Chapter 7

Plea Negotiations and Mitigation

Mike Hough and Jessica Jacobson

I. Introduction

This chapter explores the inter-relationship between plea negotiation and personal mitigation in the courts system in England and Wales. We argue that in many cases which come before the courts, negotiations over plea and the application of personal mitigation at sentencing can be seen as two phases of a single process in which the offending behaviour is reframed in a manner highly favourable to the offender. As such, they cumulatively and significantly reduce the severity of the sanction the court is likely to impose. This, we contend, raises questions about equity, proportionality and consistency in sentencing outcomes, and the purposes of sentencing more broadly.

A. Plea negotiations: historical background and scope

Lord Hewitt justified his verdict in a 1923 case with the famous statement that, 'Justice should not only be done, but should manifestly and undoubtedly be seen to be done.' The principle has become widely accepted and has done much over time to shape the justice system. It privileges fairness, transparency, certainty, clarity and finality in the resolution of cases. Arguably, however, this concern with what cynics would regard as 'keeping up appearances' also helps to explain the attitudes of the senior judiciary to plea negotiations in the 1970s and 1980s, and their keenness to keep plea bargaining hidden from public view.

The Home Office funded John Baldwin and Michael McConville (1977) to investigate plea bargaining, and their resultant research was intensely critical of the 'backstairs agreements' reached by defence and prosecution counsel. Baldwin and McConville observed the legal profession's apparent refusal to acknowledge the existence and extent of plea bargaining, or to debate the risks of wrongful convictions that arose from inducement to plead. They argued that the senior judiciary on the one hand believed that plea negotiations were 'repugnant to the English system' – largely because of the abuse of due process that the practices involved – but, on the other, were aware that plea bargaining was a pervasive practice reflecting the pragmatism of legal professionals. Senior judges tried to stop the research, driven by concerns about the damage to the legitimacy of the justice system that would flow from exposure of plea negotiation practices.

Since then, these somewhat conflicting judicial attitudes to plea negotiation have shifted, and the judiciary in England and Wales have become more aligned with the American approach, which has recognized for many years the inevitability of routine plea negotiation[1]. Zuckerman (1995) persuasively set out a justification for 'procedural rationing', even if his focus was on the civil rather than criminal law:

> It would be absurd to say that we are entitled to the best possible legal procedure, however expensive, when we cannot lay a credible claim to the best possible health service or to the best possible transport system. Yet it would be equally absurd to suggest that procedure need not strive to achieve any level of accuracy to satisfy the demands of justice. We are therefore entitled to expect procedures, which strive to provide a reasonable measure of protection of rights, commensurable with the

[1] Gormley and Tata's (2019) discussion of plea bargaining in Scotland shows that the practice is equally endemic north of the border, and that ambivalence towards the process there remains amongst legal professionals.

> resources that we can afford to spend on the administration of justice. (Zuckerman, 1995:160–1)

Accordingly, the virtues of fairness, transparency, finality and clarity are inevitably in tension with affordability throughout the criminal and civil justice systems. We shall argue here that a particular point of tension can be found in arrangements for securing guilty pleas in the criminal courts. For certain, the reality of deals hatched by defence and prosecution does indeed sometimes feel unsavoury, and the potential for innocent defendants to be coerced into pleading guilty is real – especially for vulnerable offenders (cf Helm, 2019; Helm, this volume; Hoskins, this volume). But at the same time, they arguably provide 'good enough' resolution of cases with the benefits of swift justice, economy and of minimizing the risk of erroneous acquittals. Arguments of this sort have resulted in progressively more open acknowledgement of plea negotiations in England and Wales over the last 40 years. Perhaps the most significant development in formalising the plea negotiation process has been the statutory provision of discounts to sentences for guilty pleas – first included in legislation in 1994.[2] This in essence rewards defendants for preventing the costs of a trial, with the costs understood both in economic terms and in terms of the potential anxiety and distress caused to victims and witnesses who must give evidence at trial. In general, the earlier in the process the defendant pleads guilty, the greater the discount. As set out in the Sentencing Council (2017) guilty plea guideline, those who plead at the earliest opportunity are generally entitled to a maximum sentence discount of one-third.

[2] The 1994 Criminal Justice and Public Order Act first provided a statutory basis for everyday practice, which was restated in the 2003 Criminal Justice Act and carried over into the 2020 Sentencing Code.

At first sight, guilty pleas are simple statements by defendants that they have committed the offence with which they have been charged. Of course, guilty pleas do indeed often involve a straightforward admission of the case brought by the prosecution. However, many guilty pleas can involve the presentation of a version of 'what happened' which is substantially at odds with the initial charge. Both prosecution and defence have vested interests in settling for a guilty plea, and negotiations over this are common. The baseline for such negotiations is the available guilty plea discount, as established by statute and elaborated in Sentencing Council guidelines. But plea negotiations have much wider scope, and can entail three further – often intertwined – types of bargain: in relation to *charge*, where the defence offer to plead guilty to a lesser charge is accepted; *count*, where a guilty plea to one charge is offered conditional on other unrelated charges being dropped; and *facts*, where a guilty plea may be offered contingent on the prosecution accepting a less damning account of the details of the offence of the case. (In 'fact bargaining', the disputed facts might be considered by the judge or magistrates in a Newton Hearing. This is, effectively, a mini-trial – although without a jury if in the Crown Court – at which the judge or magistrates hear evidence to determine whether to sentence in accordance with the prosecution or defence version of events.)

B. Personal mitigation

It is our contention, in short, that the offences to which defendants plead guilty often have a negotiated, contingent character – because they are the outcome of (largely hidden) processes of charge, count or fact-bargaining, or some combination thereof. Moreover, the process of negotiation may *continue* during the formal sentencing hearing, in the sense that the plea in mitigation is an opportunity for the defence to reframe further the offender's actions, circumstances and predisposition. Various important forms of personal mitigation (that is,

factors relating to the offender rather than the offence) may in fact be closely intertwined with the guilty plea, as they tend to pre-suppose an open and thoroughgoing admission of guilt on the part of the offender. Remorse, acknowledgement of the causes of the offending behaviour, and demonstrable efforts to address these causes are the obvious examples of this.

We have been forcefully struck by the relationship between guilty pleas and mitigation since we first studied the role of personal mitigation in sentencing (Jacobson and Hough, 2007: 44; Jacobson and Hough, 2011). Crown Court judges interviewed for that study spoke of this relationship, one of whom, for example, commented that the defendant who pleads guilty can claim remorse and thus 'engages the court's sympathy much more readily'. However, the position adopted by Sentencing Council guidelines is that the standard sentence discount for a guilty plea (of up to one-third of sentence length) is unrelated to any reductions that can be secured through various forms of personal mitigation. This, it seems, is largely because the justifications for the guilty plea discount are regarded as distinctive from any rationales associated with other forms of mitigation – the former being defined in terms of reduced impact of the crime on victims, saving victims and witnesses from having to testify, and the time and money saved on investigations and trials.[3]

The stepwise approach to sentence decision-making that is built into the Sentencing Council guidelines make clear the distinction between the guilty plea discount and reductions for other forms of mitigation. The three main steps that apply in decision-making on most cases are:

- step 1 – determine the sentence 'starting point and category range' by assessing which of three categories of harm and three categories of culpability the offence falls into;

[3] https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/reduction-in-sentence-for-a-guilty-plea-first-hearing-on-or-after-1-june-2017/

- step 2 – take account of specific aggravating and mitigating factors, to decide where the offence falls within the identified range
- step 3 – apply the guilty plea discount in accordance with the stage at which the offender pleaded guilty.

This Sentencing Council approach privileges a deserts perspective, by emphasising principles of proportionality in assessing offence seriousness as a product of culpability and harm. It treats as second-order both the consequentialist aims of sentencing enshrined in legislation (deterrence, rehabilitation, public protection and reparation), and the need to encourage swift and economical justice. Arguably, this approach is a useful heuristic which imposes a simplifying structure on a highly complex process. However, we would suggest that the separation of the statutory discount from personal mitigation, when the *practical reality* is that these are often closely inter-related, can mean that the remorseful offender secures a double discount: the first is for being remorseful, and the second is for offering an early guilty plea. Of course, the impact on the final sentence is greater still if one also takes into account the repercussions of any charge, count or fact bargaining along with the guilty plea discount and personal mitigation.

In other words, personal mitigation – to the extent that it is accepted by the court – interacts with the foregoing process of plea negotiation to produce an account of the offending behaviour that is significantly more favourable towards the offender than would otherwise be the case. And it is this account that is the basis of the sentencing decision. Accordingly, the *effective* impact on sentencing outcome following a guilty plea may greatly exceed the standard 'guilty plea discount' of up to one-third – reflecting the combined effects of the discount, charge/count/fact bargaining, and personal mitigation that builds on the admission of guilt. Whether these cumulative or multiplier effects of plea negotiation and

mitigation are problematic is open to question. But it is our view that, at the very least, this is a question that should be asked – which is what this chapter is seeking to do.

The main purpose of this chapter is to consider the benefits, tensions and risks associated with current practices of plea negotiation and the interaction between guilty pleas and mitigation. Among the matters at issue here are the undoubted, and widely recognised, advantages of a system which – through the provision of the guilty plea discount and scope for negotiation over plea – delivers *affordable* clarity, finality and relative speed in criminal justice, whilst simultaneously reducing the *risk of erroneous acquittal*. This brings the added benefit of sparing victims and witnesses the stress of giving evidence in court. However, the sources of anxiety about plea bargaining that the judiciary expressed in the past still remain: what 'actually happened' is not established in open court; rather, the court accepts an account of the offence constructed through informal (and at least partly hidden) negotiations between defence and prosecution. Members of the legal profession and academics alike continue to voice misgivings about the practice (eg Gormley and Tata, 2021), including the potential for defendants – especially those with vulnerabilities – to be pressured into pleading guilty against their interests and wishes.

But if there are obvious advantages, as well as risks, to current practices of plea negotiation, what are less obvious are the implications for justice of the interplay between plea negotiations and personal mitigation. It can be argued that this interplay significantly erodes the principle of proportionality[4] and leads to unjustifiably unequal treatment between the offender who pleads guilty and benefits from all impacts on sentencing outcome that this entails, and the offender who exercises their right to maintain their innocence. This issue

[4] See Ryberg (this volume) for a full discussion of the tensions between retributivist principles and the practice of discounting sentences to take account of pleas in mitigation and early guilty pleas.

becomes all the more pressing when one considers differential rates of guilty plea between white and BAME defendants (Lammy, 2017), and the repercussions for sentencing. On the other hand, a system that strongly rewards offenders who admit their guilt, and alongside this are making efforts to desist from offending, arguably offers wider societal benefits.

C. The shape of this chapter

To help us to draw out these issues, we will first present – over Sections II and III – a descriptive account of various forms of plea negotiation and describe the interaction between guilty pleas and mitigation. These accounts are based on the findings of observational research conducted by one of the authors (Jacobson) and colleagues in the Crown Court, adult Magistrates' Courts and the Youth Court over the past ten years.[5] Following the empirical sections of this chapter, Section 4 looks in more detail at what the observed processes and practices mean for equity, proportionality and consistency in sentence decision-making, and their implications for how we understand the purposes of sentencing. Finally, Section 5 concludes the chapter with some brief proposals on how the identified tensions might best be addressed. To anticipate our conclusion, we shall argue that that the legitimacy and effectiveness of the criminal justice system would benefit in the long run if processes and decision-making were more transparent, and if there was more honesty about the contradictory impulses contained within sentencing policy and practice. And whilst we have some concerns about the size of the compounded advantages in terms of sentencing

[5] Unless otherwise specified, this empirical material has not been published elsewhere. We should acknowledge the contribution of colleagues who were involved in the observational research: Penny Cooper, Gillian Hunter, Amy Kirby and Emily Setty.

outcomes that can be secured by early guilty pleas, plea bargaining and personal mitigation, we would be highly ambivalent about any 'solution' that would entail longer sentences – as anything that will further swell the prison population is unwelcome.

II. Processes of plea negotiation

The common-sense presumption about the plea process is that the defendant will know if they are guilty or not, and will plead not guilty either if they 'didn't do it' or if they 'did it' but believe their guilt will not be proven if the case goes to trial. And common sense would again hold that a guilty plea is entered either if they 'did it' and know that there is clear evidence of this or – more rarely – if they 'didn't do it' but judge that a relatively speedy resolution and reduced sentence are preferable to the delays and uncertain outcome of a trial.

These presumptions undoubtedly reflect reality in some cases, but in an unknown but probably large proportion of cases they do not[6]. The more complex reality of a great many cases can be attributed to several factors. Many offences are the result of complex social interactions, that happen quickly, with participants in an emotional state, or drunk or under the influence of drugs – especially when violence is involved. Therefore, precisely 'what happened' may be genuinely unclear to *all* those involved. Secondly, prosecutors are often faced with a choice of charges to bring, often graduated according to the intentions of the defendants and the level of harm caused, as in assaults of various levels of seriousness (causing ABH, inflicting GBH/wounding and causing GBH with intent). Several charges may

[6] See Duff (this volume) for a more extensive discussion of the practical considerations and the ethics in deciding how to plead.

simultaneously be laid, partly out of strategic considerations,[7] but equally because the intentions of the defendants are inevitably often opaque to the prosecution and sometimes even to the defendants themselves and defence lawyers.

As a consequence, the need for the defendant to enter a plea in court can often trigger a process of negotiation, involving not only the defendant but the sentencer(s), the defence and prosecuting counsel, and – to some extent – the victim(s) of the offence. First, the defendant and their lawyer may seek an indication of sentence, conditional on a guilty plea. In the magistrates' courts, the defendant may simply be told whether they are facing a custodial or non-custodial sentence. In the Crown Court, the judge may give an indication (known as a Goodyear indication) of the maximum sentence they will receive if they plead guilty. These indications of sentence do not, strictly speaking, constitute a bargaining process, but the indication is contingent on a guilty plea and thus reflects the associated discount, and might accordingly help to secure such a plea.

In cases where an indication of sentence is not sought – or if the indicated sentence fails to lead to a guilty plea – this may trigger a genuine bargaining process between the defence and prosecuting lawyers about the precise *facts of the case* to which the defendant will admit, the *level* of charges to which they will plead guilty, and the *number* of charges that can be dropped in return for a guilty plea to others.

Below, we present a number of case studies of plea negotiation. These are intended to be illustrative rather than representative. However, they demonstrate that the negotiation process tends to be highly informal. While parts of the process may occur in open court

[7] Including the more serious charges even when the evidence for the charge is less than overwhelming may place the prosecution in a good starting position for negotiating a guilty plea for one of the lesser charges.

(these cases were observed by the researchers from the public gallery), this is largely outside the bounds of a formal hearing, and the extent of engagement of lay parties is variable.[8]

A. Successful charge and count bargaining

Our first case study is an example of charge bargaining which produced a guilty plea. Here, defence and prosecution counsel in the Crown Court began the negotiations before the judge or defendant had arrived in the court room.

Case study 1: Successful charge bargain in the Crown Court

The young defendant, Steven, attended court for trial for a Section 20 assault (inflicting grievous bodily harm). On arrival in court – in advance of Steven or the judge – the defence advocate commented cheerily that in the 'spirit of Christmas' he wanted to discuss the plea. Prosecution counsel told him that several witnesses had not turned up, but there was CCTV evidence showing Steven punching the complainant.

The defence advocate suggested that a guilty plea to affray might be possible, although he had not yet discussed this with Steven (who had been on bail for nearly a year by the date of the trial). The complainant had suffered a broken jaw, but the CCTV footage could not confirm if it was Steven's punch which had caused this injury, since others had become involved in a brawl after the initial punch was thrown.

Defence and prosecution discussed how 'pragmatic' the judge might be, and the maximum sentence for affray. The prosecutor commented that he did not want to 'short-change' the

[8] One aspect of plea bargaining which, unavoidably, is entirely hidden from public view is where the defendant is offered a reduction in sentence in return for assisting the prosecution.

victim. On entering the court, the judge was informed of the discussion, agreed to view the CCTV footage, and said he was happy with the proposal to change the indictment from Section 20 assault to affray. He left the courtroom again to allow the prosecution and defence advocates to discuss matters with, respectively, the victim and Steven (who was by now in the dock).

Shortly thereafter, the defence advocate reported Steven's agreement to plead guilty to affray, and the prosecutor stated that the complainant was satisfied – indeed, had said that he did not want Steven to go to prison. On returning to the courtroom, the judge was told of this agreement and that the indictment had been amended accordingly. Only now did the judge address Steven directly: quickly explaining that he would be bailed to appear for sentencing in six weeks' time; that he must comply with probation; that 'all options are open' regarding sentence. 'Got that?' asked the judge. Steven did not speak, but presumably nodded as the judge did not enquire further. To the observer, it was by no means clear that Steven had in fact 'got it'.

Steven left the dock and courtroom, and the judge asked for the jury – who had been waiting for the trial to start – to be brought in. He showed them the CCTV footage and explained that acceptance of the guilty plea to affray was a sensible compromise given the likely difficulty of proving beyond reasonable doubt that it was Steven's punch that had broken the victim's jaw. He told them that the offence of affray could still attract a maximum sentence of three years' imprisonment. He also mentioned the 'door of the court syndrome': namely, that it is when the trial is about to begin that some defendants become more realistic about their options. (We do not know what sentence was subsequently passed in this case.)

Beyond the smoothness of the charge bargaining process in case study 1, and the close, cheerful collaboration it entailed between defence and prosecution, there are other interesting

features of the case. While the defendant's role in the process was highly peripheral, and little effort was made to confirm his understanding (reflecting the status of many defendants in court as 'ever-present extras' (Jacobson et al, 2015)), the prosecuting counsel took care to check that the complainant was aware of, and understood, the charge bargain.[9] Further, the judge went to some lengths to explain to the jury what had happened and why.

Fact bargaining occurs when defendants indicate that they are prepared to plead guilty to the offence with which they have been charged but dispute the prosecution account of the details of what happened. From the prosecution perspective, a guaranteed conviction for the less serious version of the offence may be preferable to a trial in which the defendant could be found not guilty. Case Study 2, below, concerns two linked robbery prosecutions in the Youth Court. In each case, the prosecution accepted the defendant's 'basis of plea', according to which the defendant had played a less serious role in the offence than originally alleged.

Case study 2: Fact bargaining in two linked Youth Court hearings

Darren, aged 15, had no previous convictions and was charged with two counts of robbery, committed with three or four others. The victims of the robberies – also young teenagers – had been threatened with a knife; and clothes, cash and phones had been taken from them. Darren pleaded guilty on a basis of plea accepted by the prosecution: that his involvement was relatively brief and that while he had heard the threat to use the knife during the robberies, he did not make the threat himself or produce any weapon.

[9] This was compliant with the *Farquharson Guidelines* on the role of prosecuting advocates, which directs the prosecution to 'consider the consequences of [any decision whether or not to prosecute] for the victim and … take into account any views expressed by the victim or the victim's family', https://www.cps.gov.uk/legal-guidance/farquharson-guidelines-role-prosecuting-advocates

Adam, another 15-year-old, appeared at a separate Youth Court hearing, having been charged with one of the robberies in which Darren was involved. Unlike Darren, Adam had previous convictions for violent offences: assault, robbery and attempted robbery. At the time of the hearing, he was serving a referral order. Adam also pleaded guilty on an agreed basis of plea: in his case, that he had not known anything about the presence or use of a knife in the robbery.

The group offending, significant psychological harm caused to the young victims – two of whom had made victim personal statements which were read out in court – and the use of the knife were serious aggravating features of the robberies. With regard to Adam, his record of prior offending was significant further aggravation. These features of the offending made a custodial sentence – which would have been a Detention and Training Order, given the offenders' ages – a realistic prospect. Both offenders, however, ultimately received non-custodial penalties, which in part reflected the less serious 'facts' of the offending as agreed with the prosecution.

The observer of case 2 had no way of assessing the honesty or reliability of the defendants' claims to only marginal involvement in the offence. But such is the 'messy reality' of many cases, especially those involving violent, interpersonal offences, that fact bargaining is necessarily carried out under conditions of considerable uncertainty. Among the various interests being served by this process are, inevitably, those of the justice system in achieving reasonably swift and cost-efficient outcomes.

B. Unsuccessful charge and count bargaining

It is in the nature of negotiation that the outcome is uncertain. The next case study illustrates how charge bargaining can fail to end in a deal. It also shows how charge bargaining and

count-bargaining are often interlinked – even if in this case the defendant failed to secure either a dropped or reduced charge.

Case Study 3: Unsuccessful plea-bargaining in the Crown Court

The defendant Tom, a man in his 20s, faced two charges of dangerous driving, along with charges of harassment and breach of a non-molestation order. Before Tom entered court, his defence counsel proposed to the prosecution that Tom would plead guilty to one careless driving charge in place of the two dangerous driving. The prosecution advocate left the court to consult on the charges, and the defence lawyer commented to the clerk: 'He's just asked me to do something that's against the grain - I know it's a stupid thing to do.' The clerk stated his sympathy for the lawyer's position, who was bound to do as instructed by his client.

After consulting on the defence proposal, by which time Tom was in the dock, the prosecuting advocate stated that one of the dangerous driving charges must remain, but the second could be dropped to careless driving. The defence advocate spoke to Tom, who rejected the counterproposal, and said he would continue to plead not guilty to both charges of dangerous driving, claiming mistaken identity.

The judge set a trial date some months later for the dangerous driving offences, and a second date in relation to the harassment and breach orders. Tom responded furiously when told by the judge that nothing could be done to schedule the cases any sooner: 'Go fuck yourself, you're a fucking prick, I'll be in custody for Christmas and won't see my kids.' The judge threatened to find Tom in contempt of court for swearing.

The observing researcher in case 3 later overheard the defence lawyer saying that his defendant was 'the client from hell'. It seems likely that had the defendant been more

flexible, his lawyer could have secured him a more favourable result than that for which he was probably heading, having opted for a trial. In a sense this was a case study of a defendant's misjudgements – both in relation to his personal presentation in court, and his lack of realism about the options open to him.

Case study 4 concerns a defendant (unrepresented, in a magistrates' court) who faced two separate charges. The prosecution proposed a plea to the lower charge alone, presumably calculating that a conviction on one of the counts was preferable to a trial and possible acquittal on both. This was rejected by the defendant, whose defence was subsequently accepted by the magistrates.

Case study 4: Defendant resistance to count bargaining in a magistrates' court

The unrepresented defendant, Julie, was a middle-aged woman and, judging from her clerical collar, a minister of religion. Attending court in a wheelchair, she appeared anxious and flustered. She faced charges of speeding and failure to provide driver details; she was contesting these on the basis that it was her son who had been driving the car, and she had not received the request to provide information because of postal issues at her home address. Before the case opened, the court's legal advisor suggested to Julie that she should have a look on her phone for any evidence from Royal Mail about the postal problem, and gave her a few minutes to do so. The prosecuting advocate then explained to her that failure to provide information was worth six penalty points, while speeding was worth three. He said that if she pleaded guilty to the latter charge, the former could be dropped. Julie nevertheless stuck to her not guilty plea, and was acquitted by the magistrates after trial.

In case 4, the prosecutor's offer to drop the most serious charge faced by the defendant can be seen as a perfectly proper way of testing her story and achieving a conviction – but equally, it could be constructed as pressure to secure a wrongful admission of guilt.

C. Plea bargaining as a collaborative process

The next case study, number 5, exemplifies the extensive collaboration that can go into a plea negotiation. In this case, involving a teenage girl charged with assault in the Youth Court, no bargain is explicitly on offer – except in coded terms. In essence, all the legal participants worked to steer the defendant away from a trial.

Case study 5: Active collaboration to achieve guilty plea in the Youth Court

The 16-year-old defendant, Gemma, was charged with an assault by beating[10] of a worker in the care home in which she had been living at the time. The assault had happened shortly after Gemma had self-harmed, and in the context of her ongoing mental health problems and a conflict with a new resident of the home. The district judge hearing the case said to Gemma: 'So we're now in a position to find out if you're pleading guilty or not guilty.' The legal advisor put the charge to Gemma, to which she replied: 'Not guilty.'

The judge commented that he could see from Gemma's face when the charge was put 'how upsetting' a trial would be. He went on to say that the alleged assault seemed to have happened 'in the heat of the moment'; and that Gemma might not remember everything about it, but if she were to say 'something' happened, it would be possible for the court to

[10] *Assault by beating'* is the usual formulation for the least serious forms of common assault (eg where the victim was pushed, grabbed or spat at, without any significant injury.)

deal with it. ‘I’m not trying at all to force anything,’ he added, but ‘I don’t want this to be dragging on.’ The defence and prosecution lawyers consulted with each other. The judge asked for information from the Youth Offending Service about mental health support, and said it might be possible to ‘see an end’ to the case today. He then adjourned the hearing for Gemma to talk further with her lawyer.

When the case reconvened, the judge said to the defence lawyer: ‘I think we can put the charge again?’ The lawyer replied: ‘We can – I’m very grateful.’ The legal advisor put the same charge of assault by beating to Gemma, who this time replied: ‘Guilty.’ The judge clarified the ‘agreed basis’ of the plea, which was that the offence had not involved ‘some kicking out’. He then imposed a conditional discharge for three months, and wished Gemma ‘good luck’. He also asked what she was going to name the two guinea pigs that – as Gemma’s social worker had previously explained – she was getting that day. Gemma left the court, smiling and chatting with her social worker.

It is hard to take issue with the decisions made by the legal participants in case 5. Defence, prosecution, district judge, court legal advisor and Youth Offending Service worker all contributed to the process of securing the plea, which all appeared to regard as in the best interests of the girl – especially given that the sentence passed thereafter was a conditional discharge. The case also provides a clear illustration of the increasing prominence of ‘case management’ as a facet of the judicial role and, indeed, criminal justice process more broadly (McEwan, 2011, 2013; Ward, 2017). However, it does lead one to ask why the police and CPS saw fit to proceed to prosecution for such a minor offence committed by a highly vulnerable 16-year-old.

Our final case in this section (Case Study 6) involved a collaborative endeavour between a notably interventionist judge, the prosecutor, and the defendant himself – who was

unrepresented. There was no charge or fact bargain here, but the judge's Goodyear indication of sentence clearly played a part in encouraging the guilty plea.

Case study 6: Unrepresented defendant's guilty plea in the Crown Court[11]

The unrepresented defendant, Charles, a man in his 40s, had been charged with production of cannabis in his home. At the plea hearing, Charles stated that he was producing cannabis for personal use as a medication for anxiety and PTSD; and that he was pleading not guilty on this basis.

The judge explained to Charles the difference between a defence and mitigation, and that what Charles had said about use of cannabis to treat his mental health problems was the latter. The judge checked some details of the charge with the prosecution, and asked Charles various questions about his circumstances, his family and a prior conviction for a similar offence. He also asked why Charles was unrepresented. After some further consultation with the prosecutor, including about potential sentence, the judge told Charles that he was going to speak to him as if to a lawyer. He advised him that he would not be sending him to prison whatever the outcome; that the issue was about whether he would plead guilty; and that he should speak to the prosecutor about this, who 'will be fair'.

The case reconvened after a 30-minute adjournment, and Charles pleaded guilty. The judge sentenced him to a low-level community sentence – adding, 'It's not my role to give you lifestyle advice, but heed this: cannabis is not good.'

As with the previous case study, in case 6 it appears that the judge and the prosecution were looking out for the best interests of the defendant. Again, however, wider questions are raised

[11] This case is also discussed in Jacobson (2020).

about the justice system – in this case, about the nature and scope of current drug laws. The answers fall well beyond the scope of this paper, of course.

III. Guilty pleas and mitigation

We now turn to look at some examples of how guilty pleas can interact with personal mitigation put forward by the defence. Our first example here, case study 7, is a case in which it was made clear by the judge that certain forms of personal mitigation were not available to an offender convicted after trial, precisely because of the not guilty plea.

Case 7: Loss of mitigation associated following a not guilty plea[12]

21-year-old defendant, Emmanuel, was charged with inflicting grievous bodily harm (Section 20 assault) on a fellow player at a Sunday morning football match. The assault had occurred in the course of what was variously referred to (by both prosecution and defence counsel and the judge) as a 'mass brawl', 'mass confrontation', 'melee' or 'general hubbub' among many of the players after one had been sent off. There was no dispute that the victim had been severely assaulted – a punch to the side of the face had fractured his skull – or that Emmanuel had been involved; the question for the jury was whether it was Emmanuel who had thrown the damaging punch.

Over two and a half days, seven prosecution witnesses gave evidence about what they had perceived to be the ethnicity, height, build, hairstyle and clothing of the attacker. There was enough inconsistency between these accounts from witnesses for the prosecution counsel to feel compelled to acknowledge it. He told the jury: '[A case doesn't come] in a neat and tidy package with a legal bow on top if it … That is not life … You'll make sensible

[12] This case is also discussed in Jacobson, Hunter and Kirby (2015).

allowances to reflect that reality.' Nevertheless, the jury found Emmanuel guilty after deliberating for more than a day.

In the sentencing hearing that followed, the defence advocate pointed to various mitigating aspects of Emmanuel's character and circumstances: this was a young man, he said, with no previous convictions, working hard as a plumber, and supportive of and supported by his family. The judge, however, was unimpressed by the mitigation, commenting: 'All of these points would have been good points if he'd pleaded guilty' and that Emmanuel had 'shown no remorse, no empathy'. In a somewhat contradictory fashion, the judge also stated that Emmanuel would not be punished for fighting his case.

In passing a nine-month custodial sentence, the judge commented: 'If ever there was a case where credit for plea was so important, this is it,' and said that a guilty plea would have given the court a wider range of options. He reiterated that Emmanuel was being sentenced as a man of 'impeccable good character', which made his decision to plead not guilty 'all the more distressing'.

In case 7, the nine-month sentence should have been reduced to six months had the defendant offered an early guilty plea. This guilty plea would have also enabled his lawyer to enter a much stronger plea in mitigation (or, at least, a plea in mitigation that would have had more traction with the judge), potentially reducing the sentence to a high-level community penalty. A contrast can also be drawn with the situation of Steven in case study 1, above, in which a preparedness to plea bargain led to the downgrading of a Section 20 charge to a charge of affray. It is to be hoped, of course, that case 7 was a case of a guilty defendant's bad decision about plea rather than a wrongful decision of guilt by the jury.

Case studies 8 and 9 provide striking points of comparison with that of Emmanuel. Both are cases in which there was a guilty plea, and illustrate the potential importance of

personal mitigation revolving around remorse and a demonstrable keenness to take full responsibility for one's actions.

Case study 8: A young defendant's mitigation focused on remorse and 'progress'

A teenage girl, Lauren, appeared at the Youth Court where she pleaded guilty to charges of robbery and attempted robbery. Her lawyer told the court that Lauren was 'deeply ashamed' of her behaviour and had explained how she was feeling in a letter to the judge. The lawyer went on to describe the progress Lauren had made since being subject to a secure remand by the Family Court on account of her 'completely out of control' behaviour vulnerability to criminal and sexual exploitation. Today, the lawyer said, she was drug-free, working towards her GCSEs, and engaging with therapy and mental health services.

Lauren herself told the district judge that was feeling 'better about myself'. The judge responded: 'It's a good feeling, isn't it, to achieve things?' He went on to pass a non-custodial sentence for the offences which would, he said, usually merit custody – commenting that hearing about the progress she was making on the secure order was one of the factors in the decision. 'You need to make the most of this opportunity,' he added, to which Lauren replied: 'I will.'

Case study 9: Intensely remorseful offender and sympathetic magistrates

Vincent, an unrepresented defendant in his early 30s, sat with his head in his hands at the start of the hearing. He pleaded guilty to charges of possession of a class A drug (cocaine) and drink driving. The court's legal advisor told the bench that if they thought that Vincent had 'suffered enough' they could give a conditional discharge, although this would be an unusual course of action.

The magistrate asked Vincent what he would like to say about the incident. He told the court that he had been given the wrap of cocaine by a friend during his birthday party and put it in his pocket. He had drunk three pints and was only just over the limit – 'I know it's no excuse'. He went on to say: 'One night and it's lost me my job, everything ... I've lost my relationship, my home, everything because of this'. 'It was a bad birthday,' commented the magistrate. Vincent was given a 12-month conditional discharge, at which he thanked the magistrates several times and breathed an audible sigh of relief.

In case studies 8 and 9, guilty pleas and associated mitigation, judged in the round and along with apparent co-operation with the process, provided scope for lenient sentencing. Whilst the sentences given may have been 'constructed' in hindsight to comprise separate stages relating first to personal mitigation and then to the guilty plea discount, we can surmise that in reality, the sentencers reached an overall assessment of the weight to be attached – in combination – both to the evident remorse and the preparedness to accept responsibility for their behaviour as shown by an early guilty plea. What was also clear in those cases was that the offenders 'engage[d] the court's sympathy' – to repeat the quotation above from our early research on mitigation (Jacobson and Hough, 2007).

Case studies 10 and 11, drawn from a single day's observation in a magistrates' court, contrast the compliance of a defendant pleading guilty with the vehemence of one opting to contest the case – the former provoking sympathy, and the latter, scornful laughter.

Case study 10: Destitute offender pleads guilty before magistrates

The defendant, Dariuz, was a young Polish man who appeared in court from custody (with shaven head and in a prison-issued grey tracksuit), having spent the past six weeks on

remand because of previous adjournments to the case. He pleaded guilty to two counts of theft from a supermarket, and one assault by beating of the supermarket's assistant manager who had detained him. The thefts were of low value items such as chocolate.

The prosecutor described Dariusz as a 'destitute male, homeless, on the streets', whose offences reflected this destitute status. In the plea in mitigation, his lawyer pointed out that Dariusz 'came off worse' from the altercation with the shop manager, having suffered cuts to his face, and was 'deeply remorseful'. The magistrates sentenced Dariuz to a fine which was 'deemed served' because of the time he had spent in remand. 'So you don't owe the court anything,' the chair reiterated. 'And we wish you luck for the future.' Dariusz replied, 'Thank you, your honour.'

Case study 11: Challenging the magistrate and their authority

A male defendant in his late 20s, Hunter, was charged with breaching a restraining order. The offence related to his ex-partner, with whom he had three children. It was alleged that – against the terms of the order – he had gone to her house. The prosecutor commented that this was the latest of Hunter's 'regular appearances' at court.

Hunter spoke frequently during the plea hearing, mostly asking questions of the court's legal advisor about his legal rights. The magistrates looked on and occasionally commented, with what initially appeared to be mild amusement and later some obvious irritation. When asked how he pleaded, he responded: 'Based on how the charge is put to me ... A resounding not guilty.' When then asked whether he wished to be tried in the magistrates' or Crown Court, he pondered for a moment and then said: 'I feel like justice would be served in this court. If the wind blows in the right direction.'

After the date was set for the trial, Hunter strode out of the courtroom, saying loudly: 'Carry on the oppression, guys - you're doing great!' As the door to the courtroom swung

shut behind him, one of the court officials said, laughing, to Hunter's lawyer: 'Thanks for bringing the entertainment.'

These two cases illustrate the – sometimes overwhelming – impact on court proceedings of defendants' compliance with, or defiance of, the court's authority. Defendants' decisions about their plea can lead to convincing – and often real – 'performances' of compliance; decisions to enter not guilty pleas can equally trigger displays of angry defiance.

IV. Taking stock of the cumulative impact on sentencing outcome of early plea, plea negotiations and mitigation

When it comes to the established discount for a guilty plea, and associated processes of charge/count/fact bargaining, many of the tensions between pragmatism and principled justice have been widely discussed. The pragmatists point out that the statutory discount and plea negotiations provide for affordability and speed: the criminal justice process would grind to a halt without them, as they provide reasonable incentives for defendants to plead guilty. This reduces court appearances, time spent in court and the costs of both prosecution and state-aided defence. There are real added benefits: avoiding a trial means that victims and witnesses are spared the stress and anxiety associated with giving evidence at court.

On the other side of the balance sheet, there are risks to defendants: there are clear inducements to plead guilty to an offence that they didn't commit. These risks are significant for those who are vulnerable in any way, and may therefore be more easily pressured to plead guilty (eg Gormley et al 2020, Helm 2019, Helm this volume, Peay and Player, 2018). Some victims and complainants may feel that they have been robbed of 'their day in court', and that

the offender has secured a milder punishment that the offence deserved.[13] The lack of transparency of the process must inevitably result in inconsistency in practice – as discussed at the outset of this chapter. Another area of concern about plea negotiations *per se* is the strict limit on rights to appeal convictions that are based on plea (eg Nobles & Schiff, 2020). Finally, the statutory discount and plea negotiations erode the principles of adversarial justice, in favour of a much more managerialist criminal justice process – eg Ward, 2017; Gormley and Tata, 2021; Johnston, 2020. As Johnston puts it, the dilution of the adversarial system:

> '…. ultimately renders the defence lawyer a cog in the criminal justice machine; a stark difference to the gladiator of the accused …. The tension created by the managerial agenda from the CrimPR is clear and the lawyer is required to positively contribute to the efficiency of the system; this is clearly identifiable by having to enter a guilty plea at the first hearing.'

The contours of this battleground are fairly well agreed among academics, legal commentators and practitioners even if there is little agreement about the right balance to strike between pragmatism and principles. However, discussion of plea-bargaining in the context of England and Wales rarely looks beyond the above points to consider the *interaction* of guilty plea discounts, plea negotiations and personal mitigation, and the resultant cumulative impact on the eventual outcome of the case.

The key point here is that the impacts on sentencing outcome are not simply combined arithmetically, but are compounded: charge, count or fact bargaining lessens the seriousness of the precise offence(s) for which the offender is convicted; the severity of

[13] The frustrations of some prosecution witnesses about guilty pleas were noted in research by Jacobson et al (2015).

punishment is then reduced through any plea in mitigation; and the guilty plea sentence discount is then applied on top. How this process operates is best illustrated by a 'worked example', as set out in the box below. This illustrates the potential scale of divergence in outcomes for the offender who pleads not guilty compared to the offender pleading guilty. There are three scenarios, all with the same starting point in which a 30-year-old man is initially charged with a Section 20 assault (inflicting GBH), following a late-night, alcohol-fuelled fight in which he is alleged to have punched the victim. The resultant sentence ranges from a medium level community order to a 12-month custodial sentence, depending on plea and mitigation. The first scenario is reminiscent of case study 7, involving Emmanuel the Sunday morning footballer who pleaded not guilty to a Section 20 charge; the third, case study 1, in which Steven agreed to plead guilty to affray in place of the assault charge. We should stress that this worked example presents what is by no means an extreme set of scenarios: a reduction in charge wounding/causing grievous bodily harm with intent (Section18) to unlawful wounding/inflicting grievous bodily harm (Section 20), or from affray to a less serious assault, could lead to an even wider disparity in outcome.

Worked example

Defendant is a 30-year-old male with no previous convictions, initially charged with Section 20 assault (inflicting GBH). Accused of committing offence in course of a fight involving several others, following a night's drinking. Victim was punched in the face; suffered badly broken jaw.

SCENARIO 1: Not guilty plea, limited mitigation

Defendant is **found guilty at trial**, having pleaded not guilty (claiming he had only peripheral involvement in the fight and did not throw the punch that caused injury). At

sentencing, plea in mitigation focuses on defendant's clean record and part-time employment. Judge comments that mitigation is counter-balanced by aggravating features of offence: it was committed under influence of alcohol, at night, as part of 'unprovoked group attack'. Evident from pre-sentence report that defendant continues to deny offence.

Sentence = **12 months' custody**, which is starting-point sentence for Section 20 assault involving category 3 (lesser) harm and category B (medium) culpability.

SCENARIO 2: Full discount for guilty plea, limited mitigation

Defendant **pleads guilty** to original charge at earliest opportunity. At sentencing, plea in mitigation focuses on defendant's clean record and part-time employment. Judge says failure to engage with probation during preparation of pre-sentence report, and 'arrogant' courtroom behaviour, suggest lack of remorse. Judge also says any mitigation is counter-balanced by aggravating features of offence (group attack, at night, under influence of alcohol).

Sentence = **8 months' custody**: early guilty plea reduces what would have been 12-month sentence (as in Scenario 1) by one-third.

SCENARIO 3: Charge bargain, full discount for early guilty plea, substantial mitigation

Defendant indicates willingness to plead guilty to lesser offence at earliest opportunity; ultimately, prosecution accepts **guilty plea to affray** in place of Section 20 assault. At sentencing, plea in mitigation focuses on defendant's clean record and part-time employment, along with deep remorse for what happened and concern about victim's welfare. Defendant also said to be actively addressing alcohol and related mental health

problems, which he believes to be the cause of his offending. Judge commends him on his progress; says mitigation is substantial and outweighs aggravating features of offence.

Sentence = **medium-level community order** on basis of:

- Starting point for offence of affray, involving category 2 (medium) harm and category B (medium) culpability = 26 weeks' custody
- Reduced to high-level community order because of mitigation
- Reduced to medium-level community order due to full discount for early guilty plea.

Should we regard as problematic the cumulative impact on sentencing outcomes of charge (or other) bargaining, mitigation and guilty plea discount, as illustrated by the worked example? Not necessarily. Only the strictest of retributionists would refuse to accept *some* modulation around proportionality as the determining factor in the severity of punishment. Consequentialist objectives can be accommodated to a degree, making it possible to reward remorse, reparative gestures and preparedness to address the causes of offending behaviour (cf Ryberg, this volume). Received wisdom on the bench – and a reasonable body of research – holds that sentencing practices of this sort can support rehabilitation and desistance, and there is no dispute about the wider societal benefits that rehabilitation and desistance offer. And as we discussed above, the discount for early guilty pleas is justified (in statute and sentencing guidelines) on grounds other than proportionality, as an efficient means both of 'procedural rationing' and of sparing victims and witnesses the burden of giving evidence in court. Equally important, an early guilty plea can be regarded as the first step on a path to taking responsibility for one's actions.

On the other hand, the cumulative impact of the processes we have described may be considered problematic if one considers the vast difference in sentencing outcome that can

arise. The *quantum* of the impact has become large enough to undermine the principle of proportionality that in theory, at least, remains the overarching framework for sentencing in England and Wales. Furthermore, this has happened with a lack of transparency and honesty in relation to plea negotiations and sentencing practice – and with little debate about, or recognition of, the tensions between principles and pragmatism in sentencing.

An additional consideration is whether particular groups of defendants are disadvantaged by current practice in this regard. The Lammy Review on treatment and outcomes for BAME individuals in the criminal justice system (2017) cites several studies that have consistently found lower rates of guilty plea among BAME compared to white defendants (the main cause of which is deemed to lie in differing levels of trust in the system). Lammy points to the implications of this for BAME offenders' access to interventions requiring a guilty plea, and to the guilty plea sentence discount. We would argue that the implications for ethnic disparities in criminal justice outcomes – given the interplay between plea discounts, plea negotiations and mitigation – are even greater than acknowledged by Lammy.

V. What is to be done?

This chapter has raised more questions than answers, and some of the answers we offer by way of conclusions are very tentative. The most obvious question that arises is whether the disparities in sentencing outcomes between guilty-pleading and not-guilty-pleading offenders should be narrowed.

If the answer to this question is 'yes', on grounds of proportionality and equity, then it would be relatively straightforward to achieve this, but problematic in terms of the net results. A narrowing in disparities could be achieved by reducing the guilty plea discount or reducing sentencers' discretion to mitigate for personal factors. The obvious and significant drawback

of such an approach is that it would cause sentence inflation. This would not only breach important principle of penal parsimony, but would also be fiscally irresponsible - however attractive such a development might be to populist politicians. There is the theoretical option of avoiding sentence inflation by reducing the starting points in sentencing guidelines at the same time as reducing the available discounts for guilty plea or personal mitigation. However, the history of penal politics over the last thirty years hardly offers much room for optimism about any politicians' preparedness to go down this road.

We are inclined to offer a different answer to the question of whether the disparities in sentencing outcomes between those pleading not guilty and those pleading guilty should be narrowed. This answer is that such disparities may be an inevitable and potentially justifiable feature of a sentencing system in which the overarching principle of proportionality can, in certain contexts, be over-riden by other goals. These goals include not only reducing the cost, time and potential distress to witnesses associated with criminal trials, but also supporting offenders' rehabilitation and desistance from crime, thereby providing wide societal benefits (cf. Watson, this volume; Roberts and Dagan, this volume).[14]

However, providing a convincing justification for the disparities demands, on the part of the justice system, far greater honesty and transparency than currently exists about the implications of a plea for sentencing. The existing lack of honesty and transparency means defendants may be entering pleas without full awareness of the repercussions, which is likely

[14] Consistent with our argument here, Watson (this volume) presents an insightful analysis of the value of a guilty plea – for people who are indeed guilty – as a means of preserving their self-respect in the process of prosecution and conviction. In similar vein, Roberts and Dagan (this volume) argue the case persuasively for recognising the ethical value of a guilty plea, in terms of the value of State recognition of the defendant's autonomy and agency.

to contribute to perceptions of unequal treatment on the part of defendants. As discussed above, a lack of clarity amongst defendants about the implications of not guilty pleas may also contribute to the disparities between ethnic groups in plea rates – with consequent disparities in sentences. And for victims and witnesses also, a lack of information about the plea process and poor understanding of the meaning of a guilty plea may lead to discontent with sentencing and delegitimise the courts process in their eyes. How can greater honesty and transparency be achieved? Below, we focus first on options relating to plea negotiations, and then on the relationship between the guilty plea and personal mitigation.

A. Greater honesty and transparency in plea negotiations

There has been a sea-change over the last fifty years in judicial preparedness to acknowledge the inevitability – and indeed desirability – of pleas negotiations. However the need remains for more acknowledgement, visibility and consistency in practices and procedures relating to negotiations over level of charge, number of charges and the agreed facts of the case. Achieving this will require changes at a policy level as well as delivery at a case level. We cannot claim to have developed a full agenda for change – and researchers may not be the best people to do so. But we have in mind such things as encouraging prosecutors to:

- proceed only with those charges which they are confident they can bring to court, in preference to 'charging high' as an opening gambit;
- state clearly the reasons they have for reducing the level of charge or the number of counts;
- ensure that outcomes of negotiations are fully explained to victims and witnesses;
- and place plea negotiations on a more formal footing, with agreements formally recorded.

There is also a need to address public misconceptions about plea negotiations. People need to understand that plea negotiations are a key feature of the criminal justice system in England and Wales – and that they have an important and justifiable role to play in delivering justice.

B. Recognising the inter-relationship between guilty plea and personal mitigation

The key 'compounding' effect of guilty plea on sentence arises because the sentencing guidelines treat mitigating factors and early guilty pleas as conceptually (and psychologically) unrelated. This is reflected in the stepwise sentencing approach set out in sentencing guidelines, whereby mitigation is generally considered at the second step, and the guilty plea discount applied at the third. Clearly there is no logical necessity for an early guilty plea to precede expressions of remorse and a determination to desist from crime, but the reality is that accepting responsibility for one's offending and feeling remorse are - in the vast majority of cases – likely to be intimately intertwined psychological processes. The practical implication of this is that it would make sense for sentencers to treat 'in the round' early guilty pleas and pleas of mitigation associated with expressions of remorse and determination to address offending. Accordingly, the second and third steps of the decision-making process could be merged. Doing so would dispense with the legal fiction that the discount for an early guilty plea is *solely* a recognition of the fact that the defendant has saved the court time and money, and has spared victims and witnesses inconvenience, anxiety and distress. It might have the even more significant benefit of recognising formally the guilty plea as the first stage on the road to desistance, and one that should be welcomed and rewarded as a significant consideration in its own right, not just because of pragmatic considerations of efficient case management.

The difficulties that would arise from such a reformulation of the stepwise decision-making process are partly practical, in that it would entail substantial disruption of the Sentencing Council's guidelines framework, at a stage when they are beginning to bed in very well. Another potential difficulty, as discussed above, is that this could also lead to sentence inflation. Sentencers may feel more comfortable with a series of small discounts to sentence with separate justifications than with offering the same quantum of discount in a single step. But these difficulties could be addressed, in whole or in part, by guidelines that clearly set out the scale of discounts that should be awarded for mitigation, including in the situation where a guilty plea does, and does not, form part of the mitigation.

C. In conclusion

The main thrust of our argument in this chapter has been that sentencing after a guilty plea is not a straightforward process by which the sentencer determines the penalty for criminal actions that are fully known and agreed upon. Rather, the passing of the sentence is the final step in a process of *creating* a narrative about offence and offender that is acceptable to the court. This narrative will, at least at times, have only a loose relationship to whatever 'really happened'. The proposals for change we have set out above would lead to more open and honest practices around plea negotiation. They would also result in greater recognition of the reality that, in their everyday practice, sentencers subscribe to consequentialist principles in recognising the significance of guilty pleas as an essential starting point on the road to desistance from offending.

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