion. Others reported one or two confirmed instances of fee manipulation taking place over a number of years in practice. These were very particular, out-of-the-ordinary instances where counsel either co-defending or opposite them as defence barrister gave oddly late advice, or asked the judge to preserve credit artificially:

One thing that did strike me as unusual is quite recently where somebody said, “can you please preserve my client’s credit? He can’t plead guilty today because of various things that need to be considered, but there’s a real likelihood that he will be pleading. Please preserve his credit.” But, I think other people read that as, “please don’t make my client plead today and get me a smaller cheque, please keep his credit preserved, but get me a bit bigger cheque when he does plead.”⁵⁴⁵

That a defendant was eventually advised to plead to an offence at a later stage was not

⁵⁴⁵ J1

however a defendant being given the wrong advice; rather the advice was too late in order for the barrister to increase his or her fee. This practice was emphasised, if it happened at all, as something that was very much a minority practice by a few 'bad apples' who soon got known for being 'dodgy operators'.

The majority of London barristers interviewed felt that more overt manipulation of fees was something confined to provincial court centres, and was not a feature of London courts. The practice profile of some of these barristers gave credence to their views as they worked at both London and provincial court centres, and had opportunity to compare the behaviour of counsel. H1 believed that Norwich Crown Court, in particular, had a justified reputation as a court where cases were routinely manipulated to maximise fees. This was not necessarily to defendants' disadvantage as he believed that the judges and list officers were complicit in the practice:

...there was a practice, and judges went along with this, of always pleading not guilty at the plea and case management hearing, asking the judge to preserve full credit for two weeks, the judge would tip the wink and say, "yeah". You'd then have the case listed after two weeks to plead guilty. You then get a cracked trial rather than plea which is obviously much more, the client has not lost any credit because the judge has gone along with it and you've got more money out of it. Now, I know that slightly changed under Carter, but it still goes on.

H1 stressed that this was a very rare occurrence, but was much more likely to happen at a small, provincial court than at one of the London area Crown Court centres.

Among other London barristers interviewed, Nottingham Crown Court seemed to have taken on a mythical quality for corrupt barristers and judges manipulating cases for unscrupulous ends. Although Nottingham was regularly mentioned as a place where fees were manipulated by barristers, few had personal experience of the court itself. An often repeated account was that of "double listing" whereby a barrister would receive two briefs for trial on the same day, ask to be listed in both cases, but crack one case and run the other as a trial, thus increasing their fees.

Barristers interviewed at Nottingham Crown Court categorically denied that any such practices were possible, and the current research found no evidence to support the rumours amongst those interviewees in London. There was also an unsubstantiated rumour amongst interviewees from the Midlands Circuit that a previous judge during the early 1990s had encouraged an overt practice of placing pressure on defendants to plead. That judge had been since removed and changes implemented. When asked in the Leicester Crown Court robing room about “double listing”, a group of barristers agreed that to do so would be very difficult, and could so potentially backfire as to be disastrous. Firstly, they argued that they would have to involve the list officer’s cooperation, who would likely place his or her job in jeopardy if either judge discovered that they were assisting a barrister to be listed in two trials at the same time. Secondly, they argued that if either solicitor found out about the double listing they would withhold further briefs. Double listing was therefore neither possible nor desirable.

It is perhaps reasonable to label these accounts of off circuit misbehaviour as mostly apocryphal. Those who repeated the stories regarding Nottingham Crown Court did not do so on recent personal experience and were vague anecdotes that they had heard from a friend, recounting the experience of another third party, in some cases from years ago. What seems more likely is that there are regional differences in the way in which cases are approached, however, those approaches are not necessarily determined by financial considerations. Some of the reasons for differences between the circuits are discussed in Chapter 8.

e. Incorporating ethical indeterminacy

The evidence provided by the data potentially supports the notion of ethical indeterminacy. As predicted by ethical indeterminacy, barristers, in general, do not overtly manipulate defendants over plea for financial gain, but rather mesh fee considerations with other incentives. The majority of those interviewed argued that

manipulating fees in individual cases might ruin a career in the long term. Although such barristers did exist, they were a small minority of practitioners who were known amongst the local bar and judges for being poor at their jobs and untrustworthy. Any barrister who wished to have a long and successful career would find overt manipulation of defendants to maximise fees extraordinarily difficult, practically speaking (convincing all parties concerned to take a guilty plea as a correct course), and suffer the longer term harm that being perceived as “sharp” would do to their reputation. In fact, in order to look after their career prospects, barristers felt that they had to appear to be utterly scrupulous while at work. This was not because of the ethical code of conduct, but rather expectations of their behaviour by others, especially the solicitor, judge and other barristers, prevented them from resolving cases to maximise fees.

That is not to say that fees do not play a significant role in what advice is given to the defendant. The literature on English and Scottish solicitors provides a compelling reason to believe that fees have an important effect on at what point cases are concluded and how cases are handled. Many of those interviewed agreed that fees might play some role in advice, however, that role could be said to be diminished to those indeterminate decisions where the defendant’s “best interests” are not readily discerned. On aggregate, these financially favoured decisions are more regularly taken and produce an overall effect of preferred courses of action based on fees. It is therefore important to determine what decisions are favoured by the current fee scheme. This chapter will now analyse the Advocates’ Graduated Fee Scheme to determine what they might be.

5. Modelling barristers’ pay

a. Background

Before creating a model for barrister’s pay, it is necessary to understand the scheme under which barristers are paid. Most cases proceeding through the Crown Court are subject to government funded legal representation. Under the Access to Justice Act

1999, section 14 and schedule 3, a defendant who would ‘be likely to lose his liberty or livelihood or suffer serious damage to his reputation’⁵⁴⁶ is granted representation in the courts. For practical purposes that means almost all defendants in the Crown Court are provided with legal representation by a barrister or higher court advocate paid for by the government as a matter of course.⁵⁴⁷ If a defendant is provided with legal representation, his or her advocate is paid according to the Advocates’ Graduated Fee Scheme (AGFS) under the Criminal Defence Service (Funding) Order 2007.⁵⁴⁸ The structure of defence barristers’ pay was altered by the government in April 2007 following the release of Lord Carter of Coles’ review of legal aid procurement⁵⁴⁹, the following joint consultation carried out by the Department of Constitutional Affairs and Legal Services Commission⁵⁵⁰ and subsequent Command Paper presented to Parliament.⁵⁵¹ Advocates in the Crown Court have been paid according to the Graduate Fee Scheme since 1997; a form of *ex ante* fee payment, the Graduated Fee Scheme paid advocates according to a standard basic fee which covered much of the work carried out in conducting the case with various additional payments (known as ‘bolt on payments’) made for extra work carried out by the advocate. In respect of barrister’s pay for defending cases the Carter Review recommended that ‘base payments’, the basic fee paid to barristers for a case, should be increased.⁵⁵² However, the Review also recommended that most of the bolt on payments for work such as attending PCMH, conferences with the defendant, interim court hearings, etc, should be incorporated into the basic fee.⁵⁵³ The basic fee was to incorporate the first two days of trial, and uplift payments were only to be given in

⁵⁴⁶ Access to Justice Act 1999, Schedule 3, part 5.

⁵⁴⁷ Means tested legal aid has been introduced to magistrates’ court representation by the Access to Justice Act 1999, Schedule 3, para. 3B as amended by the Criminal Defence Act 2006. Defendants with higher incomes or capital assets are expected to cover some or all of the costs of their representation. The Legal Service Commission and Ministry of Justice are currently consulting as to whether means testing should be introduced to the Crown Court: Legal Services Commission and Ministry of Justice, ‘Crown Court Means Testing’ Consultation Paper (CP27/08, 2008).

⁵⁴⁸ SI 2007/1174. The AGFS applies to all trials lasting between 1 and 40 days and details the payments to be made in respect of cracked trials and where a guilty plea is entered. For longer, more complicated cases, the Very High Cost Case scheme discussed above applies.

⁵⁴⁹ *The Carter Review* (n.508).

⁵⁵⁰ Department of Constitutional Affairs and Legal Services Commission, ‘Legal Aid: a sustainable future’ (CP 13/06, 2006)

⁵⁵¹ Department of Constitutional Affairs and Legal Services Commission ‘Legal Aid: The Way Ahead’ (Cm 6993, 2006).

⁵⁵² *The Carter Review* (n.549) 76-77.

⁵⁵³ *Ibid.*

longer trials or where pages of prosecution evidence or witnesses were above stated limits.⁵⁵⁴ These recommendations did not radically alter the way in which barristers were paid, but extended the principles of *ex ante* fees for Crown Court advocacy that had already been introduced in the original Graduated Fee Scheme in 1997. In keeping with the general ethos of the Carter Review, the purpose of paying advocacy in this way was so that the budget for legal aid could be more easily predicted and kept under control. The proposed AGFS is set out at Annex 4.5 to the review and is not remarkably different from the legislation put forward in the Criminal Defence Service (Funding) Order 2007. The increase in basic fees amounts to an average of a 16% pay rise for barristers instructed to defend⁵⁵⁵, but depends on when cases are concluded. Compared with the previous GFS, there is a reduced difference between the fee for a cracked trial and a trial. Notably, other than a brief point that ‘payment is front-loaded to reward early preparation and resolution of cases’, no precise explanation is given in the Carter Review, the Consultation Paper or Command Paper for why cases are to be remunerated at certain rates nor why the gap between fees for cracked trials in the final stages and trials has been closed.⁵⁵⁶

b. The current AGFS

i. Trial fees

The basic principle behind graduated fees is that the advocate receives a fixed, *ex ante* fee which does not vary according to the amount of hours or work done by the advocate in preparing the case. Under the AGFS, cases are categorised according to offence type, A to J.⁵⁵⁷ Offences of a similar type and seriousness are placed together in order to reflect the comparable work load, difficulty and experience required to conduct the case.

⁵⁵⁴ Some ancillary payments remain.

⁵⁵⁵ *General Council of the Bar* (n.474).

⁵⁵⁶ Peter Tague also notes this missing explanation from the government’s reports: *Tague* (n.530) footnote 57.

⁵⁵⁷ Schedule 1, part 6, Criminal Defence Service (Funding) Order 2007. Class K offences are now listed under class F and G.

For example Class A is entitled ‘Homicide and other grave offences’ and includes murder, manslaughter and infanticide.⁵⁵⁸ Barristers instructed in any particular case receive a basic fee with extra payments (uplifts) for extra days spent in trial beyond the second day, pages of evidence exceeding fifty pages, and each prosecution witness exceeding the first ten.

The calculation of fee for each case is done according to a simple formula:

$$G = B + (d \times D) + (e \times E) + (w \times W)$$

“G” is the amount of the graduated fee. “B” is the basic fee specified. “d” is the number of days or parts of a day on which the advocate attends at court by which the trial exceeds 2 days but does not exceed 40 days. “D” is the fee payable in respect of daily attendance at court for the number of days by which the trial exceeds two days but does not exceed 40 days. “e” is the number of pages of prosecution evidence excluding the first 50, up to a maximum of 10,000. “E” is the evidence uplift appropriate to the offence. “w” is the number of prosecution witnesses excluding the first ten. “W” is the witness uplift appropriate to the offence. The basic fee and each of the uplifts are specified according to the category of offence and category of trial advocate (Queen’s Counsel receive more than junior barristers). An example of the calculation in practice may assist understanding how fees are calculated. According to the tables under Criminal Defence Service (Funding) Order 2007, Part 2, section 5, a burglary is a class E offence, with a basic fee for a junior alone of £755. The advocate receives an uplift of £377 for each day of attendance over 2 days; an evidence uplift of £1.13 per page over fifty pages; and a witness uplift of £5.66 per prosecution witness over ten witnesses. Therefore the fee given to a barrister in a 2 day domestic burglary (Class E) trial with 70 pages of prosecution evidence and 4 witnesses would be calculated as follows:

⁵⁵⁸ Ibid.

$$£755 + (0 \times £377) + (20 \times £1.13) + (0 \times £5.66) = £777.60.$$

The barrister in this case receives a basic fee, an uplift of £22.60 for the extra 20 pages of evidence, but no extra payments for days in court or witness as the numbers in this case do not exceed the stated limits. The barrister under the AGFS receives no extra payments because he or she attends the plea and case management hearing, or had a pre-trial conference with the defendant. All these fees are included in the basic fee.

ii. Cracked trial and guilty plea fees

The AGFS also deals with cases that conclude before a trial.⁵⁵⁹ Commonly, these cases are where the defendant either pleads guilty at the plea and case management hearing (PCMH) or because the case becomes a cracked trial.⁵⁶⁰ As with the fee structure for trials, a barrister representing a defendant who pleads guilty at PCMH or in a case that later cracks receives a basic fee according to the category of offence. This basic fee is increased by the pages of prosecution evidence in an uplift payment. Furthermore, the AGFS splits the time between the date where the trial date is set and the date for trial into thirds (called first third, second third and third third). If a defendant pleads guilty at PCMH, a barrister's basic fee and evidence uplift remains the same as a case that later cracks within the first third before trial. However, as the case enters the second third and the third third before trial the basic fee and evidence uplift is increased. Other than a difference in evidence uplift for prosecution evidence over 1,000 pages, there is no difference in the fee received between second third and third third.⁵⁶¹

⁵⁵⁹ Schedule 1, part 3, Criminal Defence Service (Funding) Order 2007.

⁵⁶⁰ A cracked trial is defined under Schedule 1, part 1 of the Criminal Defence Service (Funding) Order 2007 as a case that has been listed for trial (normally at a plea and case management hearing), but the case does not proceed to trial either because of the entry of a guilty plea by the defendant or the prosecution offers no evidence in the case.

⁵⁶¹ The evidence uplift is capped at 10,000 pages. Uplifts for all categories of offences are higher for the first 250 pages. This is reduced to about a quarter for 250-1,000 pages and then increased again for the next 1001-10,000 pages. In the second third this is about a 30% of the fee paid per page of the first 250 pages. In the third third the uplift for pages 1,001 to 10,000 is the same as the first 250 pages. There seems little reason why these payments are structured this way.

Another example will serve as a helpful illustration. Using the same domestic burglary case as before, a barrister representing a defendant who pleads guilty at the PCMH receives £472 basic fee, plus £0.41 per page of prosecution evidence.⁵⁶² The barrister would therefore receive £500.70 for a guilty plea entered at that stage (basic fee of £472 plus £28.70 evidence uplift). If this case had a trial date set at PCMH 90 days hence, the case would enter the second third at 30 days, and the third third at 60 days. If the case were to crack at 35 days the barrister would receive a basic fee of £660, plus an uplift of £1.75 per page of prosecution evidence, or £782.50 (£660 plus £122.50 evidence uplift).⁵⁶³ This amount would not change after 60 days as extra third third payments only affect cases with over 1,000 pages of prosecution evidence. It is worth noting that in a domestic burglary with a two day trial and the same number of witnesses and pages of prosecution evidence, the barrister would be paid more for a cracked trial than for conducting the defence at a trial itself. As will be shown, the Carter reforms to GFS have created greater incentives for the late cracking of cases.

iii. Assessment of the pay structure under AGFS

The structure of the AGFS under Criminal Defence Service (Funding) Order 2007 is highly inconsistent in rewarding effort and incentivising outcomes. Firstly, the cracked trial second or third third basic fee is not uniformly proportionate to that of the trial fee. For example, for Class C offences, entitled ‘Lesser offences involving violence or damage, and less serious drugs offences’, junior barristers are paid a basic fee for a cracked trial which is 73% of that of the trial fee⁵⁶⁴ whereas for a Class E offence, “Burglary, etc”, junior barristers are paid a basic fee for a cracked trial which is 87% of that of the cracked trial fee.⁵⁶⁵ This might be understandable if more intense preparation were required for certain types of cases (entailing greater compensation for the

⁵⁶² Schedule 1, part 3, table A, Criminal Defence Service (Funding) Order 2007.

⁵⁶³ Ibid.

⁵⁶⁴ £755 instead of £1,038.

⁵⁶⁵ £660 instead of £755.

barrister's efforts), however the basic cracked trial fee in fraud cases of over £100,000 are remunerated at 85% of the trial fee.⁵⁶⁶ Fraud cases are notoriously difficult to defend because of the complexity of the financial dealings that such cases involve. Equally, cracked homicide trials are paid at 78% of the trial rate.⁵⁶⁷ As with fraud, defending a murder case requires a massive amount pre-trial of preparation that might be reasonably compensated as a proportion of the trial fee. There seems little reason why cracked burglary trials are compensated proportionately better than either fraud or murder.

Secondly, no reason is given in the Review for why the uplifts for evidence in cracked trials are treated differently according to case type, whereas in trials all evidence is paid the same. If the differentials in cracked cases are paid because different levels of experience and effort are required for the various categories of cases, then a similar distinction should be made at trial. That they are not creates a problem for how case outcomes are incentivised leading to situations where a cracked trial fee can be higher than the trial fee.

Thirdly, the Carter Review fails to account for why the uplift for pages of evidence in trials does not begin until the 51st page, whereas in cracked trials all pages of evidence are paid. The result, described below in detail, creates some situations where a second or final third crack pays better than the trial. This is objectionable on two grounds. Firstly, a trial inevitable involves more work for the advocate, therefore on a principled basis they should receive a greater fee. Secondly, such a pay scheme creates perverse incentives for the barrister who will favour a late cracked trial rather than a trial. This both endangers defendants who should be advised that a trial is in their interest, and prefers a result that the government should wish to avoid: the late cracking of cases. Late resolution of cases before trial is continually blamed as an expense that the courts and the tax-payer can ill-afford.⁵⁶⁸ Although government policy papers have blamed lack of

⁵⁶⁶ Class K. £1,887 instead of £1,604

⁵⁶⁷ Class A. £1,981 instead of £2,547

⁵⁶⁸ The Audit Commission in 2002 estimated that £80 million were wasted each year through adjournments, delayed and cracked trials in the magistrates' court and Crown Court: Secretary of State for the Home Department, Lord Chancellor and the Attorney General, 'Justice for All' (Cm 5563, 2002) 51.

preparation as the cause of ineffective trials⁵⁶⁹, cracked trials accounted for 41.6% of cases listed for trial in 2007.⁵⁷⁰ Of all cracked trials, 80.3% cracked due to a defence related decision.⁵⁷¹ The severity of this problem is made worse by the fact that for some categories of case the uplift for all pages of evidence in cracked trials is paid at a higher rate than the £1.13 paid to junior barristers for all pages of evidence for all categories of offence. The issue of prosecution page uplifts can be best explored through the lens of the financially motivated barrister.

c. The (busy) barrister motivated exclusively by money

In the model used here, our defence barrister is presumed to be motivated entirely by money and advises his clients according to that interest. This barrister cares nothing for his reputation amongst members of his chambers, judges, solicitors or defendants, nor does he fear sanction through a complaint to the Bar Standards Board. His aim is solely to extract the highest possible financial gain out of the cases in which he is instructed. This barrister is also adept at manipulating defendants into doing exactly as he wishes, convincing them to change plea whenever he advises it. In this model all defendants take his advice and follow it.

To begin with, the basic example of Category E offences can be studied and the outcomes of different ways of dealing with cases can be modelled.⁵⁷² Category E offences are paid the least out of any of the 11 categories of offences⁵⁷³ and covers all types of burglary under section 9 of the Theft Act 1968, as well as the offence of going equipped contrary to section 25 of the same Act. Defendants charged with this type of offence are typically represented by more junior members of the Bar in the first five to

⁵⁶⁹ Ibid.

⁵⁷⁰ Ministry of Justice, 'Judicial and Court Statistics 2007' (Cm 7467, 2008) Table 6.13.

⁵⁷¹ Ibid. Table 6.11. A defence related decision is either the defendant enters a late guilty plea or the defendant pleads guilty to an alternative accepted by the prosecution.

⁵⁷² Although the lowest paid, other categories of offences are similarly relatively remunerated as between trials and cracked trial fees.

⁵⁷³ Schedule 2, part 2, section 5, and part 3, table A Criminal Defence Service (Funding) Order 2007.

ten years of their careers. In this model, our barrister is instructed in a two day burglary trial to begin on Monday of the coming week. On Sunday evening the financial motivated barrister considers his options as how best to resolve the case. He will know from the tables in the Criminal Defence Service (Funding) Order 2007 on cracked trials and trial fees that the basic fee for a Category E offence is £660 and £755 respectively; a difference of £95. If it is initially assumed that there is no evidence in the case and no witnesses, and that the barrister values £95 more than a free day⁵⁷⁴ then the trial is marginally favoured by the barrister. If however, the evidence uplift is introduced, the incentives quickly change. As no uplift is given for the first 50 pages of evidence at trial, the fee for trial remains the same (£755) until 51 pages of prosecution evidence. However, the first 250 pages under the cracked trial fee tables are remunerated at £1.75 per page. Therefore, the cracked trial fee quickly increases with evidence, while the trial fee remains the same. After 50 pages the trial fee does begin to increase because of the evidence uplift, but only at £1.13 a page. This is somewhat lower than the payment given for the cracked trial evidence uplift, and the trial fee is overtaken by the cracked trial fee at 63 pages of evidence.⁵⁷⁵ Between 63 pages of evidence and 625 pages of evidence it is more financially rewarding for the barrister to crack the trial and go home on the Monday. The greatest difference is at 250 pages of evidence, where the barrister receives £116.50 more for a cracked trial than for a trial.⁵⁷⁶ In the model, witnesses are not particularly important. The barrister will only receive an extra £5.66 for every extra witness after the first 10 and, given the nature and complexity of Category E cases of between 1 and 625 pages of evidence, it is unlikely that the witness uplift will be regularly used. It is therefore plainly in the barrister's financial interest to crack cases within this range. Above 625 pages of evidence, a trial is favoured by the barrister, and the defendant will be encouraged to maintain a not guilty plea.⁵⁷⁷ Figure 6-1 shows the fee that can be earned at different page counts between a cracked trial in the final third

⁵⁷⁴ Even if the case cracks, the barrister will need to attend Monday at court dealing with the guilty plea.

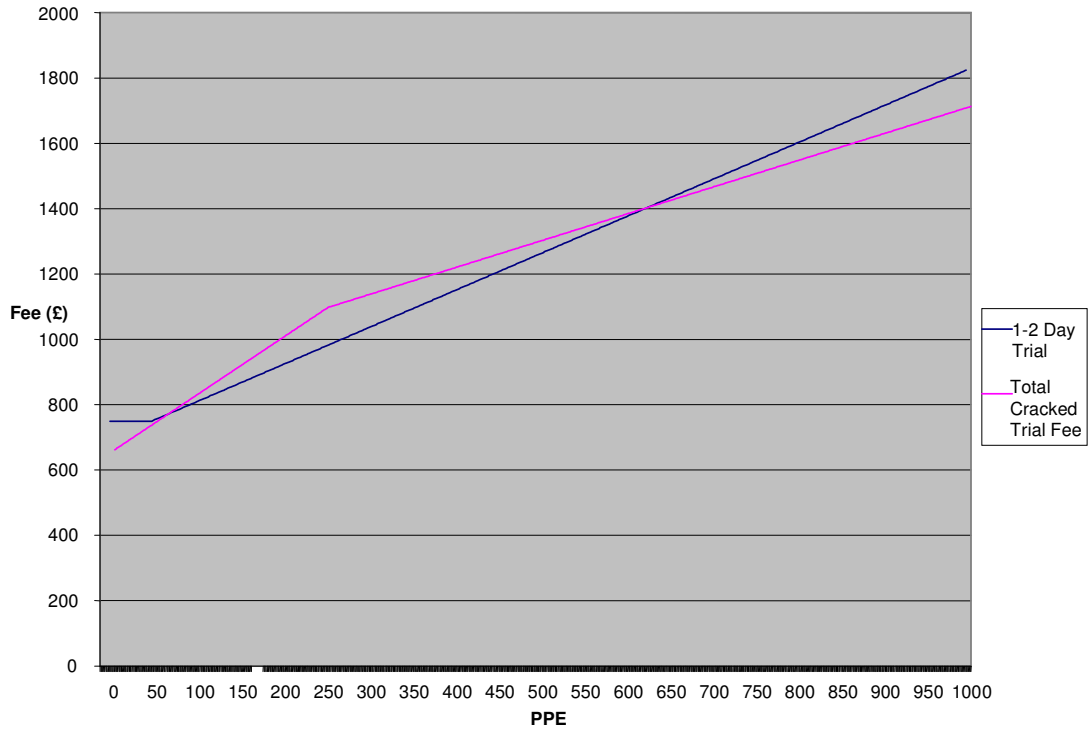
⁵⁷⁵ Trial fee of £769.69 (basic fee of £755, plus evidence uplift of £14.69) versus a cracked trial fee of £770.25 (basic fee of £660 plus £110.25 evidence uplift), a difference of £0.56.

⁵⁷⁶ The difference in fee begins to reduce after 250 pages because the evidence uplift for cracked trials is reduced from £1.75 per page to £0.82.

⁵⁷⁷ The evidence uplifts above 1,000 pages remain £1.13 a page for a trial and £0.82 for a crack trial in the third third: Category E Offences, Schedule 1, part 2, section 5, and part 3, table A, Criminal Defence Service (Funding) Order 2007. The incentive towards trial therefore increases as evidence pages increase, augmented by inevitable day uplifts and witness uplifts as the evidence grows.

and a two day trial.

Figure 6-1 Fee for 1-2 day trials and cracked trial fee (category E offence)



This presumes of course that the barrister's alternative to a trial is to crack the trial and then not do any work the next day. In fact our barrister may know that his chambers is a busy set, and that briefs are regularly returned late in the day as counsel instructed are unable to complete all of the cases they are instructed in. Our defence barrister then considers cracking the case on Monday, in easy expectation of a returned brief coming into his pigeon hole on Tuesday, Wednesday, or perhaps everyday of the rest of the week. Two possibilities present themselves for our barrister to consider. Firstly, what would his financial reward be for cracking two cases; the one at hand and the one he may fairly rely upon? Secondly, what would his financial reward be for cracking the immediate case and then running the next brief as a trial?

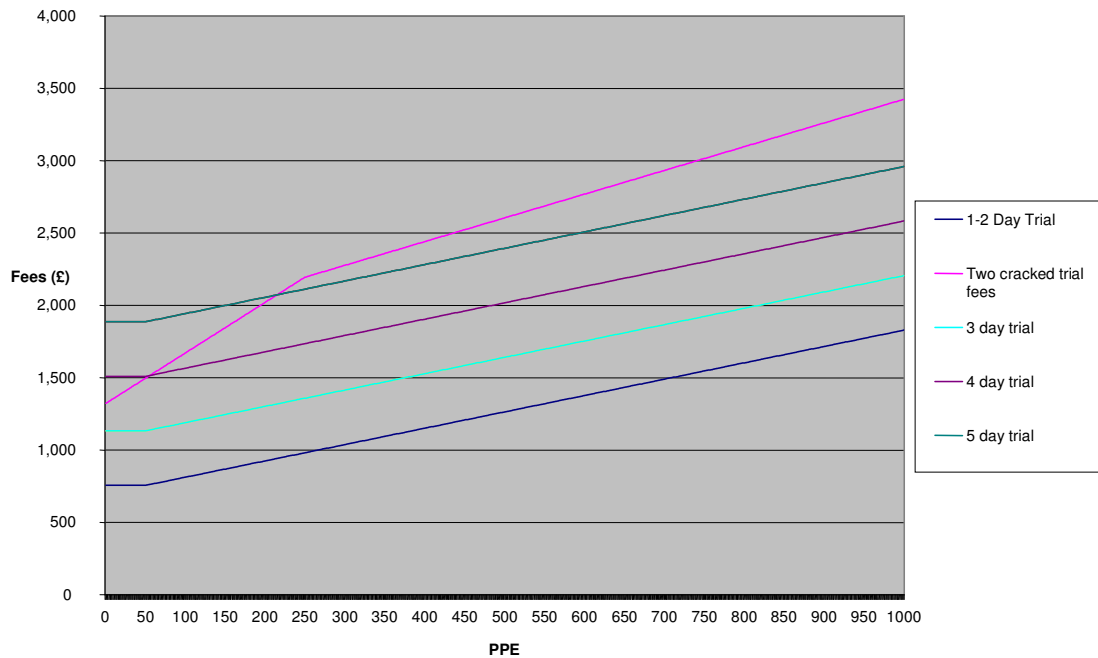
If the financial benefit of cracking two cases is compared with that of a trial, the barrister is given a stark choice in preference of cracking both cases. Continuing with the

example of Category E offences, because the difference between a cracked trial and a trial itself is never particularly large, two cracked trials are usually significantly more lucrative than one trial alone. The trial uplifts do little to reduce the incentive of choosing two cracked trials of the same class rather than a trial, indeed, two cracked trials always result in a higher income for barristers than two or three day trials under the AGFS.⁵⁷⁸ Because the evidence uplift for cracked trials is now double i.e. £3.50 per page (rather than £1.75) for the first 250 pages, and £1.64 for every other page thereafter, the trial evidence uplift rate of £1.13 is always outmatched, and the fee for trial will never meet or exceed the fee for two cracked trials. In combination with the difference in basic fee, the evidence uplift in cracked trials makes even four or five day trials unattractive if a similar case can be cracked in the same time period. Four day trials only yield greater financial reward when the evidence page count remains below 56 pages (an unlikely scenario).⁵⁷⁹ Five day trials are also more attractive at lower levels of prosecution evidence, but still at only relatively low levels of evidence with two cracked trials becoming more lucrative after 214 pages of prosecution evidence per case. Figure 6-2 shows the projected fees for two cracked trials against the fees for one to two, three, four and five day trials.

⁵⁷⁸ The fee for a two day trial equals £755. The fee for a three day trial equals £1,132 (£755 basic fee plus £377 uplift). The fee for two cracked trials equals £1,320 (£660 basic fee x 2).

⁵⁷⁹ This is an average number of pages between the two cracked cases. Therefore the four day trial may have a higher number of pages than the second “returned brief” case. Provided that the average page count between the two cases is above 56, the barrister earns more money by cracking both cases.

Figure 6-2 Fees for 1-2, 3, 4, and 5 day trials and two cracked trials (category E offence)



A trial becomes an increasingly unfavourable choice as time continues because the barrister can pick up several cracked trials, rather than just two. Two simple cracked trials of an average of 30 pages of prosecution evidence each earn the barrister £1,425.⁵⁸⁰ Together with the cracked trial fee for the five day trial of say, £1,010⁵⁸¹, the barrister stands to earn £2,435. When compared to the five day trial fee of £2,055⁵⁸² there is a clear preference for the cracked trials. It should be remember that a barrister must take time out of his or her schedule to prepare a five day trial and the time available for picking up other trials is greater than the court time alone.

The benefits of cracking the immediate case and running the other as a trial are even more financially lucrative for short trials. A barrister is always better to crack a one day trial if he can pick up another one to two day trial the following day. At a minimum he

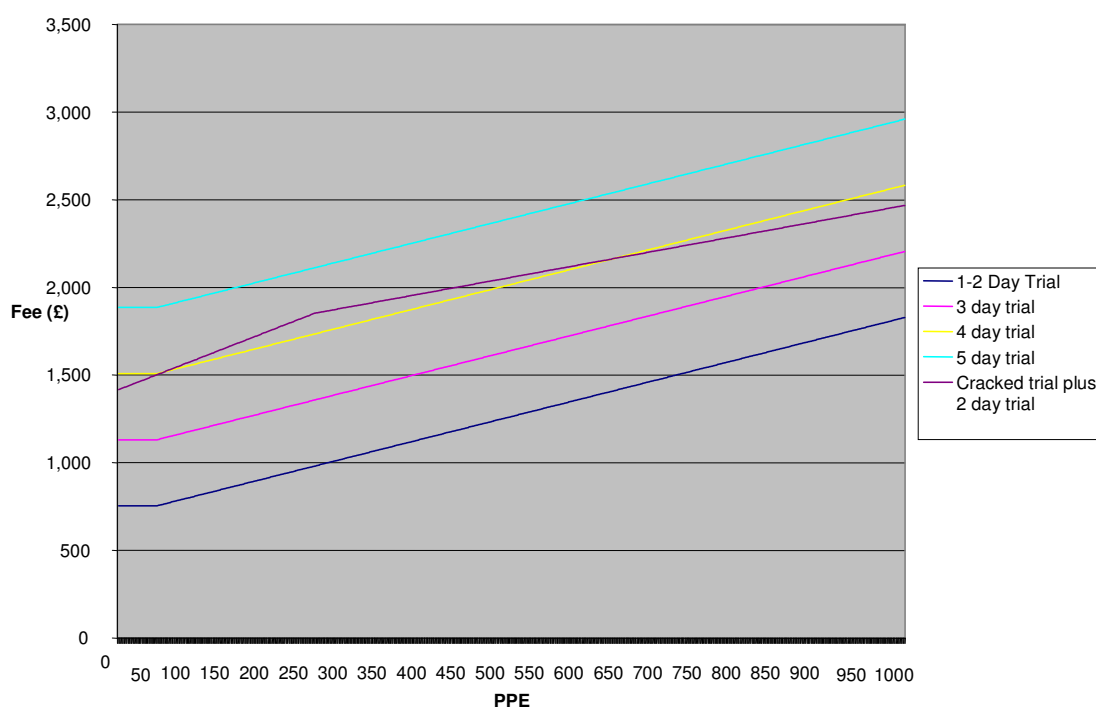
⁵⁸⁰ A basic fee of £660 + £52.50 (30 pages of evidence x £1.75) x 2.

⁵⁸¹ This is a cracked trial fee for a case with 200 pages of prosecution evidence: A basic fee of £660 + £350 (200 x £1.75).

⁵⁸² A basic fee of £755 + £1,131(day uplift of £377 x 3) + £169.50 (200 pages of evidence x £1.13).

will earn £1416.75⁵⁸³ compared to £755.⁵⁸⁴ A three day trial would always be cracked, if a one to two day trial were available,⁵⁸⁵ as would a four day trial if the page count exceeded 61 pages or remained below 632 pages. A five day trial would never be cracked in preference of running a one to two day trial. Figure 6-3 shows the projected fees for one to two, three, four and five day trials as against the fee for cracking the same trials and running a one to two day trial with less than 50 pages of prosecution evidence.

Figure 6-3 Fees for 1-2, 3, 4, 5 day trials and the same cases as cracked trials plus a 2 day trial (category E offence)



Many of these calculations presume that the barrister is busy and can pick up cases quite easily. However, even if the barrister has a quiet practice, he will prefer his clerks to take on two clashing cases offered by instructing solicitors, confident that he can convince one of the defendants to plead guilty. This will be particularly tempting if the barrister knows the case against one of the defendants is overwhelming, but realises he can wait

⁵⁸³ Basic cracked trial fee of £660 + £1.75 (1 page of prosecution evidence) + £755 basic fee for 1-2 day trial.

⁵⁸⁴ This presumes that the first trial would last longer than one day. If the trial takes one day only, running both cases as a trial is more rewarding.

⁵⁸⁵ The barrister would earn at least £1,416.75, as compared to £1,132 (£755 basic fee plus £377 day uplift). Once evidence is factored in the cracked trial rate climbs at a higher rate owing to the greater evidence uplift.

until nearer the trial to express these problems and convince the defendant to plead guilty.

d. Applying the model to barristers in practice

Picking up more than two trials in a week might not be an extraordinary situation for some barristers, but some junior members, such as E1, E2, and I1 interviewed in London, described their work flows as limited and that they did not have the numbers of cases necessary to crack cases on the expectation of “something turning up”.⁵⁸⁶ According to the model of the AGFS presented here, cracking cases would make no sense from a financial point-of-view and one might expect their practice to be dominated by trials. However, the model does suggest that barristers in popular chambers with many cases have a strong incentive to crack longer trials and fill in the time made available with 1-2 day trials or other cracked trials. There is no research to suggest what occurs in practice, but this analysis proposes that the AGFS has made work load more important in the financial incentives given to barristers than under previous schemes. Under Tague’s model of the older Graduate Fee Scheme, trials were generally more lucrative to barristers, even when there were sufficient briefs available for a barrister to crack.⁵⁸⁷ By making cracked trial fees significantly better paid, the Carter Reforms have strongly incentivised late cracking of trials in chambers when there are “spare” briefs available. This may eventually manifest itself as a regional difference. As will be seen in Chapter 8, there appears to be greater competition in London and the South East compared with the Midlands for criminal work amongst members of the Bar.⁵⁸⁸ The current research suggests that the AGFS may exacerbate the regional difference in cracked trial rates, by encouraging those in areas with more work to crack cases closer to trial, and in areas where work is reduced to promote trials.

⁵⁸⁶ There is some limited evidence that barristers’ clerks hold on to cases to insure against one of their members having a case that cracks, but this is currently unsubstantiated as a clear description of current practices: P. Rock, *The Social World of an English Crown Court* (Clarendon, London 1993) 272.

⁵⁸⁷ Tague (n.530) 12-17.

⁵⁸⁸ Chapter 8:2.b.i.

That is not to argue that barristers overtly manipulate cases for fees, rather, applying ethical indeterminacy, a barrister is more likely to delay the advice on a plea of guilty where a high crack fee is available. As previously noted, there may be good reasons for delaying advice, such as a possibility that a witness might not turn up, because the prosecution might drop charges, or because the prosecution evidence is slightly weaker than it might be. The financial incentive acts to increase the likelihood that these courses with indeterminate benefits are taken more regularly with the consequent outcome that cracked trials become more common place.

6. Conclusion

The government reforms that have sought to bring legal aid spending under control may have been successful in combating the problem of supplier-induced demand, but they have ignored the agency problem created between barrister and defendant. While fixed fee schemes do allow governments to cap legal aid budgets, there is sufficient empirical evidence to suggest that lawyers reduce inputs on cases, increase the volume of cases, and resolve cases at more financially lucrative points, changing the content and timing of advice. The decision by individual lawyers to respond to financial incentives is not, however, necessarily an attempt to overtly manipulate defendants. According to a model of ethical indeterminacy lawyers respond to financial incentives in the context of other rewards and incentives. The choice between two decisions is often not immediately a choice of one best course over the other, and many decisions are indeterminate in their benefits to the defendant. Financial incentives are also meshed with other drivers that affect lawyer behaviour. The claim that lawyers respond to these incentives by manipulating defendants in the short term in order to increase fees ignores longer term drivers that act on lawyer decision-making. The current research has tried to establish the extent to which this may occur in the practice of criminal barristers. From the interview data it can be concluded that barristers themselves do not believe that wide scale manipulation for fees is taking place. The observations of their own practice can be supported by an analysis of other drivers that act upon their behaviour. Barristers are constrained and ignore the benefits of short term manipulation by responding to a range

of incentives including the demands of instructing solicitors, their colleagues and judges. Although some barristers may advise defendants in order to maximise fees in the short term, they are soon labelled as untrustworthy by the rest of the community. From the interview data it is clear that barristers themselves recognise that there are long term costs in such a strategy.

To the extent that barristers are affected by financial incentives and take indeterminate decisions that are more financially lucrative, the current system of pay favours the late cracking of cases listed for trial, if there is sufficient work available. As the model of the AGFS has shown, cracking cases when there are other cases to be taken tends to generate higher fees. In areas where barristers have high case turnovers there may be an increase in cracked trials in response. Where case loads are reduced, however, the current climate of competition from Higher Court Advocates for work suggests that prosecution and defence barristers will seek more trials to maximise their dwindling fees, particularly at the junior end. Despite a pay rise for individual cases, the interview data details that junior barristers are facing a decline in criminal case work loads. However, further research would be required to quantify the exact level of reduction and the ways in which barristers' working behaviour changes in response to this drop.

Chapter 7: The relationship with solicitors

In any criminal case before the Crown Court in England and Wales a self-employed barrister may not be directly instructed by a defendant to act as an advocate on his or her behalf.⁵⁸⁹ Accordingly a barrister must receive instructions from a solicitor (the professional client) before undertaking the defendant's case. Self-employed barristers in the Crown Court are therefore completely reliant on their relationships with solicitors to maintain their workload. In developing a thesis on the drivers behind barristers' advice on plea in the Crown Court this crucial professional relationship must be explored. In doing so this research has examined several sources, including the interview data and the scheme under which solicitors are paid. The current literature on the relationship between solicitors and barristers will also be discussed. As will be seen, the literature raises several important research questions that this chapter attempts to answer through data collected from interviews with both barristers and solicitors. The data collected from interviews will be presented here as a partial explanation of how the barrister/solicitor relationship affects the advice given on plea. The complexity of the relationship described will be enhanced by a discussion of the incentives of defence solicitors, particularly in respect of financial incentives given to solicitors as well as reputation and sanction.

1. Current conceptions of the solicitor-barrister relationship

In McConville and Baldwin's account in *Negotiated Justice*, barristers repeatedly behaved with a disregard for the views of the defendant.⁵⁹⁰ These barristers acted in this manner with apparent impunity; the barristers observed were repeatedly instructed by the same solicitors despite acting in a manner that defendants found distressing and objectionable. McConville and Baldwin did not investigate in *Negotiated Justice* why solicitors may have been content to allow barristers to treat defendants in this way.

⁵⁸⁹ 'Code of Conduct of the Bar of England and Wales' (8th edn, Bar Standards Board 2004) Rule 401(a).

⁵⁹⁰ J. Baldwin and M. McConville, *Negotiated Justice* (Martin Robertson, London 1977) 46.

However, McConville et al argued that solicitors in England and Wales had developed a culture where guilty pleas are the norm and that defendants' guilt is presumed.⁵⁹¹ The inference seems to be that solicitors are unconcerned by what happens to their clients once the case has been briefed to a barrister.

If this description of solicitors was accurate, the tendency for barristers to manipulate defendants into pleading guilty is consistent with a general defence ethos of extracting guilty pleas in almost all circumstances. According to this view, barristers might be expected to convince a defendant to plead guilty as part of the process by which criminal defendants are managed. While this is logically consistent, there are several difficulties according to the present research with the guilty plea culture theory. Firstly, as already explained in Chapter 4, many barristers themselves do not believe that they, or their colleagues, manipulate defendants to plead guilty. Although some barristers agreed that it was their job to persuade defendants to plead in a particular way, this was generally out of a paternalistic concern that defendants make a choice that would result in a lower sentence. These barristers did not see themselves as operating within a pervasive guilty plea culture, rather they were reacting to the evidence and circumstances of particular cases. The majority of barristers interviewed felt that it was not part of their job to convince a defendant to plead one way or the other but rather to inform them as to their options and the implications of their choices. If a guilty plea culture was dominant amongst defence solicitors, barristers who advised in a facilitative style or, conceivably, a persuasive style, would be expected to clash with their instructing solicitors' expectations. In the interview data there was little evidence to suggest that such disagreements occur regularly.

A barrister who might wish to manipulate a defendant as early in the process as is alleged, confounding a defendant's expectations of what plea is to be entered immediately prior to PCMH or the trial itself⁵⁹², requires a high degree of collusion with

⁵⁹¹ M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press, Oxford 1994) 140-41.

⁵⁹² See observations: *ibid.* 254.

the solicitor in order to do so. A barrister who wanted a defendant to change their plea at short notice must be confident that the solicitor in the case would be content with such an abrupt volte-face by the defendant. While it is accepted that if a guilty plea culture predominates Crown Court litigation such behaviour might be accepted, this ignores other important incentives for the solicitor, such as building a reputation in the community amongst potential defendant clients. Defendants are free to choose who represents them as their solicitor which creates market conditions and competition between solicitor firms. It is suggested that guilty plea culture fails to properly describe the complexity of decision-making, and in fact, the solicitor-barrister relationship places large barriers in the way of either barrister or solicitor manipulating a defendant for unscrupulous ends.

Furthermore, the guilty plea culture model does not take into account the financial incentives given to solicitors. If solicitors are as susceptible to altering their handling of cases because of the litigation fee structure (as studies have suggested in the magistrates' court⁵⁹³), then fees might be expected to be extremely important in informing how they approach their relationship with barristers in the Crown Court. As will be shown, solicitors may strongly prefer trials to guilty pleas or cracked trials because of the fee structure. Solicitors whose approach to cases was determined by a guilty plea culture would be inconsistent with the fee incentives provided.

2. Subsequent incentives

The description of solicitors in McConville et al in *Standing Accused* and that of barristers in *Negotiated Justice* depicts solicitors as highly passive actors in the solicitor-defendant-barrister relationship. As noted by Peter Tague, those barristers observed in *Negotiated Justice* appear to behave with striking disregard as to the possible loss of work when irritated solicitors withheld future briefs due to the mistreatment of their

⁵⁹³ P. Fenn, A. Gray and N. Rickman, 'Standard fees for legal aid: an empirical analysis of incentives and contracts' (2007) 59 *Oxford Economic Papers* 662.

clients.⁵⁹⁴ The methods employed by barristers in *Standing Accused* also suggested that barristers were unconcerned by solicitors who might question sudden changes in plea and failures to develop cases beyond PCMH. Taken together, *Negotiated Justice* and *Standing Accused* create the impression of uninvolved solicitors, who defer to counsel's judgment in determining the course of Crown Court cases. As McConville et al say of the disinterested role of the solicitor in the Crown Court:

The absence of solicitors from case conferences with counsel and from pre-trial discussions between counsel and defendants, where many crucial decisions are taken, leaves barristers with a free hand in deciding how cases should be dealt with and what pleas should be entered.⁵⁹⁵

Solicitors are described as disengaged from the running of cases, delegating work to unqualified, inexperienced staff, who have little ability to uphold the rights of the defendant.⁵⁹⁶ However, the incentives and context within which solicitors work, particularly in the form of fees, have changed radically since the *Standing Accused* study. These changes should have reinvigorated solicitor interest in Crown Court case outcomes.

The present research has not investigated the practices of defence solicitors beyond their relationship with barristers, nor is it intended that this chapter offer a detailed discussion of the practice of defence solicitors in England and Wales, however, some conclusions can be drawn on the basis of the interviews and an analysis of solicitors' incentives.

Following Tague's reasoning that barristers wish to be known as good advocates (rather than as bullies or good negotiators) in order to attract briefs from solicitors, solicitors too wish to be known for instructing counsel who provide good advocacy. To an extent, unquantified by this research, solicitors should be subject to market pressures that

⁵⁹⁴ P. Tague, 'Barristers' selfish incentives in counselling defendants over the choice of plea' [2007] Crim. L.R 3, 9-10.

⁵⁹⁵ *McConville et al* (n.591) 239.

⁵⁹⁶ *Ibid.* 240-46

include a reputation for properly explaining issues and not making the defendant feel pressured into decisions, together with access to advocates who provide the same. Defendants have been found to be mostly unable to assess the quality of the substantive advice given to them by their lawyers, however, defendants can assess matters relating to how lawyers deal with them and guide them through the criminal justice process.⁵⁹⁷ Although defendants in the English speaking world have been found to be highly passive in decision-making in their own cases, further studies have revealed that clients are able to make assessments about their lawyers using criteria such as support, honesty, and communication. Goriely et al found in Scotland that defendants accepted that they were not in a position to assess the quality of the legal advice they had received or the command of the law demonstrated by their solicitor, but did feel able to assess their lawyer in relation to client process issues.⁵⁹⁸ Defendants assessed solicitors on the basis of ‘listening to them; believing them; being able to explain the process; being accessible; “standing up for” them, etc.’⁵⁹⁹ Given that defendants can and do make assessments of their lawyers, it is perhaps correct to assume that solicitors have a reputation among defendants for the quality of client care on the basis of these factors, which includes their selection of counsel who must also exhibit these characteristics. Solicitors who do not provide counsel who also display these favourable, client assessed characteristics are likely to have a poor reputation and lose business as a result.

Solicitors therefore have a strong incentive not to brief barristers who behave as those observed in *Negotiated Justice* or *Standing Accused*. Although the “manipulation” of the defendant appeared to be far more subtle in *Standing Accused* than *Negotiated Justice*, barristers were described as inaccessible and dismissive of defendants, while embracing the prosecution account of the case.⁶⁰⁰ However, this interpretation ignores the incentive to barristers not to act in a manner which would upset the client and therefore the solicitor. As Tague points out, a barrister who acts as those described by McConville et

⁵⁹⁷ H. Somerland and D. Wall, ‘Legally Aided Clients and their Solicitors: Qualitative Perspectives on Quality and Legal Aid’ (Law Society Research Study No.34, London 1999).

⁵⁹⁸ C. Tata, T. Goriely, P. Duff, A. Henry, P. McCrone, B. Lancaster, A. Sherr and M. Knapp, ‘Does Mode of Delivery Make a Difference to Criminal Case Outcomes and Client Satisfaction? The Public Defence Solicitor Experiment’ [2004] Crim LR 120, 131.

⁵⁹⁹ Ibid. 132.

⁶⁰⁰ *McConville et al* (n.591) 252-61.

al should lose future briefs from the solicitor and potentially damage his or her career.⁶⁰¹ The interview evidence supported this contention. S2, a senior partner of a large Midlands firm explained, building a reputation for fighting cases and instructing counsel who would do so was important:

JB: Are these barristers [those with a reputation for poor advocacy or cracking cases easily] those who you would instruct?

S2: No, because as we've said...we want a reputation for being able to hang tough on things and defend things to the max...to the max where necessary, but even where it's not necessary, as well as they need to be defended. You want to have that reputation rather than being thought as part of that shite system.

Solicitors who wished to advance their career in terms of the seriousness of the cases that they handled and grow their firms to take on more case work needed to develop a reputation for appropriately instructing counsel. Although S2 did not expand in detail on the meaning of defending matters 'as they needed to be defended', there was a clear implication that any realistic chance of acquittal should be competently and vigorously pursued.

This was recognised by barrister interviewees who understood that solicitors wanted to build a reputation for standing up for clients rather than advising them in a way that served the purposes of the lawyers themselves:

...I think you get a reputation very quickly if you are someone who [manipulated defendants]. They're running a business like anyone else, they want to attract clients who are charged with serious offences, because that improves their reputation and obviously they don't want to defend ABHs all their life. Solicitors want to do bank robberies and murders, and that sort of thing.⁶⁰²

Because solicitors may avoid counsel who are poor advocates, a subsequent incentive

⁶⁰¹ *Tague* (n.594) 10.

⁶⁰² A2.

for barristers to provide good representation, at least in the defendant's terms, is created. From the data collected for this research, that incentive was clearly understood by barristers who acted accordingly. G1 explained that solicitors would rather have a barrister who was inclined to fight cases:

I think the solicitors want barristers who will fight their clients' corner. So no, I think that solicitors like barristers who fight cases because they perceive that you are not just rolling over. So no, I think generally speaking my experience is that solicitors like you to fight their client cases and not the other way round.

Solicitors, as those in any other client orientated business, are subject to reputation effects among those they serve. Although many first time offenders may begin their relationship with their criminal defence solicitor through the police station duty scheme⁶⁰³ (and therefore do not choose their solicitor as such), having a reputation for defending matters 'as well as they need to be defended' was of primary importance to both solicitors interviewed. In England and Wales defendants have the right to choose their representative, and can shop around for a solicitor they feel will assist them best.⁶⁰⁴ Solicitors reported having a 'client base' consisting of repeat offenders and those who sought out their services after recommendation from someone they had previously represented. Barristers who wished to gain briefs from these solicitors and advance their own careers appeared to be subject to the client orientated incentives of the solicitors who instruct them.⁶⁰⁵

3. The solicitor-barrister relationship: a moderating influence?

The barristers observed in *Negotiated Justice* and *Standing Accused* generally advised defendants with little reference to the desires or wishes of the solicitor. Commonly,

⁶⁰³ Any person detained at the police station is entitled to free and independent legal advice and assistance: Police and Criminal Evidence Act 1984, Code of Practice C, Section 3. The police station duty solicitor scheme is designed and run by the Legal Services Commission.

⁶⁰⁴ Access to Justice Act 1999, section 15.

⁶⁰⁵ Of course, not all solicitors will pursue a reputation of "defending things to the max" with the same purpose as the solicitors interviewed for this study.

solicitors sent a clerk or other legally unqualified individual to accompany counsel to court and to sit in conferences with the defendant when advice was given.⁶⁰⁶ These solicitor representatives were described in *Standing Accused* as poor advocates for the defendant's rights and regularly failed to question the decision-making of barristers, even when they appeared to ignore the defendant's desire to contest the prosecution case.⁶⁰⁷ Solicitors' representatives were regularly quiet during questioning and provided little assistance at all in plea decision-making. These clerks were seen as evidence by the authors of the induction, acceptance and then endorsement of guilty plea culture by defence lawyers and their employees:

Moreover, presence at conferences is significant in the development of ideologies for clerks and articulated clerks because it is here that they learn the legitimacy within legal culture of manipulating the client and the demands of routinisation.⁶⁰⁸

These findings are difficult to reconcile with the evidence from this research that solicitors have strong incentives to maintain a reputation in the community for fighting cases and "standing-up for defendants." As indicated this may have a direct effect on the advising style adopted by barristers. Barristers who may wish to manipulate defendants for either financial gain, or because of an expectation of a guilty plea, or because of the influence of court communities, must also take into account the attitudes and desires of their instructing solicitor.⁶⁰⁹ Barristers are not generally instructed in a series of one-off cases but rather develop relationships between several solicitor firms for the core of their work load. Moreover, many solicitors tend to instruct particular chambers with preferred barristers within the set for different types of work. For example, as B1 explained, some barristers are known for excellent mitigation, or handling youth clients, or offences of different kinds. The barrister must therefore establish and maintain relationships with solicitors in order to create a successful career. Because solicitors are often "set regulars", the pressure to maintain good relations are not only created by the barrister's

⁶⁰⁶ *McConville et al* (n.591) 240-46

⁶⁰⁷ *Ibid.* 259-61.

⁶⁰⁸ *Ibid.* 245-46.

⁶⁰⁹ See *Tague* (n.594) 10.

desire for a healthy career, but also by other barristers within the same chambers who wish to maintain a good reputation with instructing solicitors for their own benefit. A barrister who might wish to manipulate a defendant, leaving them feeling unhappy with the content and manner of the advice given, runs a clear risk of upsetting both the professional client and their colleagues in chambers with potentially damaging effects on their career. According to Tague, the threat of either losing the confidence of a solicitor or a complaint to their head of chambers was a very real concern for the barristers he interviewed regarding their advice.⁶¹⁰ As in the present research, barristers felt that an attempt at trying to force a guilty plea, however subtly, would be difficult and risky.

Interviewees described the plea decision as something over which they did not have direct control; even if barristers wished to manipulate defendants, they would find it extremely difficult to do so without ramifications. H1 explained that even if he and a prosecutor wanted to, they would find it difficult to control the situation to try and force a plea from the defendant, unless that decision was a reasonable outcome for all of the parties concerned:

H1: ...So if I were to speak to barrister X and say look, let's sort a case out on this basis, it's not his decision. You know, the decision has to be passed by the reviewing lawyer in the CPS who is not part of our relationship anyway.

JB: And doesn't care about that?

H1: And doesn't care about it, no. So, I don't think it would work. Equally, if you are defending you couldn't give advice that wasn't reviewed. The solicitor on the case and they ought to be involved, I would involve them in any decision-making process, and they have a say in it. So, I don't really think [manipulation] happens. I don't know if there is a perception that that happens, but certainly I've never seen it.

According to H1's conception of the various actors involved, neither the CPS lawyer nor the defence solicitor have anything invested in a relationship of convenience between

⁶¹⁰ Ibid.

prosecution and defence counsel. Although prosecution and defence barristers might wish to assist each other in the resolution of cases, the solicitors involved have little to gain from counsel resolving a case for counsel's financial benefit or other unscrupulous reason. The fact that solicitors have a moderating involvement in plea was reiterated by K2. As will be recalled from Chapter 6, K2 argued that barristers do not take decisions on what advice to give in a vacuum from other interested parties.⁶¹¹ The involvement of the defence solicitor, as well as the defendant's family and other interested parties, serves to place several barriers in the way of a barrister attempting to convince a defendant to plead guilty. A barrister is not the sole advisor to the defendant, and the defendant is not isolated with the barrister in making a decision on plea. The involvement of other parties makes unscrupulous manipulation difficult for the barrister, who must take into account the reaction of these other parties into account when advising a defendant.

That is not to argue that barristers never inappropriately pressure defendants into pleading guilty, and that all such instances are punished by sanction from the solicitor. There may be solicitors who fail to respond to the incentive to build a reputation for fighting cases appropriately, and there may be those who do not take an interest in the fate of their Crown Court cases. Equally, some barristers may be able to cover the true motivations behind their advice in some circumstances. Furthermore, the barrister-solicitor relationship is not entirely determinative of how a barrister advises a defendant. Interviewees described being entirely happy to contradict solicitors if they felt it was necessary.

Indeed, this research does not describe barristers as dictated to by the views of their instructing solicitors. However, this chapter does argue that the present literature and research gives insufficient weight to this important incentive that, on the basis of the data, plays a large role in how barristers and solicitors work and what influences their decision-making. Simple constructions of a guilty plea culture or depicting the legal profession as short term financial opportunists fails to comprehend the wider

⁶¹¹Chapter 6:4.b

implications of complex, often contradictory incentives. The effect of the solicitor-barrister relationship as a moderating influence is not quantified here, but it is important to recognise its potential significance in how and on what a defendant is advised.

4. Financial incentives

As previously indicated in Chapter 6, financial incentives do play a large role in the decision-making of lawyers. However, these financial incentives tend only to be revealed as operative in circumstances of ethical indeterminacy. Ethical indeterminacy arises where there is potential for genuine disagreement between two legal professionals as to the best course of action in a case. In such an instance the decision taken is more likely to be the one that is more financially lucrative to the lawyer. The net effect of financial incentives is therefore only seen at a macro level when all cases are aggregated together, however on a case-by-case basis conscious and overt manipulation of cases on the basis of fees is difficult to detect.

According to notions of ethical indeterminacy, financial incentives are not completely determinative of cases, but do play a large role in the eventual outcome, especially when all cases remunerated under a single funding scheme are viewed together. It is therefore important to analyse the financial incentives given to solicitors and how that may affect cases, including the impact on how solicitors may wish cases to be handled by counsel. As will be shown, the new Litigators' Graduate Fee Scheme (LGFS) may encourage solicitors to take more work in-house and reduce the number of cases that are briefed to the independent bar.

The scheme against which solicitors fees are calculated for Crown Court litigation has recently been changed following the introduction of the Criminal Defence Service (Funding) (Amendment) Order 2007. The changes to the fees for Crown Court litigation were made according to recommendations in Lord Carter of Coles' review of legal aid

procurement and came into effect on 14 January 2008.⁶¹² Under the new payment scheme solicitors are paid according to a fixed, *ex ante* fee structure, similar to that used to calculate the fee paid to barristers under the Advocates' Graduate Fee Scheme (AGFS).⁶¹³ Solicitors were previously paid according to an *ex post facto* pay scheme, with fees calculated on the basis of items and units of work done.⁶¹⁴ This meant that the actual effort (or at least claimed effort) was directly remunerated according to the needs of the case.

The LGFS remunerates cases according to 11 classes of offences (A-K) with a basic fee.⁶¹⁵ This basic fee is increased for trials over two days (the length of trial proxy), more than one defendant (the defendant uplift) and any other transfers or retrials.⁶¹⁶ In the event that the pages of prosecution evidence (PPE) exceed stated limits (which increase according to the number of days of trial, apart from the first two days), the pay scheme no longer remunerates litigators for day uplifts, but provides different basic fee payments (called initial fees) that are increased according to the pages of prosecution evidence. The different pages of prosecution evidence are paid according to bands for which the payment decreases per page as the count rises. The scheme for guilty pleas and cracked trials is similar for trials, with a basic fee given in tables depending on class of offence and whether the trial was cracked or a guilty plea was entered at PCMH. This payment is increased by a defendant uplift and transfer or retrial payment if appropriate. As with trials, if the number of pages of prosecution evidence exceeds the stated limits the scheme pays a different initial fee plus a payment per page of prosecution evidence above the limit. The initial fee is increased in bands as the page count is increased, while the payment per page is reduced. Extra payments are not made to solicitors for reading unused material disclosed by the prosecution under the Criminal Procedure and Investigations Act 1996, section 7A or any other extra preparation.

⁶¹² Lord Carter's Review of Legal Aid Procurement, 'Legal Aid: A market-based approach to reform' ("The Carter Review") (2006).

⁶¹³ See Chapter 6:2 for discussion of fixed fee schemes.

⁶¹⁴ The most recent fee scheme prior to the introduction of the LGFS is found in The Criminal Defence Service (Funding) Order 2007, Schedule 2.

⁶¹⁵ These fee categories are the same as those used for the AGFS.

⁶¹⁶ Criminal Defence Service (Funding) (Amendment) Order 2007, Schedule 2, part 2.

As may be appreciated, the LGFS is difficult to comprehend and confusing. As S1, a London solicitor with many years experience of claiming fees for criminal work, believed about the new scheme:

It is the most appallingly complicated calculation which requires parameters for which you have to use a computer to do it, it's so complex. And you can't do it by hand...

To assist solicitors in calculating their fee for cases the Legal Services Commission has provided a downloadable spreadsheet which calculates the fee automatically.⁶¹⁷ This spreadsheet allows solicitors to readily see the difference in fee for a case depending on what plea is entered by the defendant and when.

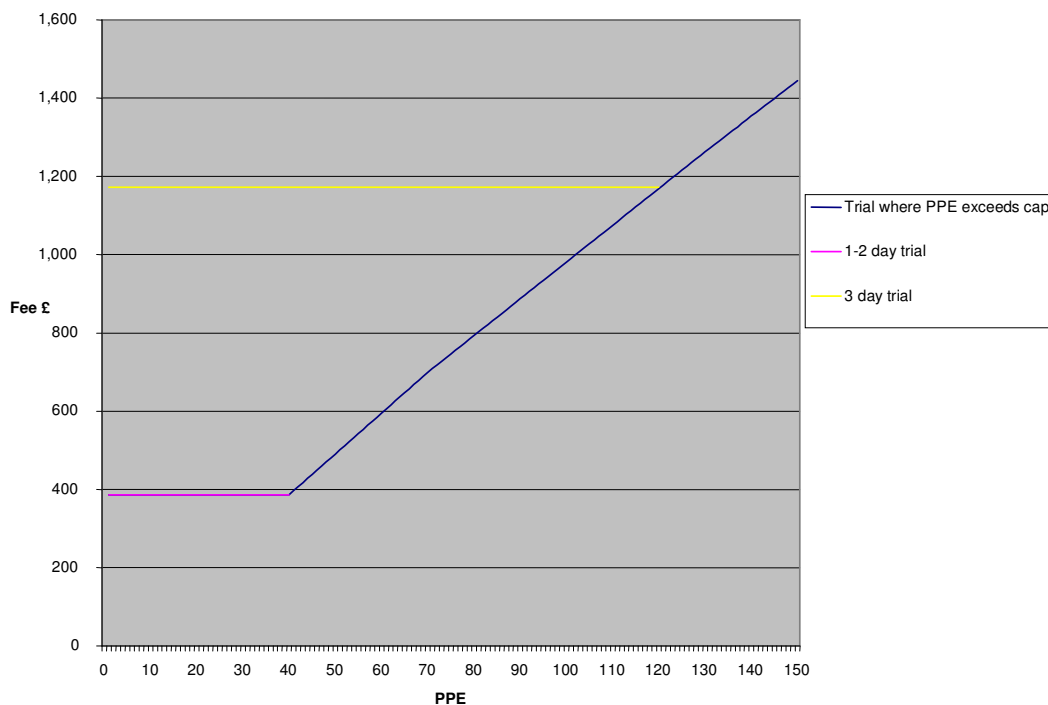
a. Trial fees

This research has sought to provide a more thorough understanding of the fee structure. Understanding the scheme and how different cases are remunerated is essential in developing a view of solicitors' incentives. This chapter looks in some detail at the offence band E, which is typical of the payment scheme. As already stated, for trials a basic fee plus a day proxy is paid to the solicitor, unless the page count exceeds a limit which is increased for every extra day the case is in court. After the page count limit, solicitors are paid a different initial fee plus an amount per page of evidence. Figure 7-1 shows a line graph for how solicitors are paid for a category E, 1-2 day and 3 day trials. Once the page limit for the number of days in trial has been exceeded the fee joins the 'Trial where PPE exceeds cap' line.⁶¹⁸

⁶¹⁷ The spreadsheet is available at
<http://www.legalservices.gov.uk/criminal/litigator_graduated_fee_scheme.asp>

⁶¹⁸ All fee calculations are without VAT.

Figure 7-1 Fee for 1-2 and 3 day trials, and trials where PPE exceeds cap



As can be seen, the solicitor is paid a flat rate of £386.54 for a one to two day trial and £1,171.84 for a three day trial.⁶¹⁹ This covers all matters to do with the case in the Crown Court from first appearance to the trial itself. However, if the page count of prosecution evidence exceeds 40 pages an initial fee of £386.54 is paid plus an extra £10.4287 for every page over 40 pages.⁶²⁰ For three day trials if the page count exceeds 120 pages, a different initial fee is paid of £699.40, plus £9.3950 for pages 70 to 129.⁶²¹ If the page count is 130 pages or greater, the solicitor is paid a different initial fee of £1263.10, plus £9.0869 per page thereafter, up to 158 pages.⁶²² If the page count exceeds 158 pages, the solicitor is paid another greater initial fee with a slightly smaller per page fee, and so on as the page count meets the stated limits. It should be noted that the solicitor is paid for pages within the band only. Therefore, a case with 132 pages is paid £1263.10 plus only two pages at £9.0869, or £18.17. The practical effect of this payment scheme is that once the 40 page limit has been exceeded the payment for the case steadily rises per extra page from the basic rate of £386.54. In figure 7-2 the same effect

⁶¹⁹ Criminal Defence Service (Funding) (Amendment) Order 2007, Schedule 2, part 2, section 6. The solicitor in a 3 day trial receives a basic fee of £386.54 plus a day proxy of £785.29.

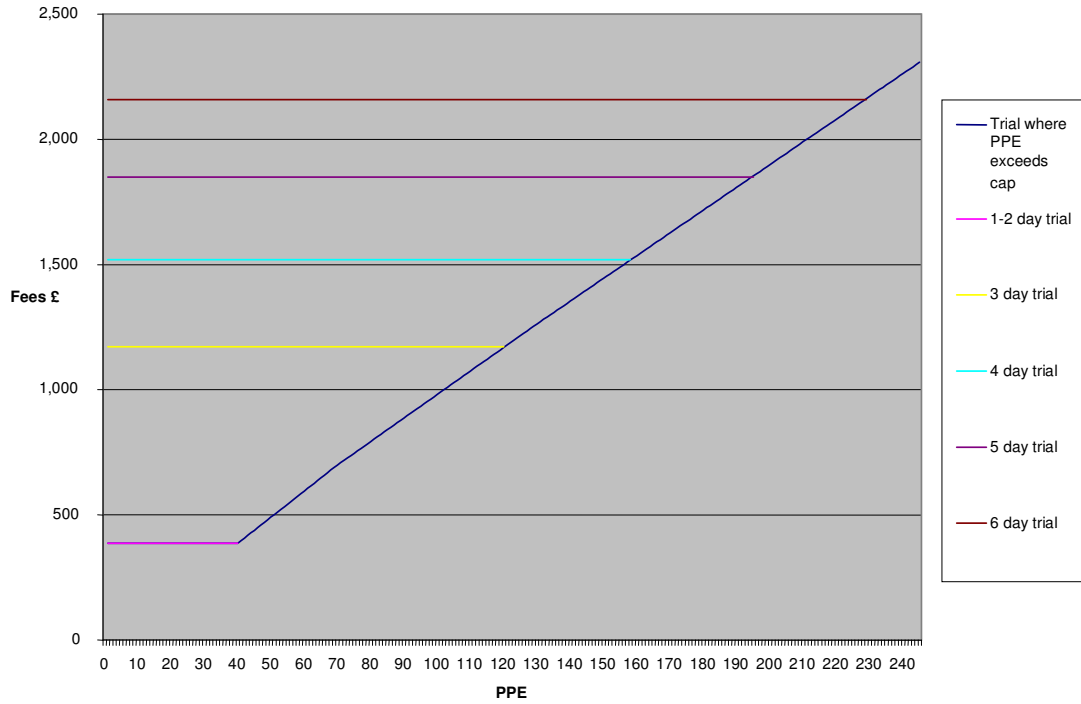
⁶²⁰ Ibid. section 8.

⁶²¹ Ibid.

⁶²² Ibid.

can be seen for a one to two, four, five and six day trial, with the basic rate slowly increasing once the page count limit for the trial days has been exceeded.

Figure 7-2 Fees for 1-2, 3, 4, 5 and 6 day trials and trial where PPE exceeds cap



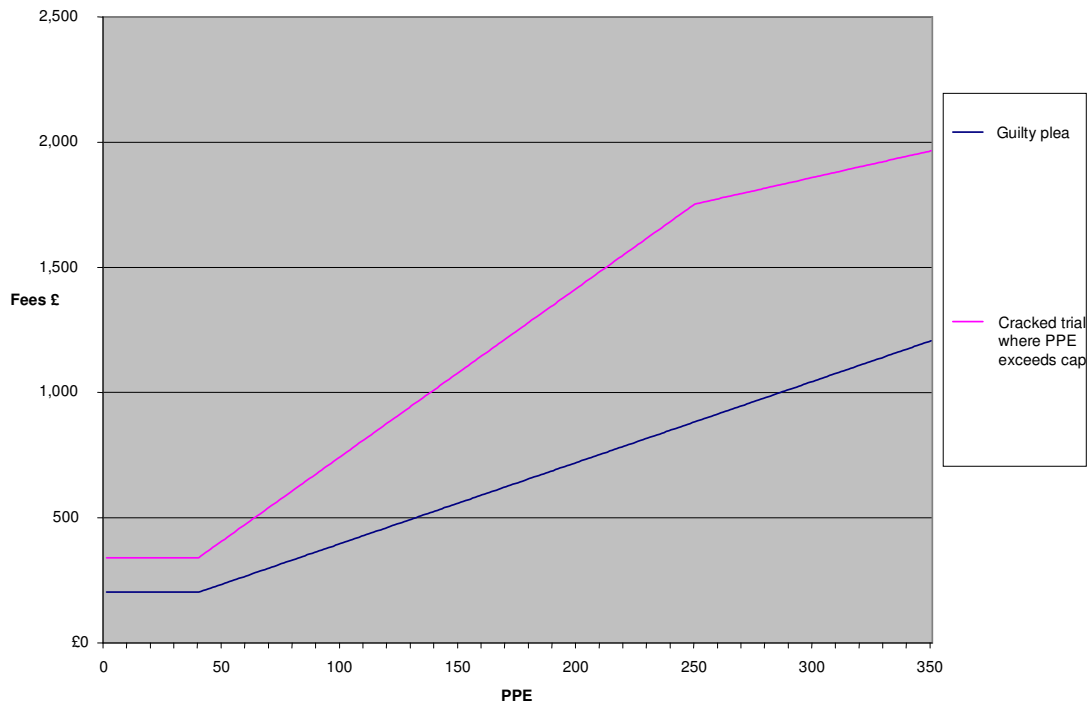
b. Guilty plea and cracked trial fees

For category E offences, guilty pleas at PCMH are paid at a basic rate of £202.41.⁶²³ After 40 pages this increases by £3.2041 per page up to 399 pages.⁶²⁴ Cracked trials are paid a basic rate of £345.50. After 40 pages this is increased by £6.7242 per page up to 249 pages. After 250 pages cracked trials are paid an initial fee of £1,752.59, plus £2.1277 per page above 250 pages. Figure 7-3 shows the projected fee depending on pages of prosecution evidence for both cracked trials and guilty pleas depending on pages of prosecution evidence.

⁶²³ Ibid. section 7

⁶²⁴ Ibid.

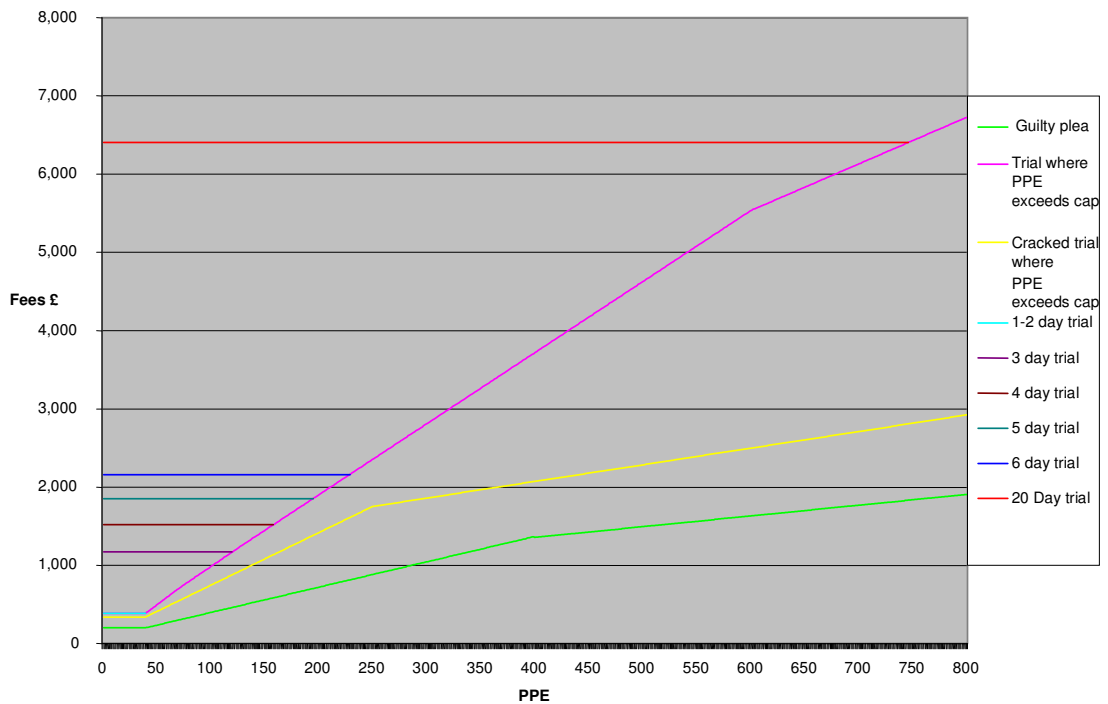
Figure 7-3 Guilty plea and cracked trial fee where PPE exceeds cap



c. The incentives

When figure 7-2 and figure 7-3 are combined it is possible to see the difference in fee that a solicitor may receive from the three ways in which a case may be concluded. Figure 7-4 plots trial fees and cracked trial fees against one another up to a 20 day trial.

Figure 7-4 Fees for 1-2, 3, 4, 5, 6 and 20 day trials, guilty pleas, cracked trial where PPE exceed cap and trial where PPE exceeds cap



Of particular interest to solicitors is the difference between the cracked trial fee and the trial fee. According to S1, the majority of work done on any case is done in the period immediately prior to trial. In the weeks between PCMH and the date of trial, the case is progressively given greater attention as the date of trial approaches. Therefore, on the date of trial, the majority of the work that will be done by the solicitor has already been completed. Besides sitting behind counsel and assisting with matters that arise during the trial, the case during this time is predominantly a matter for the barrister.⁶²⁵ The extra payment given to the solicitor between a cracked trial and a trial represents, if anything, the opportunity cost of the time in court, rather than preparatory work.

As a representation of the actual work carried out by the solicitor, the differing pay rates for a Category E offence is dependent on the pages of prosecution evidence. For shorter

⁶²⁵ The extent to which the solicitor sits behind counsel during trials is varied depending on the complexity of the case and the solicitor firm. McConville et al found limited solicitor attendance at court, preferring to send a clerk or other unqualified staff: *McConville et al* (n.591) Chapter 10. The use of “outdoor clerks” for Crown Court clerks is widespread, but the presence of any solicitor representative at all may be diminishing: D. Wolchover and A. Heaton-Armstrong, ‘Outdoor clerking: the impact of LGF on defence trial advocacy’ [2008] *Archbold News* 2, 4-5

trials of between three and five days, when a case remains close to either side of the page limit for the number of days trial, the cracked trial rate is not a large amount of money less than the trial fee.⁶²⁶ The solicitors interviewed did not express concerns about this type difference in fee paid to them. Serious concerns were raised however by those cases where the page count was low, relative to the number of days in trial, or where the page count was very high in more complicated and serious cases. In these circumstances the pay structure heavily penalises a cracked trial and the solicitors interviewed felt that only the trial fee would be adequate compensation for the time they had spent on the case.

Some examples may assist in understanding how the pay structure can create large disparities between trials and cracked trial fees. For example, if a trial would last three days, but has a low page count of around 40 pages, the solicitor stands to lose £830 if the case cracks.⁶²⁷ The difference in fee paid at higher page counts is even larger. Although rare, cases that have greater than 250 pages are either given a higher basic fee or a much higher per page payment. For example, this means that a 20 day trial is paid £6,404.77 basic fee, compared to a cracked trial rate of £2,805.80 (where the page count is 745 pages⁶²⁸); a difference of £3,598.97. Although not a huge sum in the overall turn over of a medium sized law firm, a number of such cases together would create a significant difference in the fees received over a financial year. This absolute fee difference becomes much larger at higher page counts or days in trial, and in more serious categories of offence. For example, fraudulent evasion of duty above £100,000 is a Category K offence.⁶²⁹ If the solicitors represented one defendant in a case lasting 40 days with 4,500 pages of evidence, they would be paid £43,403.55 for a trial, and £30,348.43 for a cracked trial, a difference of £13,055.12. To a fee earner working on the case this represents a loss of just over £6,500 for each of the two months the case is in trial. However, the differences can be even larger. S1 described the huge fee

⁶²⁶ See Figure 7-4. In absolute terms this represents an approximate 75% difference of around £300 for 3 day trials, £380 for 4 day trials and £460 for 5 day trials.

⁶²⁷ This difference in absolute terms is greater for more serious categories of offences

⁶²⁸ 745 pages is used in this example as it is the highest number of pages for which the basic daily fee is payable. A lower or higher page count would show an even greater difference.

⁶²⁹ Fraudulent evasion of duty is an offence contrary to the Customs and Excise Management Act 1979 section 170(1)(b).

difference in one case that he was currently handling:

We did do one test [with the new fee scheme] where the fee if we went to trial was £50,000; major people trafficking case. But, if it cracked the fee was £10,000. Now, there's a hell of a difference.

Given these large absolute differences in fees in serious or long cases, it is exceedingly doubtful that a solicitor could make up these shortfalls in income. An average case takes just over 24 weeks from committal or being sent to be heard as a trial, and just over 11 weeks from committal if the defendant enters a guilty plea.⁶³⁰ Such lengthy, well paid cases are uncommon, and the time lag between picking up a case at the police station to resolution is considerable. As S1 explained further:

S1: Now, if you are an advocate, it's all right because you can start another trial the next day. If you're a solicitor then you've just lost £40,000 worth of work.

JB: Despite having done the preparation.

S1: Despite having done the preparation... This particular one if it ran as a trial it was about 20 days, and the fee was huge, but if it cracked, I would be, because what I was being asked was will you authorise us to [seek a *Goodyear* indication] in this case? And I haven't made my final decision yet because I'm not, I can't afford to lose £40,000 on a case.

From these calculations and comments by the interviewees, some tentative conclusions can be drawn. Firstly, although longer, more complicated cases are fewer in number than typical one to two day trials involving less serious crime, they represent large sums of money to a solicitor's firm. Under the previous pay scheme, solicitors were paid *ex post facto*, with fees calculated on the basis of items and units of work done.⁶³¹ Therefore, even when a case cracked, solicitors were remunerated according to the large amounts of

⁶³⁰ Ministry of Justice, 'Judicial and Court Statistics 2008' (Cm 7697, 2009) 112-13 and Table 6.21.

⁶³¹ The most recent fee scheme prior to the introduction of the LGFS is found in The Criminal Defence Service (Funding) Order 2007, Schedule 2.

work they had put into preparing a complicated case. In these circumstances, according to the two solicitors interviewed, the loss of the trial fee represented a relatively small amount of money. However, under the LGFS a cracked trial fee may be 75% or less of the trial fee, representing a significant amount of money lost to the solicitor. In many circumstances, if the trial cracked, the solicitors interviewed argued that they would not be adequately compensated for that preparation already carried out. Only once the trial fee had been factored in would the fee accurately represent the effort that they had expended on individual cases. To make up these fees through other work would be difficult for the solicitor to readily achieve.

The pay structure for these more complicated, lengthy cases may therefore incentivise the solicitor to prefer trials over a last-minute guilty plea. Because the majority of the solicitor's work has been completed by the time the case enters trial, they may prefer a guaranteed payment of, as in the example above, an extra £13,000, rather than risk relying on their duty police station work to generate the same amount through other cases. As noted above, even if new cases do come through, there is a considerable time lag in payment being received for a case. It is therefore argued that the combined effect of uncertainty and large differentials in fees may create an overall solicitor preference of trials over cracked trials.

Secondly, because the fee for Crown Court cases is now entirely contingent on outcome rather than time or effort expended, the choice of the defendant's plea is highly significant for the solicitor. When the difference in fee paid is measured in thousands of pounds, a solicitor who has expended many hours in preparation of a case may be extremely reluctant to seek a charge bargain, *Goodyear* indication, or convince his or her client of the sense of a guilty plea in the light of new evidence. As discussed in Chapter 5, it is not necessarily to the defendant's advantage to go to trial each and every time, and a "good result" for the defendant may involve entering a plea to a lesser offence. Therefore, the LGFS, in some circumstances, creates significant agency problems between the solicitor and his or her client defendant.

Thirdly, although the presence of a barrister may mitigate the effect of favouring trials for financial reasons, solicitors in reaction to the LGFS may seek to have greater control over the contingent outcome, and therefore remove the self-employed barrister as an independent advisor. As previously noted, barristers give advice on the basis of their own incentives, which are not necessarily aligned with those of the solicitor. If barristers wish to seek a charge bargain or advise that a guilty plea is in the best interests of the defendant, this may bring them into direct conflict with the solicitor. A solution for a solicitor is either to conduct the case themselves as a higher court advocate, or to employ members of the Bar as in-house counsel over whom the solicitor would have greater control. Although there is scant evidence that this is currently happening, barristers in discussion at Leicester Crown Court expressed similar reservations about changes to solicitor fees. One of the barristers in an informal, unrecorded conversation named solicitor firms whom he felt would not brief counsel who sought guilty pleas after the fixed fee scheme was introduced. Without further qualitative data the strength of this conclusion is impossible to assess, however, the important implications of these fee changes for the defence bar warrants further investigation.

5. Counteracting the agency problem: the dampening effect of a split profession

The context within which the barrister-solicitor relationship is considered is the wider agency problem that this thesis seeks to analyse. An agency problem potentially occurs when the interests of the defendant and the representative lawyer diverge. Because the lawyer is the dominant partner in many client-lawyer relationships due to their expertise and understanding of the law, the defendant is not generally well placed to assess the advice given to them. A lawyer with diverging interests from the client may manipulate their knowledge to their own benefit. Classically, the solicitor-barrister relationship may be said to counteract the agency problem described in that any solicitor or barrister who seeks to manipulate the defendant for short term gain or other disreputable reason may jeopardise their long term career. Because each arm of the profession is being essentially “monitored” by the other, they are prevented from acting in a way that is against the

defendant's interests.⁶³² Monitoring the behaviour of an agent is often described as a potential solution to reducing agency costs.⁶³³

However, the reality is rather more complex than this theoretical analysis implies. Barristers and solicitors do not necessarily monitor one another to ensure compliance with ethical and professional standards, but rather respond to a combination of disparate influences which may reduce the frequency of acting for short term financial gain or according to a guilty plea culture. The financial incentives which affect barristers mesh with other incentives, such as maintaining a good relationship with a solicitor, so that overt and direct manipulation of defendants for financial gain does not regularly occur. As Tata argues: 'Lawyers operate with a range of influences: not only financial but also cultural, ideological, and organisational.'⁶³⁴ Barristers respond to a range of influences and the presence of the solicitor is a further incentive or influence on barristers and how they determine the advice given on plea. The interplay of these incentives is extremely complex and it is difficult to determine on the basis of this study to what extent an incentive may play a part in an individual case. For example, a solicitor who wishes to build a reputation for "standing up for clients" will not instruct barristers who manipulate their clients for financial gain or because a guilty plea is "expected". Barristers will respond to this incentive and not try to manipulate defendants. Equally, because each of the incentives is not entirely determinative but meshed with others, barristers may counteract a solicitor who wished to resolve a case for financial gain. A solicitor may prefer a trial over a guilty plea even though the defendant should be advised about the merits of pleading guilty. A barrister who is not subject to the same financial incentives can advise the defendant of the advantages of a guilty plea. Although this course of action may place them in conflict with the solicitor, other organisational or cultural factors such as professional pride, or ethical conduct play a role for the barrister in advising the defendant on plea. Therefore, although not monitoring one another, in many circumstances the split profession acts as a

⁶³² This argument is often repeated by those who defend the split profession status quo. For example, 'Report of the Committee to the Bar Council' ("The Kentridge Report") (18 January 2002) para 2.14.

⁶³³ M. Bishop, *Essential Economics* (Profile Books, London 2004).

⁶³⁴ C. Tata, 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and "Ethical Indeterminacy" in Criminal Defence Work' (2007) 34 *Journal of Law and Society* 489, 516.

counterbalance to incentives that might otherwise act against a defendant's interests. Because any incentive to act in one way must be considered against the contradictory influences to act in another, the combination of incentives created by the split profession dampens the effect of a change in those incentives for one side of the profession. While the solicitor-barrister relationship does not solve the agency problem, it may reduce the costs to the defendant in receiving advice that is against his or her interest.

Of course, the barrister who acts on one occasion to advise a defendant of the merits of a guilty plea against a solicitor's wishes cannot do so repeatedly, particularly when the financial incentives for solicitors mean that trials are strongly preferred to cracked trials. Therefore, a barrister who persistently ignored a solicitor's preference may find themselves out of work. Although this research does not include data from the barrister interviewees on the new fee scheme, it is predicted that the LGFS will place a further strain on the solicitor-barrister relationship and may cause solicitors to seek greater control over the resolution of cases by taking cases to trial themselves or employing in-house counsel. This would effectively create a single layer of representation, removing the beneficial dampening effect of a combination of incentives to both sides of the profession.

6. Conclusion

This chapter does not quantify the extent of and the manner in which the incentives outlined interplay with one another but argues that the effects of the solicitor-barrister relationship and its impact on case decision-making should be investigated further. It has been suggested here that solicitors respond to incentives related to client care, reputation and fee, and that these are passed on to barristers as subsequent incentives because of the fact that they might lose briefs if they were to act in a manner prejudicial to those interests. The incentive to maintain a good relationship with the solicitor dampens the effect of other incentives to barristers that may be to the detriment of the defendant, namely financial incentives. This chapter has examined the relatively new fixed fee

scheme for solicitors in the Crown Court and shown how it has created a strong preference for trials in longer, more complicated cases. This chapter has speculated that tying remuneration to outcome gives solicitors a greater interest in the outcome of cases and the defendant's plea, creating a very different working environment than that observed in *Standing Accused*, where solicitors were described as disinterested in their Crown Court work. In turn it has been proposed that solicitors may seek to take control over case outcome by using their own in-house counsel, rather than briefing to the self-employed bar. This will reduce the amount of available defence work to the self-employed bar and reduce the mitigating effects of the split profession that may eventually have an inimical effect on the quality of advice given to defendants on plea.

Chapter 8: Regional differences

In the initial planning of this research it was not anticipated that there would be significant regional differences between the practices of barristers. However, as early interviews progressed it became clear that interviewees in London held strong views that practices outside London Crown Court centres was markedly different. Interviewees gave a range of accounts regarding provincial courts on the basis of anecdotes from colleagues or, in some cases, direct experience. Some of the accounts given were dismissed in Chapter 6 as having little evidentiary basis⁶³⁵, however, there did appear to be some grounds for further investigation of potential differences between the circuits. A number of interviewees had direct experience of Midlands court centres and related cases where they considered that odd results had occurred or where their approach to a case was not as expected by their opposite counsel. A brief review of the judicial statistics suggested that these reports of differing court practices were not entirely apocryphal, and that there may be some substance to what the London interviewees had recounted. It was therefore decided to expand the geographical area of research to take in the Midlands Circuit.⁶³⁶ Interviews with five barristers were undertaken at both Leicester and Nottingham Crown Court and included a range of experience including a QC, a Recorder and a junior barrister of five years call. The aim of these interviews was to discover what differences existed between the circuits in terms of advising styles and general approaches to cases.

This chapter gives an overview of those differences that manifest themselves in a higher cracked trial and guilty plea rate in the Midlands. It attempts to explain why those differences occur, proposing that the variations between the areas are at least partially created by organisational drivers that produce a contrasting environment in which advice and plea negotiation take place. It will be argued that negotiation is partially dependant

⁶³⁵ Chapter 6:4.d.

⁶³⁶ For the purposes of administration the Bar of England and Wales is divided into six circuits: Midland, Northern, North Eastern, South Eastern, Wales and Chester and South Eastern. These are not to be confused with Her Majesty's Court Service Regions. There are seven HMCS Regions, with London now treated separately to the rest of the South Eastern Region.

on information exchange between the parties involved. When there are high levels of information exchange, both parties can fully understand their respective positions and more readily come to an agreement. This exchange of information would appear to be assisted when the negotiation involves “repeat players”; those who negotiate with one another on a regular basis in the same environment. Repeat players promote the exchange of information between themselves based on trust and understanding, and develop common approaches to dealing with cases. Repeat players are more readily affected by organisational drivers that are reciprocally created by and pervade their continual interactions with one another. One-off players, on the other hand, cannot establish such organisational drivers or be affected by pre-existing organisational drivers they encounter as they have not learned the common approaches and schemes and they have few incentives to conform.

After establishing this theoretical basis, the chapter will attempt to apply the model to both the Midlands and London. There is evidence to suggest that barristers working in the Midlands area are more likely to be repeat players than those in London due to the geographical layout and size of the local bar. These factors increase the contact rate between individuals and allow repeat players to appear. The evidence from the interview data points to the existence of repeat players in the Midlands, and their relative absence in London. These repeat players promote relationships of trust, greater freedom of exchange of information, and common schemes for the resolution of cases. The existence of repeat players and the organisation drivers they create will be used as a partial explanation of the statistical differences between the regions.

1. Organisational drivers

The influence of organisation and community on English lawyers is poorly documented as a sociological phenomenon. Sanders and Young allege a strong tendency amongst barristers to feel a greater loyalty to their court community of other barristers and judges

rather than the fleeting relationship with an individual defendant.⁶³⁷ The introduction of this thesis to English court rooms is borrowed from the description of American lawyers classically articulated by Blumberg.⁶³⁸ Blumberg argued that the organisational goals of the criminal court system was towards producing guilty pleas in as an efficient a manner as possible, and that these values were adopted by all actors working within the system. Lawyers are defined by the institutional setting and its values. These ‘pragmatic values, bureaucratic priorities, and administrative instruments’ create ‘a set of priorities’ that ‘exert a higher claim than the stated ideological goals of “due process of law”’,⁶³⁹ which are distorted by lawyers in pursuit of institutional purposes. According to Blumberg, lawyers abandon professional and ideological commitments in service of the higher claims of the court organisation.⁶⁴⁰ Blumberg explains that the reason for this co-option of the lawyer by the system is because of the necessity for the lawyer in maintaining healthy relationships with other “regular” members of the court community, including judges and prosecutors. These relationships are the *sine qua non* of retaining work as well as being able to negotiate pleas and sentences.⁶⁴¹ In this setting the criminal client is a secondary figure whose presentation of doubts which challenge the organisational relationships are disregarded and resolved in favour of the organisation.⁶⁴² Defence lawyers, it is alleged, stage-manage clients so that at least the appearance of help and good service is forthcoming to the client, however, this is entirely superficial and the other court actors are complicit in supporting the lawyers and providing help for their duplicity.⁶⁴³

⁶³⁷ A. Sanders and R. Young, *Criminal Justice* (3rd edn OUP, London 2007) 423-24. McConville et al rejected this as an accurate description of solicitor behaviour in the magistrates’ court: M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press, Oxford 1994) 186-188.

⁶³⁸ A. Blumberg, ‘The Practice of Law as a Confidence Game’ (1966-1967) 1 *Law and Society Review* 15. Blumberg’s thesis has often been repeated as a description of American lawyers incentives: M. Galanter, ‘Mega Law and Mega Lawyering in the Contemporary United States’ in R. Dingwall and P. Lewis (eds) *The Sociology of Professions* (MacMillan Press, London 1983) 159; R. Gordon, ‘The Independence of Lawyers’ (1988) 68 *B.U. L. Rev.* 1.

⁶³⁹ *Ibid.* 19

⁶⁴⁰ *Ibid.*

⁶⁴¹ *Ibid.* 21.

⁶⁴² *Ibid.*

⁶⁴³ *Ibid.* 30.

Tague has rejected Blumberg's thesis as an accurate description of English barristers' incentives and working practices.⁶⁴⁴ According to Tague, the incentives (as discussed in detail in previous chapters), reputation, compensation and sanction, are not served by a model that places organisational relationships at its core.⁶⁴⁵ While partially agreeing with Tague's analysis, this chapter will seek to show that organisational relationships do have an impact on the behaviour of barristers, and that the regional difference between the London and Midlands Circuits reflects the true nature of those relationships. In reply to Tague's question 'might it be true that barristers have a conflicting incentive to induce guilty pleas to avoid being sanctioned by the judge or prosecuting barrister?', this research argues that there are *always* organisational drivers that affect barristers' behaviour, however, these factors are incorporated into the complex combination of drivers that affect professional judgment that have been discussed throughout this thesis. The fact that organisational factors play a role in advice can be seen in a comparison of the London and Midlands circuits and this reveals that these factors play a greater role in advice where the community of lawyers is smaller and actors have a greater opportunity to deal with one another on a day-to-day basis. These organisational drivers are created by and are reciprocally reinforced by repeat players, who in turn share information more easily with one another aiding negotiation.

a. Repeat players and information exchange.

As discussed in Chapter 5, both prosecution and defence barristers are mainly consequentialist in their approach to criminal cases. In Chapter 5 it was described how barristers assess the chances of criminal conviction and sentence and combine those factors when advising a defendant on plea. As was pointed out, the issue of *de facto* innocence is only given notional importance in that a barrister must consider the risks associated with going trial on the basis of the prosecution and defence cases, rather than an unsubstantiated assertion of innocence by the accused. In entering negotiations over

⁶⁴⁴ P. Tague, 'Barristers' selfish incentives in counselling defendants over the choice of plea' [2007] Crim LR 3, 11.

⁶⁴⁵ Ibid. 11 and accompanying text at note 37.

charge or fact bargain, what concerns the barristers of both sides is the credibility of the defendant's account and how that may conclude in front of a jury given the other evidence and witnesses. Of central concern is: given this defendant's account and the other evidence, what is the probability of conviction and associated sentence?

The information exchange important to barristers is therefore the basis of both the prosecution and defence cases. As discussed in Chapter 5, the disclosure laws in England and Wales promote early information exchanges, particularly from the defendant.⁶⁴⁶ Starting at the police station the defendant is expected to give an adequate account of his or her case in response to police questioning. As described in Chapter 5, England and Wales now requires extensive disclosure by the defence at a pre-trial stage. In all areas of the country, therefore, instructed counsel should have similar levels of starting information with which to work. The effect of repeat players in the Midlands promotes *greater* information exchange built on the trust of repeated encounters, together with a small court community where common approaches to cases are developed, and those barristers who cannot be trusted or deviate from established norms are quickly discovered and marked out. Unfortunately, on the basis of this study alone it is not possible to say whether greater information exchange benefits the defendant. Although reducing the information deficit should make negotiation more efficient, other strong factors may influence community values; factors that could not be detected here on the basis of interviews. Firstly, the theoretical basis for this argument will be established by modelling repeat players, their creation of court communities and effect of information deficits according to the literature, before discussing the judicial statistics and evidence from the interview data of barristers acting as repeat players.

b. Theoretical model of repeat players

A model of repeat players argues that those who have more regular contact with the court community are more able to reach a plea agreement than those who are 'one-offs'

⁶⁴⁶ Chapter 5:3.d.

or those who come in to contact with the court community irregularly. Phillips and Ekland-Olson summarising how those abilities are created and maintained note that the status of repeat players is well-founded in the literature on American courts.⁶⁴⁷ Some commentators believe that through continual interaction, the players' definitions of situations begin to converge:

Through constant contact, informal relationships develop among members of the courthouse community. These relationships facilitate the flow of information and encourage the development of common schemes for the classification of cases and defendants. Eventually, prosecutors and defense attorneys will evaluate proposals for bond, demands concerning sentences, and other situations from a common perspective. Processing stereotypes and shared concepts of justice bind together repeat-players in the courthouse community.⁶⁴⁸

Repeat players by their constant interaction are responsible for the formation and continued coherence of the court community. Within the community of repeat players, relationships of trust emerge which aid the exchange of information and negotiation. By having a common view of cases, defence lawyers within the community understand the "correct" disposition of a case according to an outlook shared with prosecutors.

Others argue that that participation in the court is akin to participation in a market-place. A defence attorney exchanges his or her commodities- those of placing demands upon the court time through motions and applications- in return for advantages from the prosecutor and judge such as access to fees, assisting in the efficient disposition of workloads, and pursuing career goals.⁶⁴⁹

⁶⁴⁷ C.D Phillips and S. Ekland-Olson, "Repeat Players" in a Criminal Court: The Fate of Their Clients (1982) 19 *Criminology* 530

⁶⁴⁸ *Ibid.* 531-32, summarising the views of M. Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys* (University of Chicago Press, Chicago 1978); L. Mather, 'Some determinants of the method of case disposition: decision-making by public defenders in Los Angeles' (1973) 8 *Law and Society Review* 187; A. Rosett and D.R. Cressey, *Justice By Consent: Plea Bargains in the American Courthouse* (J.B. Lippincott, Philadelphia 1976); D. Sudnow, 'Normal crimes: sociological features of the penal code in a public defender office' (1965) 12 *Social Problems* 255.

⁶⁴⁹ *Phillips and Ekland-Olson* (n.647) 532. This account of "repeat players" has such acceptance in the United States that some of the justices of the Supreme Court of the United States have described the criminal bar these terms: see the comments of Justice Antonin Scalia during oral argument in *Melendez-Diaz v. Massachusetts* 557 US ___(2009), reported by L. Newby, 'Supreme Court Argument Report:

Whether as a result of shared values, or exchange of “commodities”, that repeat players exist and enjoy a special status seems to be relatively accepted in the American literature. However, the effect on cases and defendants remains unclear. Galanter, in his commentary on attorneys in the United States, has described the advantages of being a repeat player, albeit in the context of civil litigation, as:

[The] ability to structure the transaction; expertise, economies of scale, low start up costs; informal relations with institutional incumbents; bargaining credibility; ability to adopt optimal strategies...⁶⁵⁰

According to Galanter, the position of the attorney as a repeat player is clearly beneficial to his or her client as they are able to take advantage of their special status. A repeat player understands the local “prices” of cases and can alter his or her case strategies to exploit his or her insight. The strategies of the repeat player are assisted by relationships of trust that the repeat player has established which improve his or her bargaining credibility.

Blumberg and Sudnow believe that the effect of lawyer becoming repeat players is detrimental to the defendants they represent, as their values are co-opted by the court community.⁶⁵¹ As discussed above, lawyers are said to abandon professional and ideological commitments in service of the higher claims of the court organisation. However, empirical studies in American courts found that the repeat players have no effect on final case disposition and severity of sentence.⁶⁵²

Lawyers as “Repeat Players” Law.com (12 November 2009)
<<http://www.law.com/jsp/article.jsp?id=1202425955797>>

⁶⁵⁰ M. Galanter, ‘Afterword: explaining litigation’ (1975) 9 *Law and Society Review* 347.

⁶⁵¹ *Blumberg* (n.638); D. Sudnow, ‘Normal crimes: sociological features of the penal code in a public defender office’ (1965) 12 *Social Problems* 255.

⁶⁵² P. Nardulli, *The Courtroom Elite: An Organization Perspective on Criminal Justice* (Ballinger, Cambridge MA 1978); C.D Phillips and S. Eklund-Olson, “‘Repeat Players’ in a Criminal Court: The Fate of Their Clients (1982) 19 *Criminology* 530; P. Nardulli, J. Eisenstein and R. Flemming, *The Tenor of Justice: Criminal Courts and the Guilty Plea Process* (University of Chicago Press, Chicago 1988); and, a meta-analysis of many studies: F. Feeney and P.G. Jackson, ‘Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?’ (1991) 22 *Rutgers LJ* 361.

The “shared values” view rather than the “commodity exchange” view is probably a more accurate description of barristers’ behaviour. There is little in the data that suggests that barristers have the ability or the desire to manipulate cases as American lawyers may be able to do.⁶⁵³ Because of the cab rank rule barristers cannot create commodities, such as delaying cases and by making a case more difficult for the other side, they risk being penalised when the roles are reversed in the next case.⁶⁵⁴ However, the thesis of Blumberg, and latterly Sanders and Young in relation to English courts, that repeat players necessarily suffer from a co-option of their values to create an environment detrimental to the defendant is not necessarily accurate.⁶⁵⁵ In fact, just because a community of lawyers develop common approaches to cases does not mean that they are against the defendant’s interests.⁶⁵⁶ Although the “shared values” model may be correct, it does not act as a measure of whether the values within particular communities are “good” or “bad”. Certainly in some communities, some parts of the prevailing culture may act in a way so that defendants’ interests are poorly affected. However, to say that court communities always act to the detriment of the defendant ignores the powerful incentives (as outlined by Tague, and this research) that may form a part of a community’s standards and expectations of its members. As discussed in previous chapters, there are a great number of other drivers acting on barristers’ behaviour which combine together to create common approaches within the court community. These are not necessarily drivers that promote guilty pleas to the detriment of the defendant. In some communities common approaches may indicate that a prosecution should no longer be pursued due to a shared view that the prosecution evidence is insufficient to support a conviction, or that a prosecution is not in the public interest. A prosecutor may more readily drop an unsustainable charge in preference for a lesser charge which reflects the evidence. Part of those common approaches may be an accurate perception of the chances of conviction when measured against local juries, as well as ethical and financial considerations. The model of repeat players put forward here is one where

⁶⁵³ See also Tague’s analysis of barristers’ inability to manipulate cases to raise the cost of the prosecution: *Tague* (n.644) 11.

⁶⁵⁴ *Ibid.* 11.

⁶⁵⁵ *Blumberg* (n.638); *Sanders and Young* (n.637).

⁶⁵⁶ Cooperation between prosecution and defence may be beneficial to the defendant: M. Lichtenstein, ‘Public Defenders: Dimensions of Cooperation’ (1984) 9 *The Justice Systems Journal* 102.

barristers understand the appropriate way of dealing with a case and therefore act accordingly, able to measure that case against the internal ‘common schemes’ and ‘classifications’ constructed by constant interaction between individual barristers. Where an individual case is poised within those schemes is readily reached by a flow of information between barristers who can then agree about where the case falls within their own community’s standards. In this respect, Tague’s analysis of barristers’ incentives is potentially limited. While Tague identifies drivers relating to reputation, sanction and compensation⁶⁵⁷, he does not take into account strong cultural drivers created by being a repeat player in a relatively small court community.⁶⁵⁸

These ideas can be transposed into Scott and Stuntz’s contractual approach by understanding that smaller court communities with repeat players promote information exchange based on a common view of the case.⁶⁵⁹ Scott and Stuntz believe that lawyers hinder information exchange and therefore prevent successful negotiation.⁶⁶⁰ As was discussed in Chapter 5, the privilege against self-incrimination, asserted on behalf of the defendant by his or her lawyer, can prevent a *de facto* innocent defendant from differentiating himself or herself from *de facto* guilty defendants with an early, plausible and consistent account.⁶⁶¹ While lawyers may disrupt accurate information exchange in all circumstances, this is less of a problem when the lawyers know and trust one another. Where a collaborative approach is promoted, lawyers are more likely to be frank with one another about the prospects of their respective cases. If there is a common, shared evaluation of the case against the defendant (based on accurate information), and therefore a common view of the prospects of conviction or acquittal, prosecution and defence barristers can more easily reach agreement over the appropriate charge and basis of plea. Conversely, in a court community where little interaction occurs between barristers, the effect of “common schemes” and trust is much reduced. Of course, the

⁶⁵⁷ Tague (n.644).

⁶⁵⁸ Tague’s sample of barristers only contained participants from London. As the present research has discovered, court community factors appear to be limited or non-existent there.

⁶⁵⁹ R. Scott and W. Stuntz, ‘Plea Bargaining as Contract’ (1992) 101 Yale LJ 1909.

⁶⁶⁰ Ibid. 1951

⁶⁶¹ That is not to argue that the privilege against self-incrimination is always detrimental to defendants. The privilege may have value beyond its restrictive effect on information exchange. For critical discussion of justifications for the privilege: M. Redmayne, ‘Rethinking the privilege against self-incrimination’ [2007] OJLS 209

profession as a whole may share common views on what should or should not be a guilty plea, however, these views are within a wide band of variation, unlike those shared by a smaller court community. Larger communities with “one-off” players do not create the same relationships of trust and standards so that the rate of plea agreement is markedly lower. This leads to a variation in guilty plea and cracked trial rates dependant on the size of the local bar making up the court community and the community’s isolation from “one-off” players. One-off players who enter the community may find themselves closed off from proper negotiation and the benefits of being able to have open conversations over plea and charge.

2. Evidence for court community and repeat players

a. The Judicial Statistics

i. Guilty plea rates and cracked trial rates

The Judicial Statistics are a ‘comprehensive set of statistics on judicial and court activity in England and Wales’⁶⁶² kept by the Ministry of Justice.⁶⁶³ The statistics detail amongst other things, guilty plea rates by judicial circuit, as well as cracked trial rates and court efficiency. Unfortunately for comparative purposes, the manner in which the statistics for guilty pleas are presented have been changed for the years 2006, 2007 and 2008. In these years the guilty plea rate is given per defendant as a percentage of overall defendants dealt with in the Crown Court rather than recording guilty pleas as a percentage of overall cases dealt with in the Crown Court. Because defendants are occasionally tried together, they may plead in a different way making the two measurements different. Therefore, although comparisons can be made between London and the Midlands circuits within years, exact variations across the years cannot.

⁶⁶² Ministry of Justice, ‘Judicial and Court Statistics 2008’ (Cm 7697, 2009) Introductory Note, 5.

⁶⁶³ Despite changing their name in 2008 to being called the Judicial and Court Statistics, these statistics and all previous years’ editions are called the “Judicial Statistics” here for ease of reference.

According to the Judicial Statistics, in the years 2002-2008 the guilty plea rate either per case or defendant in the Midland HMCS region has been substantially higher than that of London. In the latest year for which statistics are available, 2008, the guilty plea rate in the Midlands was 17% higher than that of London.⁶⁶⁴ Table 8-1 shows the guilty plea rates for London, the Midlands and England and Wales, as well as the difference between the circuits.

⁶⁶⁴ Midland guilty plea rate: 76%; London guilty plea rate: 59%; *Ministry of Justice* (n.662) Table 6.21.

Table 8-1 Guilty plea rates: London and Midlands HMCS regions and England Wales 2002-08⁶⁶⁵

Guilty plea statistics				
	Total cases where plea was entered	Case with guilty plea to all charges	Guilty plea rate (% of cases disposed)	Percentage difference between circuits
2002				
London	13,581	6,096	45%	
Midlands	13,546	8,838	65%	20%
England and Wales	70,608	40,187	57%	
2003				
London	13,595	6,168	45%	
Midlands	13,972	9,121	65%	20%
England and Wales	72,782	41,855	58%	
2004				
London	14,093	6,526	46%	
Midlands	13,639	9,914	73%	26%
England and Wales	72,428	42,182	58%	
2005				
London	13,760	6,672	48%	
Midlands	12,618	8,459	67%	18%
England and Wales	69,755	41,578	60%	

⁶⁶⁵ Table based on data presented in Department for Constitutional Affairs, 'Judicial Statistics 2002' (Cm 5863, 2003) Table 6.8, 'Judicial Statistics 2003' (Cm 6251, 2004) Table 6.8, 'Judicial Statistics 2004' (Cm 6565, 2005) Table 6.8, 'Judicial Statistics 2005 (Revised)' (Cm 6799, 2006) Table 6.8; Ministry of Justice, 'Judicial and Court Statistics 2006' (Cm 7273, 2007) Table 6.6 and 6.20, 'Judicial and Court Statistics' (Cm 7467, 2008) Table 6.6 and 6.21, 'Judicial and Court Statistics 2008' (Cm 7697, 2009) Table 6.6 and 6.21.

	Total defendants where plea was entered	Defendants pleading guilty to all charges	Guilty plea rate (% of defendants disposed)	Percentage difference between circuits
2006				
London	—	—	53%	
Midlands	—	—	71%	18%
England and Wales	80,947	52,126	64%	
2007				
London	—	—	57%	
Midlands	—	—	74%	17%
England and Wales	90,943	59,162	68%	
2008				
London	—	—	59%	
Midlands	—	—	76%	17%
England and Wales	96,027	65,571	70%	

The Judicial Statistics also record an equally significant difference in the cracked trial rates between the circuits.⁶⁶⁶ In 2008 the cracked trial rate in the Midlands was 13% higher than London.⁶⁶⁷ Table 7-2 shows the cracked trial rates for the years 2002-2007 and includes the calculated differences between the circuits. Cracked trial statistics have been consistently kept throughout the period shown, although for the years 2002-2005 the total cases listed for trial for the years 2002-2005 was calculated by the researcher by adding the total of not guilty pleas to the total of cracked trials to produce a percentage of listed trials cracked. The regional cracked trial rates in 2006 and 2007 are given in the Judicial Statistics tables. Statistical discrepancies are caused by rounding.

⁶⁶⁶ The cracked trial rate is those cases listed for trial that “crack” (as a result of guilty plea entered after a date of trial has been set, a bind over, the prosecution ending the case by offering no evidence or another reason) as a percentage of cases listed for trial.

⁶⁶⁷ Midland cracked trial rate: 44%; London cracked trial rate: 31%: *Ministry of Justice* (2009) (n.665) Table 6.13. The average difference on cracked trial rates for the years 2002-2009 on both circuits is 15%. The deviation from the mean for all years is within 3%.

Table 8-2 Cracked trial rates: London and Midlands HMCS regions 2002-08⁶⁶⁸

Cracked trial statistics	Total cases listed for trial	Cracked trials	Percentage of cases listed for trial cracked	Percentage difference between circuits
2002				
London	10,852	3,375	31%	
Midlands	8,700	4,031	46%	15%
2003				
London	10,887	3,479	32%	
Midlands	8,853	4,026	45%	14%
2004				
London	10,638	3,108	29%	
Midlands	7,960	3,488	44%	15%
2005				
London	9,340	2,368	25%	
Midlands	6,716	2,586	39%	13%
2006				
London	8,828	2,469	28%	
Midlands	5,677	2,596	46%	18%
2007				
London	9,393	2,962	32%	
Midlands	5,177	2,352	45%	14%
2008				
London	9,284	2,868	31%	
Midlands	4,827	2,108	44%	13%

⁶⁶⁸ Table based on data presented in Department for Constitutional Affairs, 'Judicial Statistics 2002' (Cm 5863, 2003) Table 6.7 and 6.8, 'Judicial Statistics 2003' (Cm 6251, 2004) Table 6.7 and 6.8, 'Judicial Statistics 2004' (Cm 6565, 2005) Table 6.7 and 6.8, 'Judicial Statistics 2005 (Revised)' (Cm 6799, 2006) Table 6.7 and 6.8; Ministry of Justice, 'Judicial and Court Statistics 2006' (Cm 7273, 2007) Table 6.13, 'Judicial and Court Statistics 2007' (Cm 7467, 2008) Table 6.13, 'Judicial and Court Statistics 2008' (Cm 7697, 2009) Table 6.13.

According to the statistics for national trends, the large majority of cracks are caused by the defendant entering a late plea of guilty, or entering a guilty plea to a lesser charge.⁶⁶⁹ On a regional basis the reasons for case cracks are also significantly different. Table 8-3 shows the reasons for crack for the years 2002-2005.⁶⁷⁰

⁶⁶⁹ These two reasons accounted for 80% of cracked trials in England and Wales in 2007: *Ministry of Justice* (n.662) Table 6.11.

⁶⁷⁰ Because of a change in statistical gathering, the Judicial Statistics for 2006 and 2007 do not show regional reasons for cracked trials.

Table 8-3 Cracked trials in London and Midlands HMCS regions, and England and Wales by reason for crack 2002-05⁶⁷¹

Cracked trials: reason for crack	Defendant pleads guilty	Prosecution accepts guilty plea	No evidence offered	Bind over	Unfit to plea/ deceased
2002					
London	56%	10%	31%	3%	0.1%
Midlands	59%	18%	19%	3%	0.1%
England and Wales	63%	15%	19%	3%	0.1%
2003					
London	56%	12%	29%	2%	0.2%
Midlands	57%	19%	20%	4%	0.1%
England and Wales	62%	17%	19%	2%	0.2%
2004					
London	55%	14%	29%	2%	0.3%
Midlands	60%	20%	17%	3%	0.1%
England and Wales	60%	19%	19%	2%	0.1%
2005					
London	58%	13%	26%	2%	0.3%
Midlands	62%	19%	17%	2%	0.1%
England and Wales	63%	18%	17%	2%	0.2%

In the years shown, the two reasons “defendant pleads guilty” and “prosecution accepts guilty plea” account for the majority of cracks in both regions. However, as a percentage, both reasons why trials crack are higher in the Midlands than London and, in particular, significantly higher for “prosecution accepts guilty plea” in the Midlands in

⁶⁷¹ Table based on data presented in Department for Constitutional Affairs, ‘Judicial Statistics 2002’ (Cm 5863, 2003) Table 6.7, ‘Judicial Statistics 2003’ (Cm 6251, 2004) Table 6.7, ‘Judicial Statistics 2004’ (Cm 6565, 2005) Table 6.7, ‘Judicial Statistics 2005 (Revised)’ (Cm 6799, 2006) Table 6.7.

all years.⁶⁷² Therefore, not only are cracked trials generally more common in the Midlands than in London, but when they occur it is more often the result of either a late guilty plea from the defendant or because the prosecution accepts a guilty plea to a lower offence. The plea rate and cracked trial statistics in Tables 8-1, 8-2 and 8-3 provide significant circumstantial evidence for regional variations in both the use of plea bargaining and the advising styles of barristers.

This difference in guilty plea rates is not a recent phenomenon, with statistics in the 1980s recording even greater differences between the circuits.⁶⁷³ Despite these dramatic differences between the judicial circuits, no thorough research has been done on the causes of regional variations. Previous researchers have commented on the marked variation, although none have conducted a formal qualitative or quantitative study to account for why these variations occur.⁶⁷⁴ Ole Hanson, a solicitor examining the North-Eastern Circuit did provide a limited analysis of court room practices, giving a number of reasons for why differences might occur.⁶⁷⁵ The circuit administrator in Leeds told Hansen that he believed the variations might be down to ‘a good dollop of northern common sense’ and that the higher guilty plea rate reflected the ‘robustness’ of the bench. Hansen also found a Leeds solicitor who argued that members of local bar, as well as solicitors, were less inclined to fight cases. Hansen further suggested that because prosecuting counsel, defending counsel and judge were from the same chambers they were worried to not be seen to be wasting court time. Hansen’s findings, although lacking a formal methodology, produce an interesting insight into possible reasons for why circuits have different plea and cracked trial rates.

⁶⁷² The higher rate of “no evidence offered” for London strongly supports the anecdotal instances of organisational problems suffered by the CPS in that region in the data.

⁶⁷³ M. Zander, ‘What the annual statistics tell us about pleas and acquittals’ [1991] Crim. LR 252. In the three years of Zander’s sample, the average guilty plea rate difference was 32%.

⁶⁷⁴ Ibid.

⁶⁷⁵ (27 June 1986) 136 NLJ 601

b. The respective sizes of the HMCS regions

i. Size and make up of local bar

The Bar Council does not keep statistics on the respective sizes of those practising criminal law and no official study has sought to definitively quantify the number of barristers undertaking cases on a regular basis in the Crown Court.⁶⁷⁶ Even the Carter Review, which purported to thoroughly examine the provision of legal services, did not provide accurate figures for the size of the criminal bar. To some extent, keeping figures on how many barristers practice in criminal law would be difficult. Many members of the Bar have a mixed practice with the type of work undertaken varying from month to month. Furthermore, some solicitors now have in-house advocates who carry out work in the Crown Court. It is therefore impossible to say on the data available how many barristers, or indeed advocates, practice criminal law in a given area of the country with a great deal of precision. However, this research has attempted to make a very approximate measurement based on the Bar Directory published online by Sweet and Maxwell.⁶⁷⁷ The Directory lists chambers by specialism and geographical area. The combined search options make it possible to estimate the size of the local bar for comparative purposes. According to the Directory there are 17 chambers in the Midlands area with barristers specialising in crime. These chambers vary in size from solo-practitioners to large sets comprising of up to 50 members. Within chambers, barristers have different specialities, with those focusing on defence or prosecution, a mix of both, or a mix of crime and civil law, or no criminal work whatsoever. Comparatively, in London the Directory lists 88 chambers which advertise themselves as specialising in criminal law. Furthermore, there are another 15 chambers listed as located in the South East in large provincial towns such as Oxford and Brighton. Some of these sets are annexes of London chambers that provide advocacy regularly on a local scale. These chambers also vary in size from solo-practitioners to large 50 member sets, and have the

⁶⁷⁶ The Bar Council only attempts to quantify the size of the profession as a whole, gender and ethnic group: <<http://www.barcouncil.org.uk/about/statistics/>>

⁶⁷⁷ <<http://www.legalhub.co.uk/>>

same mix of work within chambers ranging from solely “defence sets” to those with a civil practice running alongside criminal work.

Making a thoroughly accurate assessment about the number of cases per barrister from this information from the Bar Directory alone would be exceedingly difficult. The influx of Higher Court Advocates, solicitors taking more work in-house at different regional rates, barristers who have a national practice, as well as differing sizes of chambers means that areas cannot be isolated entirely and examined in a simple comparison of cases disposed of in the Crown Court per practising member of the Bar. However, what appears apparent, even on these rough approximations, is that London and South East has more barristers practising criminal law per case and therefore greater competition for criminal cases. The Midlands, South Eastern and London HMCS regions all deal with roughly 8-10,000 Crown Court cases per year⁶⁷⁸, but the Midlands has many fewer barristers. Given the high concentration of barristers in London and the South East, these figures broadly support the notion that there is less work available per barrister in this area than the Midlands, and that there are far more barristers working in London courtrooms. This view is supported by the interview data. Many interviewees speculated that London was far more competitive than the provinces, particularly at the junior end, and those in London seemed to be far more concerned about the quantity of work available.

ii. Geographical area

The HMCS regions comprise a similar number of Crown Court centres with 11 court centres in London, and 12 in the Midlands.⁶⁷⁹ However, the geographical size of the two court areas is dramatically different. The Midlands region is large, covering much of

⁶⁷⁸ *Ministry of Justice* (2009) (n.665) Table 6.2.

⁶⁷⁹ HMCS London Crown Court centres: Blackfriars, The Central Criminal Court, Croydon, Harrow, Inner London, Isleworth, Kingston, Snaresbrook, Southwark, Wood Green and Woolwich. HMCS Midland Crown Court Centres: Birmingham, Derby (Combined Court), Hereford, Leicester, Lincoln, Northampton (Combined Court), Nottingham, Shrewsbury, Stafford (Combined Court), Stoke on Trent (Combined Court), Warwick and Worcester <<http://www.hmcourts-service.gov.uk>>

central England, with the two Crown Court centres furthest apart being approximately 120 miles from one another.⁶⁸⁰ However, the London HMCS region is geographically confined with the two courts centres furthest apart being barely 20 miles from one another.⁶⁸¹ The geographical isolation of some of the court centres in the Midlands area is exacerbated by poor rail and road links across country east to west and barristers in the Midlands are normally restricted on a day to day basis to two or three local courts within easy reach of chambers. According to the Bar Directory, chambers in the Midlands are either in Birmingham (8 criminal sets), Nottingham (4 criminal sets), Leicester (4 criminal sets) or Stoke-on-Trent (1 criminal set). Interviewees from the Midlands said that they generally attended Nottingham, Derby or Leicester Crown Court on a regular basis. This was unsurprising given that they were all from one of the two largest Nottingham chambers. Some explained that although they might take a brief for a case elsewhere, such occurrences were rare, with local solicitors instructing local counsel from the same or nearby city.

London barristers, on the other hand, tend to congregate around the Inns of Court in the centre of the city. Solicitors from all over the London area who wish to instruct a barrister generally approach these chambers. Barristers practising in the London area can therefore be expected to go to any one of the 11 court centres. Most of the court centres can be reached by the Underground and all are readily accessible from a central London location. This means that a barrister working in London can easily move between court centres on a single day, conducting a PCMH in the morning and moving to another hearing in any one of the other court centres by the afternoon, or between days conducting back-to-back trials in different court centres. Within London, the listed 88 chambers plus the other 15 chambers in the South East area, give a huge choice to solicitors looking to instruct an advocate in a case in any of those courts.

It is not suggested that barristers are geographically confined to their local courts in all circumstances. Those who practice in Nottingham and Derby also mentioned Doncaster

⁶⁸⁰ Hereford Crown Court and Lincoln Crown Court: measurements by Google Earth.

⁶⁸¹ Kingston Crown Court and Snaresbrook Crown Court: measurements by Google Earth.

and Sheffield Crown Court as courts where they have conducted trials, as some barristers in London mentioned travelling out to the South Western and Midlands Circuits, as well as within the South Eastern Circuit to provincial courts. However, these were out of the ordinary occasions which did not constitute the majority of their case loads. It is accepted that the size of the criminal bar as estimated here are only very rough figures with barristers occasionally moving around the country and across circuit lines, however, the basic point relating to comparative sizes of the Bar and their regular court appearances remains.

iii. Contact rate

Relative to the Midlands, London solicitors have a far greater choice of barrister and barristers themselves can potentially move more frequently between courts according to their instructions. As shown, these conditions are created by two factors. Firstly, the number of barristers who may be conveniently instructed is far greater in London than the Midlands. Secondly, this larger number of barristers can access a much larger number of courts on a regular basis. The net effect of geography and numbers of counsel is to vary the contact rate of barristers in cases as opponents, or within the environs of the courthouse generally, depending upon the region within which their chambers is based. A barrister in Nottingham Crown Court is much more likely than a London barrister to have as his or her opponent a fellow member of chambers, someone that he or she has known from a previous case, or at least, someone that he or she has met in the robing room. Furthermore, he or she is much more likely to be in front of a judge who has previously tried cases in which they have appeared or who is or was a member of their chambers. This increased contact rate between barristers and judges is a potentially viable explanation for why the plea rate and cracked trial rates are different between London and the Midlands. This increase in contact rate has given greater weight to organisational drivers that may play a part of all barristers' advice regardless of their location in the country. Through an analysis of the interview data this research will attempt to partially establish the nature of those organisational drivers that make guilty pleas and cracked trials more frequent in the Midlands and less frequent in

London. This research argues that the values of the barrister are not necessarily co-opted by the machinery of criminal justice to the detriment of the defendant, as Blumberg and Sanders and Young put forward, but that bargained pleas become easier within an environment where counsel know one another and already have a relationship prior to the case. As L1 commented:

I know some people who would say, if they were here, every case can be cracked. Every defendant can be cracked on something somewhere down the line, except the one in 1000 who is there on principle.

That that point ‘down the line’ is less difficult to reach when both counsel have a close or previous relationship. This point is necessarily reached by barristers doing one another favours or helping out friends, rather barristers in close contact can understand how their opposite number approaches the case and can therefore enter into negotiations with knowledge of their opponent’s strengths and weakness. With greater information about their opponents’ abilities and the likelihood of more frank discussions, barristers are in a better position to negotiate successfully.

c. The robing room

During the course of the field work for this study, the researcher visited several robing rooms in various locations, including the Central Criminal Court, Kingston Crown Court, Leicester Crown Court and Nottingham Crown Court. As was noted at the time of the interviews, the atmosphere in the robing room between these courts was markedly different. Barristers, including those interviewed, regularly sat alone in the London Crown Court centres, failing to acknowledge anyone else who might enter or leave the room, and spent the entire interview period by themselves. In contrast, the robing rooms of the Midland court centres visited appeared far more sociable and amenable. Barristers regularly greeted one another by first name and mentioned recent social engagements or names of cases where they were in opposition to one another. Although superficial, these observations strongly suggested a level of familiarity in the Midlands court centres that

was absent from London. Again, this was unsurprising given that most of those in the robing room for a case on those days that the researcher was present seemed to be from either one of two larger Nottingham sets. As this experience was the same in Nottingham and Leicester there was nothing to suggest that these days were out of the ordinary or in any way exceptional.

When organising the interviews for this study, the researcher was placed in contact with a senior member of a Midlands chambers. On meeting that member the researcher was introduced to several barristers at Leicester and Nottingham Crown Court who were recommended on the basis of being “sound” or “trustworthy”. In fact several barristers in the robing room were covertly pointed out as a barrister not to talk to. The idea of “out-siders” who did not play by the community rules was reinforced by the interviews themselves. As discussed below, barristers with an alternative approach were treated with suspicion.

d. Evidence for court community and repeat players in the interviews

The observation that different court practices existed in different areas of the country was common to many interviewees’ replies to questions relating to rates of guilty pleas. For the most part, the comments made about different circuits were unsolicited and came out of discussions about the interviewee’s practice in relation to plea bargaining. Barristers who practised in London frequently encountered a different atmosphere in provincial courts, noting that regular barristers were very friendly with one another, as well as the judiciary, as A2 commented:

...there is much more of a community feel. If you go to Sheffield Crown Court, it’s the same people everyday, going to the same court, and the judges are known to all the barristers very well, they all come from their chambers. In London there are maybe 20 courts. You go to different courts all the time, you’re not going to the same courts.

The report of A2 that in London ‘you go to different courts all the time’, strengthens the point made above regarding the contact rate in London as compared to the Midlands. As A2 understood, barristers in London simply cannot create the same kind of relationships as those in provincial courts because they lack continuous contact. E1’s experience of Nottingham Crown Court compared with her normal day-to-day work was very similar:

People in London, there isn’t such a community. I mean, people know each other but you can be in London, out of London, in different courts around London everyday of the week, every week of the year. So, you don’t see the same people every day. If you’re a barrister in Nottingham you go to Nottingham and you go to Derby, and that is it. And I’ve done cases in both towns, and there is a real tight knit group, particularly at Nottingham.

That there were definable court communities was acknowledged by Midlands’ barristers, as well as those from London chambers. There is therefore a firm basis in the interview data for believing that the geographical isolation and grouping of courts described above does have a clear effect on the number of different barristers who are able to accept briefs at particular court centres. This in turn has a knock-on effect in terms of the community created there. London courts have a relatively high number of barristers, with a high turn over of individuals, through a larger number of court centres. This prevents communities and repeat players from forming, to the same extent as they might do in the Midlands where there are a relatively small number of barristers, with a low turn over, through one or two court centres.

Barristers were then asked what impact the differences in court culture might be and have on the resolution of cases. Members of the London Bar said they felt like they were occasionally treated as an outsider by both opposing counsel and judges when they left the South Eastern Circuit. Some interviewees said they found that the regional bars and judges treated them with suspicion and that:

Some courts are parochial in their structure, in the way that the judges treat certain barristers. In the way that barristers treat you, you’re not from round here,

kind of attitude.⁶⁸²

E1, who had experience of a trial in Nottingham, claimed that Midlands counsel refused to negotiate with her or take her view on the case into consideration.

This lack of co-operation and mutual suspicion seemed to have created rather stereotypical and unsubstantiated myths surrounding each other's ways of practising. London barristers accused the members of the Midlands Bar of cracking everything for fees, or other unscrupulous tactics such as listing themselves in two trials on the same day, and then cracking one case and running the other as a trial. None of the London barristers who related this account of double listing had experienced it directly and, as discussed in Chapter 6, the practice seemed to have limited possibilities and was described as undesirable by Midland barristers. However, the story had formidable currency as an accurate depiction of the Midlands Bar amongst some of those interviewed. In Nottingham, many of those interviewed put forward the idea of the 'alternative bar' from London. These barristers were from 'left-wing sets' who tried to wring as much money from cases by taking every point possible against the prosecution case. L1 explained the typical member of the 'alternative bar' as:

L1: ...the radical left wing, alternative bar. Many of them hail from London I'm afraid. That is why there is a gulf between us and London...

JB: So, you call them the alternative bar in that they are...?

L1: Dishonest.

The archetype of the alternative bar advertised his or herself as willing to fight all cases and take all points possible. Such tactics might prove very popular with the defendant, but in the long run the defendant's interests were harmed (perhaps by not taking a good

⁶⁸² G1.

plea offer) and were motivated entirely by more money for the barrister.

While there did seem to be limited, anecdotal evidence for these suspicions, other interviewees with direct experience of the local bar were far more circumspect. C1, a barrister at a London set gave an evaluation of the Midlands Bar which was more guarded in its explanation for why more cases cracked there:

...there's a huge cultural difference between the practices outside London and inside London...they can't be separated from plea. The system at work, the criminal justice system at work is far closer outside London than inside London...I think that's certainly that people can have perhaps more open and frank discussions with people that they know well about the merits of cases. And I think traditionally used to be a way of getting through work in some areas perhaps. And I think just the style of advocacy in some parts of the country compared to London is far more collaborative.

This reasoned approach shares much in common with how L1 and N2 explained their own work and how negotiations were conducted in the Midlands as compared with London. L1 described the Midlands court centres' culture:

I think there's a culture of trust up here which is far less common in London...I mean, we've got dodgy people up here, don't get me wrong, but if you are dodgy up here you soon get seen for what you are. I mean, the community knows who you are and you will get marginalised by the community. You need to trust, for all this business of plea bargaining, *Goodyear* indications, early pleas. You need trust, you need fairness.

That 'culture of trust' was used by L1 to explain the readiness with which he might come to an agreement with opposing counsel on how a case should be guided through the courts and eventually resolved. As was described in the theoretical model above, repeat players develop relationships of trust and information can be readily transferred between one another. Those from outside the community, or those who have shown themselves to be untrustworthy are quickly picked out and marginalised. N2 argued that there were clear advantages in having common approaches to cases:

Many positive examples exist of two advocates who know each other and know how each other operate, thinking, talking, working professionally with professional pride to achieve a sensible compromise on the facts. It spares the system, the witnesses, all the nonsense or the panoply of a trial, if in that particular case it happens to be the best thing for the nonsense to be avoided and for there to be a resolution. That often happens. So maybe it is a bad thing but that happens. I've no doubt that that's a bad thing that happens less in London, but that is a side-effect, not a side-effects, a symptom if you like, an unfortunate symptom of contesting more.

What was perceived as a disadvantage, and regarded with suspicion by some London counsel, was seen as a real advantage by those interviewed from the Midlands Circuit. A barrister from off the circuit, N2 admitted, would not be dealt with in the same way, simply because he would not know how he or she approached cases:

Now, if that prosecution brief on the affray wasn't with my chambers and was some out-of-towner that I've never met before, I might have tried it, discussed the idea of a basis, I might not have. But, I certainly wouldn't have been able to go in with, armed with all the facts about my opponent and achieve what I achieved on this young man's behalf. You know?

It is difficult to know whether settling cases in this manner is detrimental to the defendant. On N2's account, the free exchange of information about the true nature of the case against the defendant brings about a 'sensible compromise on the facts.' With a greater information exchange, cases that can be settled by way of a plea bargain are more likely to occur. However, a court community might have norms of settlement that work against the majority of defendants' interests. Some London interviewees believed that regional solicitors regularly instructed London barristers where they wanted a trial and because London counsel were 'more willing to fight cases.'⁶⁸³ This reinforces the idea that there is a court community that outsiders cannot readily break into, and it also suggests that these solicitors perceive Midlands' barristers as settling cases too readily. S2 was also of the belief that local, Midlands barristers settled too easily, and he chose who he instructed extremely carefully. Why solicitors might want a case "to fight" is not

⁶⁸³ A3.

necessarily because it is in the best interests of the defendant, however. As established in the previous chapter, a long trial may be lucrative to a solicitor. Instructing London counsel would therefore be seen as improving the chances that negotiation will fail and a trial ensues.

During the course of this research barristers were not observed advising nor were they observed in negotiation, therefore it is not possible to make an evaluation of this kind of collaboration between barristers. What does appear to be apparent on the limited basis of these interviews is that repeat players in Midland's court rooms have created organisational drivers that create greater possibilities for settlement in cases. Further research would be required, including a scrutiny of case files and interviews with defendants before any conclusions about the operation of such drivers could be safely drawn.

3. Other factors that may affect the guilty plea and cracked trial rates

The explanation given here of the regional differences observed in the statistics is not intended to be a complete description. Other factors could have an impact on the guilty plea and cracked trial rates, however, they could not all be measured in the present research. Discussed briefly below are matters that were considered as potentially important in affecting why defendants in the Midlands are more likely to plead guilty and trials were more likely to crack. As will be seen some of these factors can be discounted, whilst others deserve further research.

a. London deals with more serious offending?

N1 suggested that London dealt with more serious offences and therefore the cracked trial rate there was likely to be lower:

I think the crack rate here is influenced by the fact that there is less serious crime and therefore it is cracking. The less serious the case the more likely it is to crack, quite frankly. I think input from judges and barristers is vastly overrated. I think it's how serious a crime is. You are not in get someone pleading guilty to murder are you? And you're not going to get someone pleading guilty to kidnapping. And there must just be a higher volume of serious crime in London and I would be interested to see the statistics, if you took it simply on serious crime.

While N1 is correct in asserting that serious crime, such as rape and murder tend to have a lower plea rate⁶⁸⁴, the difference in the seriousness of offending between the circuits is minimal. The Judicial Statistics provide an overview of the types of offences dealt with by HMCS region, split into three classes of offences. In 2007, Class One offences, which include murder, rape, and kidnapping, account for 1.7% of all cases heard in London and 1.3% of all cases heard in the Midlands.⁶⁸⁵ Category 2 offences made up 2.7% of all cases heard in London and 4.7% in the Midlands.⁶⁸⁶ Category 3, the least serious offences, including theft and many either-way offences, comprised 95.6% of cases heard in London and 94% of cases heard in the Midlands.⁶⁸⁷ According to these categories, the profile of the seriousness of offences is therefore very similar between the circuits. Although high profile cases may be heard in the Central Criminal Court, their number is very small when placed in the over context of criminal justice within each HMCS region and have very little impact on overall guilty plea and cracked trial rates.

b. The acquittal rate in the Midlands is better

Unfortunately, the Judicial Statistics for 2006, 2007 and 2008 do not list the acquittal rate for defendants by HMCS region. However, according to the 2005 statistics the acquittal rate in London (when a not guilty plea was entered to all offences charged) was

⁶⁸⁴ See Table 2-2.

⁶⁸⁵ *Ministry of Justice* (n.662) Table 6.3.

⁶⁸⁶ *Ibid.*

⁶⁸⁷ *Ibid.*

65.5%, whereas the acquittal rate in the Midlands was 68.4%.⁶⁸⁸ This might suggest that barristers in the Midlands are slightly better at identifying and diverting from trial those who should plead guilty, and may support the notion that suitable bargained pleas are more readily reached by Midland's barristers within their court communities. The improved acquittal rate in the Midlands however is quite small and cannot account for the larger differences in the guilty plea and cracked trial rates alone. Furthermore, the acquittal rate may be accounted for by other factors, such as local jury attitudes, that were undetectable in the present research.

c. Work load

As noted above, the ability of any researcher to accurately estimate the size of the Bar is significantly impeded by a lack of reliable statistics on the number of barristers and advocates practising in the Crown Court. The general feeling from most of the barristers interviewed, and the rough estimations of the sizes of the local bar given here at paragraph 3)b.i, indicates that there is significantly greater competition for cases in London than in the Midlands. It will be recalled from Chapter 6 that the financial incentives given to barristers were highly dependent on work load under the new AGFS. A busy barrister with many cases can make more money by cracking cases and running few trials. On the other hand, a barrister with few briefs will try to run cases as trials to ensure that they gain the greatest fee from the small number of cases that are available. Although the AGFS was only a recently enacted and cannot explain the historical difference, it is suggested that work load may have a significant impact on how cases are handled. Under the analysis provided in Chapter 6, it might be predicted that a higher work load, as that potentially found in the Midlands, would result in a great number of guilty pleas and cracked trials. In order to produce a definitive link, the typical work loads of barristers in both HMCS regions should be studied and the effect of cases per barrister quantified.

⁶⁸⁸ Department of Constitutional Affairs, 'Judicial Statistics 2005' (Cm 6799, 2006) Table 6.9. This small, 3-6% difference is replicated in other years: 'Judicial Statistics 2004' (Cm 6565, 2005) Table 6.9; 'Judicial Statistics 2003' (Cm 6251, 2004) Table 6.9; and 'Judicial Statistics 2002' (Cm 5863, 2003) Table 6.9.

4. Conclusion

This data provides an indication that repeat players with court communities are established in the Midlands and that they assist with negotiation over plea, whereas in London, such communities are absent or weak in their effects on plea. This difference in local culture partially accounts for the differences in guilty plea and cracked trial rates between London and the Midlands as displayed in the Judicial Statistics. What cannot be said on the basis of this data is whether the presence of such communities are in the defendant's interest or not. American studies that have examined the effects of repeat players on defendant outcomes have concluded that they have little impact on final sentence.⁶⁸⁹ A comparable study that examined the insider/outsider status of barristers and the effect on cases outcome would be useful in identifying whether or not the same conclusion can be drawn in the case of England and Wales.

While information exchange is certainly improved in court communities, leading to better negotiations as per Scott and Stuntz, it is not possible to say what other values may be informing decision-making within each respective court culture. If barristers negotiated and advised on the basis of acquittal and conviction only, then the free exchange of information as displayed in the Midlands should be to the benefit of the defendant, who can evaluate their position on the basis of a realistic projection of trial and sentencing possibilities. The improved acquittal rate in the Midlands, subject to the caveats outlined above, might indicate that some defendants in the Midlands derive benefit from their representatives being repeat players. This however is unsubstantiated in the data and cannot account for the overall differences observed in the statistics.

This chapter has not sought to argue that court communities account for all the differences in the guilty plea and cracked trial rates. As described, other significant factors may play a role. Rather, this chapter argues for a reassessment of the role of the

⁶⁸⁹ See n.652

court community in barrister decision-making, how court communities might inform the content and timing of advice, and to what extent communities and repeat players may affect the pleas entered by defendants.

Chapter 9: Conclusions

This thesis has sought to provide a different perspective on the factors which determine a barrister's advice on plea in the Crown Court. Beginning with the earlier literature, it has been argued that the present scholarship is too dated to act as an accurate description of the practices of the current Bar, and that the wealth of changes that have occurred in the past 20-30 years have created a very different environment for legal advice. In addition, the literature is missing vital empirical evidence on barristers' own perspectives and does not reflect the current work environment of practising at the criminal bar. This research has sought to fill that lacuna by providing in-depth interviews with a sample of barristers and two solicitors. This research has discovered data that provides evidence which does not conform to current theories as to why guilty pleas are advised.

Chapter 4 presents data that reveals that barristers themselves consider that they are fully committed to providing disinterested advice to the defendant which is based upon a proper consideration of evidence and sentence. This is not merely an unsubstantiated assertion by those interviewed. The interviewees, in describing their practices, were able to demonstrate detailed thought processes about how evidence is considered, how matters of sentence and the sentencing discount are discussed with the defendant, and the effect that those issues had on defendant decision-making. These interviewees revealed a carefully considered view about their role as an advisor. They were also openly critical of practices that they felt were improper. These findings are inconsistent with the description of an entrenched guilty plea culture, a court community that is deleterious to the defendant's interests, or advice-giving which is driven primarily by the goal of maximising fees.

This chapter also illustrated the danger of treating the Bar as a homogenous group. Amongst barristers, real differences of opinion about the appropriate way in which advice may be delivered appears to be present. The evidence for different advising styles supports Peter Tague's findings and provides further issues about the appropriate role of the barristers in advising defendants. In particular, the data indicates that while some

barristers adopt a persuasive approach others adopt a facilitative approach which seeks to provide defendants with the necessary advice and information with which they can reach their own assessment of the costs and benefits of pleading. This thesis has argued in favour of a facilitative approach to preserve defendant autonomy and prevent the potential for their manipulation, while acknowledging the potential danger that some highly risk-averse factually innocent defendants might decide to plead guilty unless persuaded not to.

In Chapter 5 it was suggested that plea bargains are often sought as a way of achieving an optimal outcome for the defendant. The interviewees were highly result focused, with a consequentialist view of criminal cases. The interviewees rejected the idea that plea bargains necessarily place unfair pressure on the accused, but rather argued that they provide a suitable plea that properly balances risk, as assessed by evidence, and outcome, as assessed by sentence. The current literature treats *de facto* innocent defendants as a discernable group, whereas in reality barristers, in predicting outcome, are only able to treat defendants according to the weight of the evidence. In England and Wales, the laws of evidence make it easier to assess pre-trial claims of evidence than it is in the United States by providing incentives to reveal defences at an early stage. In these respects, plea bargains are more likely to be based on an accurate assessment of the risk of conviction and sentence which the defendant faces. In many cases, the plea bargain may reduce the overall penalty faced by a *de facto* innocent defendant who is unfortunate enough to face a compelling prosecution case. Banning plea bargaining would probably increase the number of cases going through the courts and reduce the available resources that may be expended per trial. In this circumstance *de facto* innocent defendants who previously pleaded guilty to lesser offences might be convicted of more serious offences and face harsher penalties.

Chapters 6, 7 and 8 considered overarching drivers that did not come out of the case at hand but were created by external factors. Incentives regarding fees clearly establish a causative link between fee and outcome, however, this link is not a direct relationship. In line with Peter Tague's findings, the data suggests that barristers are typically unaware of the exact method by which fees for cases are calculated. This evidence suggests that

barristers' clerks may be far more instrumental in the handling of cases than previously thought.

Although there existed limited evidence in the data of fee manipulation by barristers, doing so overtly could be disastrous to the aspirations for a successful career. Instead, it was proposed that fees affect advice in areas of indeterminacy where the "best course of action" is difficult to determine. Here, a more financially remunerative course might be proposed more regularly, however, that course of action is perfectly valid and not necessarily detrimental to the interests of the defendant. By modelling the Advocates' Graduated Fee Scheme it was determined that there is an incentive to encourage cracked trials provided that the barrister has sufficient work available. In certain chambers or, perhaps, regions of the country where fewer cases are available, trials are much more likely to occur.

The findings of the research supported Peter Tague's arguments as to the importance of the barristers' relationship with their instructing solicitors in the plea decision. Although not determinative, Chapter 7 argued that the incentives affecting solicitors had a knock-on effect on the incentives of barristers. Those who pressurised or manipulated defendants might find themselves rapidly out of work. These subsequent incentives are primarily financial. The new Litigators' Graduated Fee Scheme creates a strong incentive for solicitors to continue to trial, particularly in long or complicated cases. That solicitors' fees are now contingent on outcome is potentially highly significant in the future relationship between barristers and solicitors. Solicitors, unable to afford a last minute plea, may decline to instruct independent counsel, and take more and more work in-house as they seek to assert greater control over case outcomes. This might have a detrimental impact on the advice given to defendants as the mitigating effect of a split profession is removed.

Finally this thesis proposed a partial explanation for the observed differences in the Judicial Statistics between London and Midlands HMCS regions for guilty plea and cracked trial rates. Using a model of repeat players and the reciprocal emergence of a court community, it was argued that an environment of increased trust and cooperation has emerged in the Midlands. This environment promotes negotiation as information is

more readily exchanged between counsel, and standard approaches to cases are formulated. This allows a ready resolution of cases through plea bargaining and suitable charging of cases. The interview data combined with calculations indicate that the courthouses of the Midlands are more isolated than their London counterparts. Combined with a reduction in competition for work, it was tentatively established that barristers in Midlands courtrooms have an increased contact rate, leading to the community effect described. On the basis of the data it was not possible to determine whether the court community postulated was inimical to the defendant's interests, even though much of the data recognised that such communities did exist. Contrary to some of the literature, many incentives could act upon the way barristers behave in a way that might be beneficial to defendants. It was further proposed that case outcomes with repeat players of similar cases could be compared with those of one-off players from outside the circuit. This investigation might indicate whether and how repeat players affect outcomes for those they represent.

This thesis does not argue that barristers are unaffected by factors that may lead to advice that is detrimental to the defendant. Instead the research has demonstrated is that the current literature overly simplifies the motivations of barristers, and risks obscuring the multitude of drivers that affect advice. Without seeking greater detail about what incentives influence legal advisors, policy which seeks to affect those incentives will be poorly informed. With a thorough, nuanced understanding of what motivates barristers, including matters that affect their assessment about the probability of conviction and sentence, why plea bargains are entered into, the fees incentives created, the impact of the relationship with solicitors, and court community factors, incentives can be adjusted so that the risks to defendants of inaccurate advice are minimised. Furthermore, costs within criminal justice can be more easily managed. As was revealed in Chapter 6 and 7, the current fee structure which provide incentives to solicitors to pursue a case to trial, may possibly create a break down in the use of independent counsel and an increase in trials. Whether or not an increase in trials is desirable in terms of the quality of justice, it will certainly undermine the aims of the government to save money on legal aid. Given that the barrister's advice on plea is critical to the decision made by the defendant, which in turn is critical to the cost of a criminal case, a thorough understanding of the drivers behind advice is vital in formulating government policy.

APPENDIX A Methodology

1. Research objective

The aim of the research is to identify the factors or drivers which may determine a barrister's advice on plea. This objective was determined with reference to the relevant literature on plea negotiations and the conduct of barristers. Recently no published research, with the exception of Peter Tague, has spoken to barristers about how and why they advise defendants to plead.⁶⁹⁰ Tague's research has suggested that a set of complex motives may determine a barrister's advice and that the position of McConville et al does not attempt to explore barristers' motivations, perhaps failing to appreciate the subtleties of how barristers formulate a proposed course of action to the defendant. The research objective is therefore not only to discover what determines a barrister's advice on plea but to also evaluate the literature and to test the plausibility of the "selfish"/unprepared/financially motivated/guilty plea focused practitioner

2. Method

In identifying what determines a barrister's advice on plea an appropriate method must be chosen. This research has determined that a qualitative approach is necessary- a research question with emphasis on decision-making processes is not readily answered through statistical or quantitative methods.⁶⁹¹ What determines a barrister's advice on plea is almost certainly brought about by complex social processes and cannot be measured through the analysis of the causal relationships between variables.⁶⁹² On the

⁶⁹⁰ P. Tague, 'Barristers' selfish incentives in counselling defendants over the choice of plea' [2007] Crim LR 3.

⁶⁹¹ D. Silverman, *Doing Qualitative Research* (2nd edn Sage Publications, London 2005) chapter 2.

⁶⁹² For the purposes of qualitative measures: N. Denzin and Y. Lincoln, *Handbook of Qualitative Research* (2nd edn, Sage Publications, Thousand Oaks and London 2000).

other hand qualitative research allows the use of methods which explore how and why people behave the way they do. Exploring the motives and purposes of people requires a careful choice of method. That choice depends on what the study wishes to discover.⁶⁹³ The method must satisfy the requirements of validity and reliability.

a. Using interviews

i. Validity

Validity is understood here to raise the question of whether the research actually does investigate that which it claims to investigate. Using interviews as the primary research tool is a well suited, valid method to tackle the research question. Although observation of social phenomena provides an understanding of how people behave, it does not allow for the understanding of motivation or experience. The research question requires an exploration of motivation and therefore would be partly hidden to someone who merely observed behaviour. As Patton says, ‘the purpose of interviewing is to find out what is in and on a person’s mind..., to access the perspective of the person being interviewed..., to find out from them things that we cannot directly observe.’⁶⁹⁴ Interviews allow an exploration of why people behave as they do and allows them to explain their own behaviour. The use of interviews to measure people’s attitudes and opinions is a widespread practice amongst social researchers.

From the literature on plea negotiations and the numbers of defendants pleading guilty it is apparent that barristers regularly advise a plea of guilty, occasionally in ‘strong terms.’ Observational research as apposed to interviewing would not therefore

⁶⁹³ *Silverman* (n.691) 113.

⁶⁹⁴ M.Q. Patton, *Qualitative Evaluation and Research Methods* (2nd edn Sage Publications, Thousand Oaks CA and London 1990) 278.

significantly assist in answering why barristers' advice takes a particular form. A limitation of the current literature has been the propensity to observe the actions of barristers but not to explore the reasons behind them. Little of the central areas to be researched would be exposed by observation. The main interest of this research is not focused upon how barristers advise or their "lived experience" of advising clients, but rather why they come to the decisions that they do. Interviews are an excellent vehicle to explore purpose and decision-making. Interviews have the added advantage of allowing participants to reflect on their behaviour in a manner that they might not normally do. Interviews give a chance for participants to think about their own behaviour and to explain it. If the focus of the research is find out why barristers advise as they do rather than how, the best way of finding that data is to ask the barristers themselves.

ii. Reliability

Reliability is understood here to mean whether the data received is an accurate description of the real world. Interviewing is open to the traditional charges of relativism and an embedded subjectivity- that it would be impossible for the researcher to test the reliability of the barrister's responses and whether what is said in interview bears at all upon the reality of the decision-making process on plea.⁶⁹⁵ Furthermore, the barrister herself may not understand her own true motives for how they make decisions or construct responses to fit with those that are those that are "expected", "normal" or otherwise entirely located within themselves. This is further complicated by the researcher imposing his or her own biases on the data during interpretation and explanation.

These are general criticisms of all qualitative research and are recognised here as a difficulty for both the design of this research and the interpretation of the data gathered.

⁶⁹⁵ H. Arksey and P. Knight, *Interviewing for Social Scientists* (Sage Publications, Thousand Oaks CA and London 1999) 15.

Interviews in particular have been criticised as being ‘a trace of other things, not the thing- lived experience- itself’⁶⁹⁶, creating numerous levels of representation from the lived experience, to the telling to the researcher, to the final product of the research. While this view is not entirely accepted it is understood that drawing conclusions from qualitative research beyond the experience of the interviewee is a difficult process. At the same time it is possible to find realities in interviews. Interviews do yield useful information about people’s social worlds and are not completely meaningless beyond the context of the interview.⁶⁹⁷ Without embracing post-modernist interpretations of the construction of “realities”, this research proposes to accept the value of this criticism in that it ‘extends, complicates and challenges understanding, sensitising...practitioners to the complex dimensions of their work.’⁶⁹⁸ The apparent reliability of interviewing barristers about the way in which they reach their advice to defendants is therefore threatened and needs to be addressed. It is easy to envisage that barristers on interview will fall back to a “standard response”- the one taught to them on the Bar Vocational Course about the advice process, which may bear very little resemblance to what they do in practice. In recognising the inherent weaknesses in interview based research, it is the intention of this research to carefully navigate the potential pit-falls of overstating the reliability of the received data and to ameliorate its flaws through the use of other various methods.

Interviewing alone may, therefore, be reproached on the basis that individual accounts of attitudes or thought process may not reflect the reality of what occurs when a barrister has a defendant in front of them and has a decision to make. This view, as explained, is not entirely accepted here, however it is agreed that the qualitative researcher must proceed carefully. A number of steps were taken in the present research to ameliorate the negative effects of using interviews.

⁶⁹⁶ N.K. Denzin, ‘Representing lived experiences in ethnographic texts’ in N.K. Denzin (ed), *Studies in Symbolic Interaction* (JAI, Greenwich Connecticut 1991) 59, 68.

⁶⁹⁷ J. Miller and B. Glassner, ‘The Inside and the Outside: Finding Realities in Interviews’ in D. Silverman (ed), *Qualitative Research Theory Method and Practice* (2nd edn Sage Publications, London, Thousand Oaks CA 2004) 129.

⁶⁹⁸ *Arksey and Knight* (n.695) 14.

Firstly, while the views of how barristers see themselves at work alone would be relevant and worthy of research, the reality of what occurs in the thought processes of the barrister when advising on plea is reflected interviews. That interviews can be used to gain viable data about lawyers' "reality" is well established in the current literature, and several studies have used interviews with lawyers as part of data collection.⁶⁹⁹ Barristers can give at least a partially accurate account of how they themselves think about the plea process. Barristers, as anyone, create and maintain meaningful worlds which they can communicate through language to the researcher.⁷⁰⁰ What is vital, however, is to achieve intersubjective depth and understanding based on trust, rapport and that the interviewer 'have lived or experienced their material in some fashion.'⁷⁰¹ This was achieved in a number of ways. To prevent the barrister falling back on the "classic reply" of how they advise, the interview questions were designed to focus the interviewee on each of the elements that might impact on advice. These elements were drawn from the literature, the law, and the researcher's experience of giving advice, and allowed an exploration of the complexity of the advice giving process beyond the "standard response". The researcher also approached interviewees as a member of the Bar. As a non-practising barrister, being introduced as a member of the Bar and a lawyer (rather than as a sociologist, academic or student) engendered rapport between the researcher and the interview subject. The researcher has also studied criminal law and procedure in-depth and has some insight into the language used by lawyers to communicate ideas about their work from his experience of law in practice. The researcher was therefore able gain a rapport with the interviewee's experience providing suitable follow-up questions or topics to their responses and interpreting the meaning to their answers as those given by a criminal practitioner.⁷⁰²

⁶⁹⁹ For recent examples: C. Tata and F. Stephen, "'Swings and roundabouts': do changes to the structure of legal aid remuneration make a real difference to criminal case management and case outcomes?" [2006] Crim LR 722; P. Tague, 'Barristers' selfish incentives in counselling defendants over the choice of plea' [2007] Crim LR 3;

⁷⁰⁰ *Miller and Glassner* (n.697) 126-127

⁷⁰¹ *Ibid.* 132 citing P.H. Collins, *Black Feminist Thought* (Unwin Hyman, Boston 1990) 232.

⁷⁰² For discussion of ways in which validity is enhanced: *Arksey and Knight* (n.695) at 52.

Secondly, to minimise the effects of the researcher's own biases, the interviewees were asked open questions, rather than closed, directed questions which require only a "yes" or "no" answer. The researcher only became more specific with questioning once the interviewee had indicated a knowledge or preference for one particular form of answer. In this way "leading" the interviewees through the research questions was reduced to a minimum.

Thirdly, the reliability of what barristers say about their own work can be checked by reference to whether their explanation satisfactorily explains high guilty plea rates. If the interviewees' accounts are a realistic explanation of what occurs in practice it may be concluded that the accounts may at least be a partially reliable description.

iii. Improving validity and reliability

One view of qualitative research is that its validity can be improved through triangulation whereby the data is compared with other data for confirmation⁷⁰³ and completeness.⁷⁰⁴ Confirmation is defined as data which converges with the main research to support the conclusions drawn. Completeness is defined as data that supplements other research methods and adds dimensions to meaning and improves understanding.

Triangulation techniques to improve completeness are the most appropriate as other forms of research method would not, and probably could not, confirm the data received

⁷⁰³ N.K Denzin, *The Research Act in Sociology: A Theoretical Introduction to Sociological Methods* (1st edn, Prentice-Hall, New Jersey 1970).

⁷⁰⁴ T.D. Jick, 'Mixing Qualitative and Quantitative Methods: triangulation in action' (1979) 24 *Administrative Science Quarterly* 602.

from interviewing barristers about their thought processes. Several methods presented themselves as potential ways to triangulate and help complete the data or at least allow a consideration of the data in context and depth.

It was decided that at least two solicitors should be interviewed about the advising practices of barristers. Solicitors are uniquely placed to assess barristers whom they regular instruct and observe. The relationship of solicitor-barrister allows for a cross checking of what barristers do, and gives an informed third party perspective to interpret barrister behaviour. It was also theorised that, following Peter Tague's research on barrister's incentives, the subsequent incentives of solicitors relating to fees and treatment of defendants might have an effect on barrister advice.⁷⁰⁵ Two solicitors, S1 and S2 were therefore interviewed. The interviews were digitally recorded and based on the responses given by barristers. S1 was interviewed after the 9th interview with a barrister, and S2 after the 20th interview with a barrister. The spacing allowed the researcher to put appropriately informed data to the solicitors for their responses.

The data from this research was also compared with that of other qualitative and quantitative studies. As will be seen, the data was compared against quantitative studies, such as the judicial and criminal statistics, in the main thesis to test the accuracy and validity of what the interviews related. The results of the interviews were also checked against qualitative studies, including interviews with barristers that have previously been conducted.

A final way of checking the validity and reliability of the data was done through theoretical triangulation. Here, the data in the main body of the thesis was compared against a diverse set of socio-legal theoretical explanations of lawyer behaviour given by other writers. This allowed the verification of whether the data provides a reasonable

⁷⁰⁵ Tague (n.690).

explanation of ‘what is it that determines a barristers advice on plea’ according to accepted theories of lawyers, and how and why they give advice.

3. Research design

By recognising the methodological difficulties of interview based research, the interview field work was designed in order to address those problems or at least ameliorate their effects. From the beginning this research adopted a grounded theory approach.⁷⁰⁶ This type of methodology allowed the questions asked and the sample of participants to change to allow the development of the emerging theory based on the data collected. Beginning with existing or ‘grounded’ theories, these may be elaborated and modified as the income data is played against them.⁷⁰⁷ In essence, this type of theory ‘involves constantly searching, comparing and interrogating the first few transcripts to establish analytical categories that address the research questions, that are mindful of the research data, and which allow the greatest amount of data to be coded...’⁷⁰⁸ In grounded theory ‘analysis is interwoven with data collection, a process of finding, analysing and theorizing.’⁷⁰⁹

The research design can therefore be summarised as follows: a grounded theory approach with theoretical sampling to conduct qualitative, semi-standardised interviews with practicing barristers who regularly represent defendants in the Crown Court of England and Wales.

⁷⁰⁶ See generally: A. Strauss and J. Corbin, *Basics of Qualitative Research Techniques and Procedures for Developing Grounded Theory* (2nd edn Sage Publications, Thousand Oaks CA and London 1998); ‘Grounded Theory: An Overview’ in N. Denzin and Y. Lincoln (eds) *Handbook of Qualitative Research* (Sage, Thousand Oaks CA and London 1994) 273.

⁷⁰⁷ *Strauss and Corbin* (n.706) (1994) 273.

⁷⁰⁸ *Arksey and Knight* (n.695) 162.

⁷⁰⁹ *Ibid.*

a. Using semi-standardised interviews

At the start of this research a good general idea about the variables to be measured was identified by the interviews. These variables have been drawn from the literature and sought to test the current position adopted by the literature on why barristers advise the way they do. This not only allowed this research to relate back to the current research in the area, but allowed penetration into the reality beyond the interview and the “standard response”.

From these variables a set of standardised questions were drawn up, designed to explore the issues identified.⁷¹⁰ A semi-standardised interview format was chosen, using a set of standardised questions followed up with scheduled and unscheduled probes to explore the interviewee’s responses. This method was selected so that each interviewee was asked about the same areas of interest while any further interesting points could be pursued to gain further information and allow the emerging theory to develop. A rigid set of questions would ignore unanticipated data and presume that all possible variables had been identified prior to the study. As Strauss and Corbin note, ‘some questions or foci with which you entered the interview...will get quickly dropped, or seem less salient, or at least get supplemented.’⁷¹¹ Because these initial questions had not come from data but rather other researchers’ perspectives, ‘they must be regarded as provisional and [potentially] discarded as data begin to come in.’⁷¹² The beginning format of questions therefore developed as interesting or unanticipated matters arose. That is not to say that the research changed tack on a whim, but rather was flexible enough to absorb new avenues for research and allow the collected data to guide the process. A flexible set of questions that allowed for variation supported the emerging theory method and gave extra reliability to the study. As the interviews progressed, for

⁷¹⁰ The piloted question schedule and “final” question schedule appears at Appendix B.

⁷¹¹ A. Strauss and J. Corbin, *Basics of Qualitative Research: Grounded Theory, Procedures and Techniques* (Sage Publications, Thousand Oaks CA and London 1990) 183. For further use of continual amendment and development of questions in accordance with an emerging theory: *Silverman* (n.691) 104.

⁷¹² *Strauss and Corbin* (n.706) 205.

example, it became more apparent that barristers did not have many concerns about civil liability arising as a result of their advice. As a consequence this question has less time devoted to it and other questions that had greater relevance were explored in more detail. The regional differences found were also pursued more vigorously as interviewees with “off-circuit” experience began to relate their observations of varying practices. Questions on the differences of the circuits were therefore added and barristers in later interviews who identified a difference were asked for reasons to account for this.

4. Pilot

These questions were piloted with 2 barristers to test whether they could be understood, whether they explored the relevant areas and whether they produced useful information. Basic matters such as the efficacy of the digital voice recorder were also tested as well as transcription. These interviews were conducted with personal contacts who could feel comfortable providing critical feedback on the interview process.

The pilot interviews took place on Monday 10th December 2007. The interviews took place away from the interviewees’ chambers in a restaurant in the Temple. This location was chosen for its relative quiet. Both interviews were digitally recorded with the participants’ consent. The researcher also took some notes as they spoke, although most of the time was spent listening to their responses the researcher could participate properly in the interview process. To each interviewee the interview process was re-explained and the ethical considerations of participating in the pilot.

The first interview took exactly one hour, whilst the second around 54 minutes. The first barrister was exceedingly helpful despite her relative junior status. However, the second barrister was too junior to provide much beyond a basic sketch of a case moving through the Crown Court. The questions were, on the whole, well received and understood. P1

and P2 had some difficulty calculating the proportion of their practice that was in crime and what proportion was in prosecution and defending.

The question: ‘how do you advise on plea?’ seemed to be difficult to answer for both these barristers. Both barristers left the impression that the advice ‘I think you should plead guilty’ was not a very good way of describing what they do. Both were keen to take instructions from the defendant and then together with the evidence in front of them make a recommendation to the defendant that was supported by reasons as disparate as how they thought the defendant would stand up to cross examination, the character of the prosecution witnesses and the strength of the evidence on the papers, and other matters going to a finding of guilt. This allowed them to make an assessment that could be presented to the defendant who then made the final decision. Both barristers were cautious not to be seen as supplanting the defendant’s decision with their own opinion about how the defendant should plead. The first barrister in particular was worried about being seen as anything other than ‘whiter than white’, and had some fear about ending up in the Court of Appeal giving evidence on the voluntariness of plea.

Their advice on plea did not seem to be affected by matters such as the discount which do not go to guilt, however, both felt it their obligation to point out to the defendant the possible benefits of pleading guilty. On reflection it was decided that further questioning should have taken place as to whether either barrister felt that informing the defendant about the discount placed too much pressure on the accused or whether this was merely a professional responsibility that they were obliged to fulfil.

Both barristers were aware of barristers who boasted of their fees on getting a guilty plea and P1 related a story of a defence barrister going down to the cells and asking ‘what’s all this not guilty shit?’ P1 believed that there was a culture amongst some barristers who were normally outside London and of a “type” who would certainly plead out cases in the interests of bravado and higher fees. P1 believed that these barristers were mostly

of an older age and worked in provincial courthouses where such behaviour was not frowned upon or was considered to be 'just the way X does things.' By contrast P1 felt that the highly competitive nature of the London bar made it more difficult for barristers to engage in fee focused work, at least overtly. P1 felt that the Carter Reforms would discourage barristers from taking this course as the financial incentive would be simply removed. Accounts of third party actions are difficult to verify, but it was noted that this barrister felt comfortable enough to expose behaviour she felt highly was unethical.

a. Changes to the question schedule as a result of the pilots.

As a result of the pilots it was necessary to change the understanding of how advice is given so that the process of giving advice was taken into account. This involved a presentation of the defendants' options and overall assessment of the case rather than a blunt "I advise you to plead guilty/not guilty". Asking: "In approximately what proportion of cases in which you are instructed to defend do you advise a plea?"⁷¹³ was therefore a little artificial. Of course, the barristers questioned made recommendations on plea but this seemed to be more accurately put to the defendant as: "In my view the prosecution will present the evidence in this way, which, unless you have a satisfactory answer, will be highly unfavourable to you." It was concluded that concentrating on the advice process rather than on how a particular factor impacts on a blunt guilty/not guilty conclusion would be more informative. It was determined that the questions should reflect how advice develops according to the various factors to try and get a sense of the complexities involved. It was therefore decided that the questions in this area should start with: "What process do you follow in advising a defendant- how do you begin?" This allowed the interviewee to talk through the process. This would be followed up with input from the researcher in the form of probes about how different elements impact upon the way the interviewees think. The pilot questions allowed this to a certain extent but were altered to allow the interviewees to lay out the process of advice giving rather

⁷¹³ Appendix B Initial Interview Schedule, Question 4.

than replying to questions that look to the question of the final recommendation on plea.

On listening to the interview it was apparent that charge bargain process should have been focused on in more detail. The interview questions were altered to ask a barrister how that process of bargain is initiated, carried out and presented to the defendant. This was obviously critical. If the bargain process is initiated after speaking with the defendant and an analysis of the “proper charge” on the papers, then the bargain might more realistically represent a charge that would be provable a trial. If the process is initiated by the prosecution and defence barrister, without an analysis of prosecution disclosure or an account from the defendant (who is presented with the deal) then the charge bargain would more closely resemble the description given by McConville et al.⁷¹⁴

The questions also benefited from a re-organisation into matters going to the actual determination of plea, as discussed above, and then further matters such as fees which although may impact on the content of advice, are external to the actual advice giving process itself. This avoided confusing the participants and improved the flow of the interview. The order was changed and categorised into: Preliminary questions; A) The advising process; B) Charge bargaining/relationship with the court; C) Fees/workload; D) The relationship between defendants and solicitors; and E) Ethics and professional liability.

Reminders were also placed at the top of the question schedule as to important explanations that should be made to interviewees regarding ethics, and the general conduct of the interview.

⁷¹⁴ M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press, Oxford 1994) 256-261.

b. Other matters arising from the pilots

In a second short comment P1 mentioned that some barristers' chambers were completely defence minded and therefore refused to represent the Crown in proceedings. These chambers, P1 pointed out, were far more likely to advise a defendant to plead not guilty and to go to trial. Arguably these chambers represent the antithesis to the guilty plea culture described by McConville et al's research and had an impact on the selection of chambers when looking for barristers to interview.

To improve the consistency of the interviews a number of scheduled probes as follow ups to the questions were inserted to ensure that the same kinds of areas with each interviewee were covered. It was concluded that the questions as drafted worked well and other than the changes noted above no radical rethink of the study was thought necessary. Both barristers involved said that they enjoyed the process of participating and were happy that they had decided to take part.

5. Sampling

a. Emerging theory sampling

In common with the question design, the sampling technique proposed for this research was based upon a broad "emerging theory" methodology. This sampling technique is a type of theoretical sampling whereby the participants are chosen according to a developing theory which explains the data and drives selection as the study continues. Sampling proceeds purposefully and develops as the study does according to variables controlled by the needs of the theory.⁷¹⁵ Following Sandelowski's description, this study

⁷¹⁵ M.B. Miles and A.M Huberman, *Qualitative Data Analysis* (2 edn Sage Publications, Thousand Oaks

began with a selected sample ‘according to preconceived, but reasonable initial set of criteria.’⁷¹⁶ This initial sampling frame ‘permits the researcher to develop the conceptual lines that will ultimately drive theoretical sampling’⁷¹⁷ as the emerging theory of the data becomes clear. As Glaser argues, researchers ‘begin by talking to the most knowledgeable people to get a line on relevancies and leads to track down more data and where and how to locate oneself for a rich supply of data’⁷¹⁸ The researcher begins with a sample of where the phenomena occurs and then ‘collect more data to examine categories and their relationships and to assure that representativeness on the category exists. Simultaneous data collection and analysis are critical...The full range and variation in a category is sought to guide the emerging theory.’⁷¹⁹ While the initial sample was controlled according to variables that were thought to be important, these variables did change as the study developed according to the inductive process involving the emerging theory from the data and the deductive process of the purposeful selection of samples to check out the emerging theory.⁷²⁰ This method was satisfactory in some respects, however it did pose some difficulties as described below.

a. Sampling in action

Interviewees were initially drawn according to demographic sampling techniques to cover a predetermined cross-section of the criminal bar. This sample should be ““encultured informants”, individuals who know their culture well and take it as their

CA and London 1994) 29.

⁷¹⁶ M. Sandelowski, D. Holditch-Davis and B. Glenn Harris, ‘Using qualitative and quantitative methods: the transition to parenthood of infertile couples’ in J.F. Gilgun, K. Daly and G. Handel (eds) *Qualitative Methods in Family Research* (Sage Publications, Newbury Park 1992) 302.

⁷¹⁷ I. Coyne, ‘Sampling in qualitative research. Purposeful and theoretical sampling; merging or clear boundaries?’ (1997) 26 *Journal of Advanced Nursing* 628.

⁷¹⁸ B. Glaser, *Theoretical Sensitivity: Advances in the Methodology of Grounded Theory* (Sociology Press, Mill Valley 1978) 45.

⁷¹⁹ W.C. Chenitz and J.M. Swanson, *From Practice to Grounded Theory* (Addison Wesley Publishing Company, Englewood Cliffs CA 1986) 9.

⁷²⁰ *Strauss and Corbin* (n.706) Chapter 13.

responsibility to explain it,⁷²¹. Almost certainly barristers of any year of call know their culture and take it as their responsibility to explain it. The sample was specifically chosen to take in a number of what were thought to be initially significant, controllable variables. The following variations were identified as being significant for initial selection purposes: year of call (and therefore experience and type of work undertaken); size of chambers; gender⁷²²; proportion of work in prosecution and defence; and practice profile of chambers. These last two factors were thought to be important for several reasons as the pilot found. Some chambers are known to be “defence sets” and therefore do no work for the CPS whatsoever. Barristers from these chambers possibly do not share exactly the same views as those from chambers where prosecution work is also conducted.

A range of barristers and chambers that took in this range of traits were therefore contacted for interview. These traits were continually analysed and compared to guide the emerging theory. Barristers were selected using the Bar Directory published by Sweet and Maxwell and chambers’ own websites.⁷²³ Almost all chambers in England and Wales now have their own website which details the practice profile of the chambers and individual barristers. This allowed selection according to the variables identified, and the targeting of relevant individuals as the study progressed. After each interview was conducted, what was discussed was reflected upon and the data transcribed. Although the core questions and areas of interests remained the same with each interviewee, this allowed a process of continual theory development as data was revealed and gaps and weaknesses were discovered. Accordingly, although the first interviewees came from London sets, the data collected strongly suggested a divergence of practice between the South Eastern Circuit and the Midlands Circuit. In response, the sample was widened to take in five barristers at both Leicester and Nottingham Crown

⁷²¹ H. Rubin and I. Rubin, *Qualitative Interviewing: The Art of Hearing Data* (2nd edn Sage Publications, Thousand Oaks and London 2005) 66, citing J.P. Spradley, *The Ethnographic Interviews* (Thomson Learning, London 1979) 47.

⁷²² It was not understood whether the interviewee’s gender had any impact on the data given, however, it was recorded as a variable to ensure that the sample was in some way representative of the criminal bar.

⁷²³ The Bar Directory <<http://www.legalhub.co.uk/legalhub/app/appinit>>

Court centres, and the senior partner of a solicitor firm in Nottingham. These interviewees were not individually targeted by being identified beforehand, as the researcher was introduced to prospective participants in the robing rooms of both courts. During the time spent in the robing room of each court, the profiles of each barrister interviewed was ascertained beforehand from a contact in the court and checked against the overall profile of those already interviewed. Controlling this part of the sample in this way ensured that the five interviewed represented a mix of experience from less than 5 years call to QC.

The process of theory development together with purposeful sampling did cause some difficulties as the response rate to requests for interview was generally muted. Despite an initial high rate of agreement from those contacted to participate- approximately 8 out of 10 of those first contacted for interviewed agreed to participate- this fell to very low rates towards the end of the study- around 1 in 20. This made it difficult to target gaps in the data with total precision. Accordingly the number of barristers interviewed with 5-10 years experience is unrepresentative of the Bar itself as is the number of women.⁷²⁴ It is felt that this under representation does not have a large impact on the results of this research as the women interviewed and the interviewee with 5-10 years experience did not relate experiences that were particularly different from their male/more experienced colleagues.

As with any research of this nature, those barristers who responded to the request for interview were volunteers and therefore were not necessarily representative or typical of the variables identified.⁷²⁵ In trying to ameliorate the effects of self-selection the sample of interviewees was continually reviewed to ensure that variable characteristics were

⁷²⁴ Table 3.1 and 3.5 below. The Bar Council gives annual reports on the gender profile of the Bar: 'Bar Council Annual Reports and Account 2008' 51
<<http://www.barcouncil.org.uk/aboutthebarcouncil/annualreports/>>. Women account for around 30% of the Bar, whereas in this research they represent around 25%.

⁷²⁵ For characteristics of volunteers: G. Holden, G. Rosenberg, K. Barker, S. Tuhim and B. Brenner, 'The Recruitment of Research Participants: a review' (1993) 19 *Social Work in Health Care* 1.

represented and that the data did not just concentrate on one type of criminal practice. The practice break down of the interviewees and their chambers is shown in Tables A-2 and A-3.

The number of participants in this research was 22 interviewees coming from 15 different chambers, plus two solicitors who were senior partners in their respective firms. The original research design had planned to interview around 25 barristers, as this was felt to be a potential 'saturation' point for the data.⁷²⁶ Given that the last few interviews yielded little different data, the number of interviews undertaken was sufficient. The following tables presents a break down of the interviewees by number of years in practice, interviewees' practice break down, interviewees' chamber's practice break down, geographical location and gender.⁷²⁷

⁷²⁶ Eventually a study reaches a point where adding new participants does not add any new information: W. Axinn and L. Pearce, *Mixed Method Data Collection Strategies* (CUP, Cambridge 2006) 35

⁷²⁷ The practice break down details current practice only. Some of the interviews explained a variation of different work throughout their career.

Table A-1 Years call of interviewees

	Years call					
	0-5 years	5-10 years	10-20 years	20-30 years	30 years +	Total
Number of interviewees	2	1	13	5 (including 1 Queen's Counsel and 2 recorders)	1(Queen's Counsel)	22

Table A-2 Practice break down of interviewees

	Practice break down					
	100% defence	75% defence/25% prosecution	50/50%	75% prosecution/25% defence	100% prosecution	Total
Number of interviewees	8	3	4	5	2	22

Table A-3 Practice break down of interviewees' chambers

	Practice break down			
	Criminal only practice sets		Mixed common law sets	Total
	100% defence	Mixed prosecution and defence		
Number of interviewees	4	16	2	22

Table A-4 Interviewees' circuit of main practice

	Circuit of main practice		
	South Eastern	Midlands	Total
Number of interviewees	17	5	22

Table A-5 Interviewees by gender

	Gender		
	Male	Female	Total
Number of interviewees	17	5	22

The solicitors selected for interview were chosen on the basis of their experience of criminal justice in the Crown Court within the South Eastern and Midlands Circuits. Both were senior partners of well respected firms that have high ratings from reviewing agencies, such as the Legal 500 website.⁷²⁸ These solicitors were selected because of their extensive knowledge of criminal practice, legal aid and the local bar. Unlike the barristers interviewed, it was not felt that junior solicitors were necessarily beneficial to the study as they did not have the requisite experience to have formed a detailed view of barristers' work, nor the understanding of running a criminal practice with respect to fees. Both these areas were felt to be important in asking the solicitors to give an opinion about how the Bar operates and how fees can affect advice.

6. Approaching participants

Before approaching potential participants directly, it was felt that the ethical conduct of

⁷²⁸ The Legal 500, 'a series of guides, reviews the strengths and strategies of law firms in over 90 countries' and includes firms dealing with crime: <<http://www.legal500.com/>>

the study required the approval of the Criminal Bar Association.⁷²⁹ The researcher therefore drafted a letter to the Chairman of the Criminal Bar Association at the time, Sally O'Neill QC. After a brief correspondence, Ms O'Neill agreed that the study was appropriate and that the researcher might approach members of the Bar for interview.

In accordance with informed consent and paragraph 7 of the College's guidelines on ethical research, each of the barristers interviewed was informed of the purpose of the study and the manner in which the data would be published and stored.⁷³⁰ No barrister is identified by name nor is any data that could identify them personally presented in the final thesis. A draft research methodology and question schedule was submitted to the Queen Mary College Research Ethics Committee which indicated approval for the research design and objectives on 21 November 2007.

The interviewees in London were approached by email or letter which included the same text and topic guide outlining the general areas to be discussed in each interview.⁷³¹ This letter explained the purpose of the study, drew participants attention to guarantees of anonymity and prior approval from the Criminal Bar Association. As noted above, a good initial response rate dwindled so that few invitations were replied to. This is typical of any research looking for volunteers and the initial good response was probably an aberration of the study. After a positive response from the email or letter, the interviewee was contacted again by telephone or email to set up a convenient time and place for interview. Almost all those in London were interviewed in chambers or at court, with one preferring a local pub with a quiet saloon bar. The barristers in Leicester and Nottingham were interviewed at court after an initial contact with a senior member of chambers. This barrister was interviewed first, who then introduced the researcher to other barristers in the robing room. Those in the robing room were given a similar verbal

⁷²⁹ The Criminal Bar Association is a part of the Bar Council of England and Wales and regulates the professional conduct of its members.

⁷³⁰ Council of Queen Mary, University of London Statement of Research Ethics Policy
<<http://www.qmul.ac.uk/research/ethics/>>

⁷³¹ The text of this letter and topic guide appears in Appendix C.

explanation of the interview as that contained within the letter and asked if they would like to participate. Although some of those approached declined on the basis of insufficient time, most of the barristers asked to participate agreed.

The solicitors were approached differently. Both solicitors were identified beforehand as being particularly knowledgeable and were contacted through personal contacts of the researcher. After an initial introduction, correspondence via email arranged the time and date for interview. Both solicitors were interviewed at their respective offices.

7. Conducting the interviews

The 24 interviews (including the two interviews with solicitors) were conducted between January and May 2008. Each interview was digitally recorded and lasted between 35 minutes and 1 hour and 20 minutes. After each interview the recording was transcribed by the researcher using voice recognition software. This allowed an ongoing analysis of the content of the interviews and gave the researcher a thorough knowledge of the content of each transcript. As is important with a grounded theory approach, the questions asked were reviewed after each interview, and salient, previously unrecognised issues (such as geography, and the differences between prosecution and defence pay) could be included in future interviews as scheduled probes. This also gave opportunity for the researcher to reflect on interview technique, including when matters should be probed more thoroughly and how interviewees could be set at their ease. It was apparent that interviewees appeared content to talk about the topics presented and were very willing to discuss all matters in detail and at length. Even potentially sensitive questions regarding pay were generally well received and no discernible change was detected in the style of answers given. The fluency of the interviews was improved by the researcher's understanding of criminal law and procedure and prevented the difficulty of interviewees having to explain basic legal issues. This allowed interviewees to talk in depth about their expertise and professional experience. The interviews were,

overall, relaxed and the interviewees were very generous with their time. Nearly all of the interviewees commented on how much they had enjoyed the process and expressed interest in the results of the research. The positive attitude of the interviewees towards their interview experience reinforces the confidence that can be had in the reliability of the data- by gaining a relationship of trust and rapport with the interviewees the quality of the data was improved, as the participants were more open and frank about what they did in practice. The researcher endeavoured to reduce researcher led bias by avoiding any indication of approval for one view or another before or during the interviews.

8. Data collection and coding

The interviews were recorded digitally, stored on a computer and transcribed with voice recognition software. To ensure anonymity, each London interviewee was given an alphanumeric label to distinguish him or her from others. The letter given to each interview indicated the chambers from which the barrister came from, and the number indicated the individual barrister. Thus the first interview with a barrister from chambers “A” was labelled “A1”, the second “A2”, etc. The next interview participant from the second chambers was labelled “B1” and so on. The barristers interviewed in Leicester Crown Court were labelled “L1”, etc, for “Leicester” and the barristers interviewed in Nottingham Crown Court “N1”, etc, for “Nottingham”. Because these interviewees were selected to vary the data set, they were labelled slightly differently to ensure that they could be easily spotted in the final thesis as a “Midlands participant.” The two solicitors interviewed were labelled “S1” and “S2”. “JB” indicates the researcher.

During the interviews the ‘triad of data collection, coding and analysis’⁷³² was a continual process. As transcription was carried out early ideas about the data were constructed by annotating the text and a hand written log was kept that attempted to

⁷³² P.H. Becker, ‘Common Pitfalls in published grounded theory research’ (1993) 3 *Qualitative Health Research* 254, 256

explain the data and noted significant areas for development. As the interviews had been self-transcribed, the researcher was able to note nuances of tone of voice and context so that data was not misinterpreted.

There is no right way to code and organise interview data, as there is no right way to organise data of any kind.⁷³³ According to Esterberg, qualitative data analysis is a creative process of making meaning rather than a method that reveals fixed, predetermined information.⁷³⁴ However, the researcher should endeavour to immerse themselves in the data in order to understand it and identify patterned relationships within it.⁷³⁵ It was recognised that an open mind should be maintained throughout the coding process so that themes and categories ‘earned’ their way into the analysis.⁷³⁶ The interview data was subject to a two stage coding process.⁷³⁷ Without using pre-established codes the transcribed data was analysed looking for developing themes and categories which were labelled on the transcript. These codes developed a commonality and a focus as the data became more familiar. Categories such as “pressure on the defendant”, “sentence as a factor”, “pay rates” were initially created which could then be developed into focused coding. In focused coding the data was examined, line by line, with the generated codes from open coding to group data together in single text computer files. These text files held together all the relevant data from all the interviewees on a particular identified theme with similar or contrasting responses noted. Alongside each sample of text yet further annotations were made with details of the data. The following is a typical example of annotated text in a text file entitled “Goodyear”:

JB: Right, okay, okay. We’ve mentioned *Goodyear*. What do you consider to be the merits or difficulties of the case? And the operation of *Goodyear*?

⁷³³ K. Esterberg, *Qualitative methods in social research* (McGraw-Hill, Boston 2002) 152.

⁷³⁴ Ibid.

⁷³⁵ K. Charmaz, ‘Grounded Theory’ in S. Nagy Hesse-Biber and L. Leavy (eds) *Approaches to Qualitative Research: A Reader on Theory and Practice* (OUP, New York 2004) 497

⁷³⁶ Ibid.

⁷³⁷ Esterberg (n.733) 158.

L1: Of *Goodyear*? I think *Goodyear* is brilliant. I think *Goodyear* is brilliant. I think it's high time in the system that judges were able to say, in appropriate cases, this is what you will get, or up to this if you have a trial, if you plead guilty. I think it's high time we were able to do that. And I know there are lots of important safeguards within *Goodyear* and I note that there are many cases where a *Goodyear* is totally inappropriate, if it's an IPP or if it's a multi-hander, some going off for trial. And when I sit, I've been asked to give *Goodyears*. As an advocate I've asked for them repeatedly. And if somebody is on the cusp of going to prison or not a judge might say, "Mr [L1], I'm not ruling out custody but, nor am I my ruling out a non-custodial." And you can read into the language you're being given a hope of non-custodial without a guarantee of it. And the lay client can understand. No, I think that *Goodyear* is marvellous.

Annotation: Positive opinion of Goodyear with reasoning of safeguards provided. Not always appropriate.

In the text file "Goodyear" all the relevant responses were held with annotations alongside.

The coded material fed into the emerging theory and allowed for the spotting of gaps in the data thus informing the sampling process as the interviews continued. Although extra questions were added as the research continued, the researcher was mindful not to lead interviewees in later interviews as to their responses. As the interviews drew to a close, these text files served as the basis of chapter construction for the main body of the thesis.

To address the possibility of false coincidence of data, where a researcher may include a few well chosen quotes to support an otherwise unsubstantiated or contentious conclusion, the text was re-examined against other data that might contradict or complicate the issues identified.⁷³⁸ The grouping of data into text files helped this process as all data on single issues was placed together. This was assisted by employing the earlier discussed methods of triangulation used to improve reliability and validity of the data.

⁷³⁸ Silverman (n.691) 176.

APPENDIX B Interview schedules

Initial interview schedule

Questions generated from areas of interest

The questions have been numbered for easy of reference.

Question schedule

1. What is your year of call to the Bar?

2. What proportion of your practice is in crime?

3. What proportion of your practice is in prosecuting/defending?

4. In approximately what proportion of cases in which you are instructed to defend do you advise a plea?

5. What proportion of those advised to plead guilty accepts your advice?

6. Of those that fail to take your advice, how common is a not guilty verdict?

7. Do you think the proportion of cases in which you advise a plea has increased over the years?

I would like to explore factors which may influence your advice on plea.

8. What is the primary consideration when advising a defendant on plea?
9. How do you assess the probability of conviction?
10. How do you weigh a defendant's chances of conviction against the benefits of a guilty plea?
11. Are there any particular rules of evidence that you feel are important in deciding what advice to give?
12. Have any changes to, or the introduction of, evidentiary or procedural rules changed the advice you give to defendants?
13. How have those changes effected your overall assessment of what advice is to be given?
14. How do you feel about your current level of pay?
15. What is your current work load in terms of number of court

appearances/trials/etc?

16. Does your workload affect your advice on plea?

17. Do you know the difference in the fee you would receive between a case resolved at the PCMH, as a cracked trial, or as a full trial?

18. Do you know the formula used by the Legal Services Commission to calculate your fees?

19. Does the fee structure work in such a way as to penalise legal advisors who have a high proportion of clients pleading not guilty?

20. Have the Carter Reforms made a difference to how you advise?

21. Are you aware of barristers who advise defendants according to their own financial interest?

21.(A) If yes, how do you think that the Carter Reforms will affect this kind of behaviour?

22. Are you adequately prepared for most of your cases in the Crown Court?

23. Does your level of preparedness affect your advice on plea?

24. Who do you consider you owe your primary duty to- the professional or the lay client?
25. How strongly do you feel the necessity to follow the wishes of instructing solicitors on plea?
26. Would you ever contradict an instructing solicitor? If yes, in what circumstances?
27. Do you think it would be beneficial to you if you could get more guilty pleas from defendants?
28. Would you ever advise a defendant to plea guilty even though you believed him or her to be innocent on the papers? If yes, in what circumstances?
29. How do you feel about defending someone in a trial who had little chance of acquittal?
30. When advising on plea, in what way do you interpret “in strong terms, if necessary?”
31. When do you think it is appropriate to advise a defendant on the discount principle?

32. How important is the custody threshold in advising on plea?

33. Would you advise a defendant to plead guilty to keep the case in the magistrates' court?

34. What do you consider to be the merits or difficulties of the Court of Appeal's decision in Goodyear?

35. In what circumstances would you seek a Goodyear indication from the judge?

36. How regularly do judges remind you of the possibility of seeking a Goodyear indication?

37. Do you ever worry about incurring civil liability or having professional action taken against you as a result of your advice?

38. Have you ever considered the ethical implications of your advice? If so, how?

39. In what circumstances would you approach the prosecutor or judge over charge or plea negotiations?

40. How regularly do you approach the prosecutor or judge over charge or plea negotiations?

41. Do you feel you owe any duty to co-operate with the prosecutor or judge in getting a guilty plea?
42. Does who the prosecutor is impact on your advice on plea?
43. Does who the judge is impact on your advice on plea?
44. Do you believe that defendants make a voluntary choice on plea?
45. Why do you think that the guilty plea rate is so high in the Crown Court?

Final version of interview schedule⁷³⁹

ASK FOR PERMISSION TO TAPE RECORD

RE EXPLAIN PURPOSE OF STUDY AND THANK FOR PARTICIPATION

INTERVIEWEE IS FREE TO END INTERVIEW AT ANY TIME OR MAY REFUSE TO ANSWER ANY QUESTION

STUDY HAS BEEN APPROVED BY BAR COUNCIL AND QMREC

Preliminary Questions

1. What is your year of call to the Bar?
2. What proportion of your practice is in crime?
3. What proportion of your practice is in prosecuting/defending?
4. In approximately what proportion of cases in which you are instructed to defend do you advise a defendant that a guilty plea would be appropriate?
5. What proportion of those advised to plead guilty accepts your advice?

⁷³⁹ This is the 'final version' that was taken to the first interview with A1 however later versions included other probes relating to other matters such as geographical statistical differences and prosecution pay.

6. Of those that fail to take your advice, how common is a not guilty verdict?

7. Do you think the proportion of cases in which you advise a plea has increased over the years?

I would like to explore factors which may influence your advice on plea.

A) The advising process

8. At what point are you normally asked to give advice on plea?

9. What process do you follow in advising a defendant- how do you begin?

Standard process or does it depend on the defendant?

If I were a defendant what would you want to know from me?

Primary considerations when advising a defendant on plea.

Assessing the probability of conviction.

10. Are there any particular rules of evidence that you feel are important in deciding what advice to give?

Explore changes to, or the introduction of, evidentiary or procedural rules such as bad character and hearsay.

Changes to overall assessment of what advice is to be given.

11. How do you discuss with a defendant the chances of a conviction against the benefits of a guilty plea and the discount?

12. When advising on plea, in what way do you interpret “in strong terms”?

See Turner [1970] 2 QB 321.

Suggest what other forms of conduct have been considered appropriate.

13. When do you think it is appropriate to advise a defendant on the discount?

Probe as to fairness/appropriateness in all circumstances/effect on defendant.

14. How important is the custody threshold in advising on plea?

15. Would you advise a defendant to plead guilty to keep the case in the magistrates' court?

16. What do you consider to be the merits or difficulties of the Court of Appeal's decision in Goodyear?

17. In what circumstances would you seek a Goodyear indication from the judge?

Do judges remind of the possibility of seeking a Goodyear indication?

18. Do you think that defendants can understand the processes to make a proper decision?

Probe as to whether belief that defendants make a voluntary and informed choice on plea.

B) Charge bargaining/relationship with the court

19. Do you ever engage in negotiations over charge?

Probe as to regularity.

20. In your experience how is the process of the charge bargain initiated?

Probe as to process of the charge bargain; how is the process started?; who approaches who?; who is involved?; how is the defendant involved?;

how is the deal presented to the defendant?' do they believe this exerts unfair pressure on the defendant.

21. Do you feel you owe any duty to co-operate with the prosecutor or judge in getting a guilty plea?
22. Does who the prosecutor is impact on your advice on plea?
23. Does who the judge is impact on your advice on plea?

C) Fees/work load

24. How do you feel about your current level of pay?
25. What is your current work load in terms of number of court appearances/trials/etc?
26. Does your workload affect your advice on plea?
27. Are you adequately prepared for most of your cases in the Crown Court?
28. Does your level of preparedness affect your advice on plea?

29. Do you know the difference in the fee you would receive between a case resolved at the PCMH, as a cracked trial, or as a full trial?

30. Do you know the formula used by the Legal Services Commission to calculate your fees?

31. Does the fee structure work in such a way as to penalise legal advisors who have a high proportion of clients pleading not guilty?

32. Have the Carter Reforms made a difference to how you advise?

33. Are you aware of barristers who advise defendants according to their own financial interest?

33(A). If yes, how do you think that the Carter Reforms will affect this kind of behaviour?

D) The relationship with defendants and solicitors

34. Who do you consider you owe your primary duty to- the professional or the lay client?

35. How strongly do you feel the necessity to follow the wishes of instructing solicitors on plea?

36. Would you ever contradict an instructing solicitor? If yes, in what circumstances?

37. Do you think it would be beneficial to you if you could get more guilty pleas from defendants?

38. Would you ever advise a defendant to plea guilty even though you believed him or her to be innocent on the papers? If yes, in what circumstances?

39. How do you feel about defending someone in a trial who had little chance of acquittal?

E) Ethics and professional liability

40. Do you ever worry about incurring civil liability or having professional action taken against you as a result of your advice?

41. Have you ever considered the ethical implications of your advice? If so, how?

42. Why do you think that the guilty plea rate is so high in the Crown Court?

APPENDIX C Letter to Participants

Dear [Barrister's Name]

I am a member of the Bar and a PhD candidate at Queen Mary College, University of London conducting doctoral research on criminal justice in England and Wales under the supervision of Professor David Ormerod and Professor Kate Maleson. As part of my work I will be gathering data on the working practices of barristers in the Crown Court. The Bar Council has given permission to approach you, and I am writing to ask if you would be willing to participate in an interview lasting approximately 45 minutes regarding the factors which affect the advice given to defendants in the Crown Court on plea. The aims of the project and the sorts of areas which I would like to discuss with you are set out below in more detail in the research and topic guide. As you will see, the topic explores some interesting areas of your work and as a participant you would be making a vital contribution to the academic discussion of the role of barristers in the criminal justice process.

If you would be willing to be interviewed, please reply via my email address [researcher's email]. I will then endeavour to arrange a suitable place and time for the interview at your earliest convenience.

Please do not hesitate to contact me if you would like me to clarify anything about my research or the interview process.

Yours sincerely,

James Barry

Research and Topic Guide

Your interview will form part of a doctoral thesis on barristers' working practices in the Crown Court of England and Wales. The research aims to look in detail at the various factors that make up a barrister's advice to defendants on plea and how recent changes to the law may have impacted upon the advice giving process.

Your interview will be digitally recorded, last for approximately 45 minutes and cover a number of issues that are relevant to plea. You will be asked to discuss a number of areas including the influence of changes to evidentiary rules, the Court of Appeal's decision in *Goodyear*, the balance of professional and ethical duties, work load and fees, and the sentencing discount. The interview is expected to be wide ranging and you will be free to raise any points or issues that you feel should be discussed. It is hoped that you will find the experience interesting and provide you with an opportunity to speak frankly about your work.

In the interest of maintaining the highest ethical and professional standards your interview will be conducted in accordance with the Code of Conduct. The Bar Council has given permission to approach you and they are satisfied that the aims of the research and the methods used comply with the Code. In taking part in this research you will be interviewed anonymously and allocated a number only by way of identification. All the data held will be accessible only by James Barry and will not be passed to any third party. The research has been scrutinized and approved by the Queen Mary Research Ethics Committee. Copies of the ethical approval will be made available for you to inspect if you decide to participate.

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