Plea-based Sentence Reductions: Legal Assumptions and Empirical Realities

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Introduction: Masking Plea Complexity

In 2014, the European Court of Human Rights passed down it's judgment in the case of Natsvlishvili and Togonidze v Georgia (Natsvlishvili and Togonidze v Georgia, 2014). In that case the court determined the validity of guilty pleas that had been made by one of the applicants, Amiran Natsvlishvili. A relevant question in making this determination was whether Mr Natsvlishvili had chosen to plead guilty voluntarily. Essentially, Mr Natsvlishvili had faced a choice between pleading guilty and paying a fine or going to trial and facing a near certain lengthy custodial sentence (given Georgia's 98% conviction rate at trial) in poor conditions.[1] The European Court of Human Rights concluded that Mr Natsvlishvili's decision to plead guilty in these circumstances was "undoubtedly" conscious and voluntary. In one way, it is easy to understand this conclusion. It is likely that if faced with the choice of a fine or a near certain lengthy sentence in prison, most people would accept the fine without facing external pressure, and would do so regardless of factual guilt or innocence. In the same way it could be said that someone who hands over all their money to a thief who threatens to shoot them if they don't, hands over the money voluntarily. Given that they would be shot otherwise, they will choose to hand over the money without facing external pressure to do so (see also Kipnis, 1976). But accepting these decisions as conscious and voluntary misses the point. The terms of a choice itself can, in reality, undermine or even eliminate voluntariness. Framing the choice to plead guilty in Natsvlishvili as undoubtably conscious and voluntary masks a high degree of complexity present in real decisions in a way that is common in systems incentivising guilty pleas through the use of sentence reductions.

The complex influence of sentence reductions on guilty plea decision making is largely due to the fact that these sentence reductions act as incentives – encouraging often vulnerable defendants to waive their right to trial.[2] Decisions to plead guilty have traditionally been regarded as morally positive admissions, worthy of recognition or reward (see Roberts & Dagan, this volume). However, sentence reductions can change plea decisions into tactical decisions motivated by a far greater range of influences than factual guilt and innocence (see Helm, 2018). The influence of sentence reductions on behaviour is complicated by the fact that the state, the body that benefits the most when defendants plead guilty, can set sentence reductions that can essentially cause defendants to do so. When reductions begin to result in guilty pleas through creating strong incentives for defendants to plead guilty, it becomes problematic to describe those reductions as recognitions or rewards for positive behaviour. Where a person performs what would otherwise be a morally positive behaviour, such as owning up or telling the truth, as a result of strong incentivisation, that behaviour is no longer performed for morally positive reasons worthy of reward and instead becomes self-interested behaviour or, in extreme cases, mere compliance (see also Zaibert, this volume).

The contention that plea-based sentence reductions change defendant behaviour rather than just recognising morally-positive behaviour is supported by an examination of the history of guilty pleas - before guilty pleas were incentivised, evidence suggests that very few defendants chose

[1] In fact, he was in very poor conditions when deciding whether to plead – sharing a cell with a murderer who had previously abducted him.

[2] I focus in this paper on sentence reductions, although many jurisdictions also allow charge reductions offered prior to conviction which can have similar or stronger effects.

to plead guilty (see Alschuler, 1979). Perhaps more importantly, the fact that plea decisions can represent self-interested behaviour or even compliance rather than morally positive behaviours can be seen by the fact that innocent as well as guilty defendants plead guilty, known as the 'innocence problem' (note that at least in non-dystopian systems, guilty pleas from innocent defendants could actually be seen as morally wrong due to frustrating the interests of justice and the victim, see Duff, this volume). Incentives to plead guilty, including sentence reductions, result in innocent people pleading guilty and being convicted of crimes with no independent scrutiny of the evidence against them (see, for example, Baldwin & McConville, 1978; Blume & Helm, 2014; Helm, 2019; Nash et al., 2021; Hoskins, this volume).

In this context, regardless of whether sentence reductions are intended to influence defendant choice or whether they are rewards that have a side effect of influencing defendant choice, it is crucially important to understand the influence that they have on that choice. In fact, the nature and reality of that choice plays a key role in determining whether convictions via guilty plea are legitimate from a normative perspective. The innocence problem associated with guilty pleas combined with the lack of enquiry into the veracity of resulting convictions, suggest that self-conviction via guilty plea can no longer be legitimised in the same way as convictions at trial are - through being *accurate* as well as fair and respecting human rights (see Dennis, 2017: Chapter 2). Commentary now suggests that convictions via guilty plea are justified on the basis of the autonomous choice of a defendant (Bowers, 2007; Easterbrook, 1992; Nobles & Schiff, 2019; Scott & Stuntz, 1992). Imposing a trial on a defendant who doesn't want one might be seen as paternalistic or wasteful, and offering incentives to plead can be seen as providing opportunities for both innocent and guilty defendants as well as benefits for the state (Bowers, 2007). This idea that convictions via plea are justified by being consistent with the choice of accused people is consistent with existing legal regulation, which typically does not require guilty pleas to be accurate or based on any particular amount of evidence, but does require that choices made by defendants are *voluntary* and made *autonomously* (ie. on the basis of informed consent), free from *constraint* or *pressure.* On the basis of this freedom, systems typically impose far less regulation on processes surrounding guilty pleas than on those surrounding full trial.

Therefore, concepts such as voluntariness, autonomy, constraint, and pressure, are crucially important in the context of guilty pleas. These concepts are complex psycho-legal constructs. They can be enhanced or depleted in subtle and psychologically intricate ways, and their definitions are debated in philosophical and psychological literatures. Importantly, the operation of these kind of constructs in a system where sentence reductions actively incentivise decisions to be made a certain way is complicated. In this essay, I consider a series of three empirically incorrect assumptions relating to these psycho-legal constructs that are currently relied on in maintaining and regulating plea-based sentence reduction regimes: the assumption that sentence reductions cannot undermine voluntariness, the assumption that there is a dichotomy between incentivisation and pressure, and the assumption that giving all defendants a choice ensures equality. I demonstrate the impact of these assumptions through explorations of plea-based sentence reductions in England and Wales and the USA, and suggest that legal systems need to move away from reliance on superficial conceptions and confront the question of precisely what impact of sentence reductions on defendant choice is acceptable. I conclude by laying out suggested criteria for acceptable sentence reductions based on meaningful engagement with psycho-legal constructs, and by making some brief suggestions as to how sentence reductions might be structured and regulated to meet these criteria.

Assumption 1: Sentence Reductions Can't Undermine Voluntariness

Voluntariness is an important psycho-legal concept in criminal convictions via guilty plea. Jurisdictions that allow convictions via guilty plea generally have some requirement that essentially means that to be valid, guilty pleas must be entered voluntarily. For example, laws in the United States and Canada require that to be valid, guilty pleas must be entered voluntarily (Brady v United States, 1970: 748; s606 Canadian Criminal Code), and in England and Wales a guilty plea that is shown to be involuntary will be considered a nullity (e.g. Chalkey and Jeffries, 1998). In applying these requirements, states have tended to assume that allowing sentence reductions does not undermine the voluntariness of defendant choice, even in relatively extreme cases. In the US context, in a case holding that the threat of life imprisonment if convicted at trial compared to a five-year term of imprisonment from pleading guilty did not compromise the voluntary nature of a defendant's decision, the United States Supreme Court explicitly stated that the determination of whether a plea agreement is truly voluntary does not depend on the terms or generosity of the bargain involved (i.e. the discount offered, see Bordenkirtcher v Hayes, 1978). Essentially, the court reasoned that it was inherent in the nature of offering sentence reductions to incentivise guilty pleas (through plea bargaining in that context) that guilty pleas are *induced* by promises of a more lenient sentence and fear of the possibility of a greater penalty upon conviction after a trial. In fact, the US Federal Rules of Criminal Procedure suggest that a guilty plea should only be considered involuntary where it is the result of force or threats or of promises apart from the plea agreement (Federal Rule of Criminal Procedure 11(b)(2)). The United Kingdom House of Lords (the predecessor to the current Supreme Court) adopted a relatively similar approach in an extradition case involving consideration of whether the right to a fair trial would be compromised by incentives to plead guilty in the United States, appearing to suggest that almost any discounts from a justifiable sentence upon conviction at trial would not undermine the right to a fair trial. In that case, Lord Brown, delivering the judgment of the court, acknowledged that "In one sense all discounts for pleas of guilty could be said to subject the defendant to pressure" but suggested that this pressure would not be unlawful in the absence of very significant discounts ("very substantially more generous than anything promised here") and consequences of trial that go "significantly beyond what could properly be regarded as the defendant's just desserts" (McKinnon v United States, 2008).

These discussions of voluntariness (and, relatedly, pressure) rely on relatively superficial conceptions of what voluntariness is from a psychological and philosophical perspective. The current interpretation of voluntariness in plea decision-making, illustrated by the examples given above, suggests that whether a decision is voluntary depends not on the availability of alternative choices for the person making the choice, but the acceptability of any limitations on alternative choices. So, voluntariness is measured by reference to the actions of the state rather than the actual choice of the defendant (see also Kisekka, 2020). This interpretation is in line with what have been called "rights-based" conceptions of voluntariness. For example, in defining the limits of voluntariness, philosopher Robert Nozick stated: "Whether a person's actions are voluntary depends on what it is that limits his alternatives… Other people's actions place limits on one's available opportunities. Whether this makes one's resulting action non-voluntary depends upon whether these others had the right to act as they did" (Nozick, 1974: 262). While consideration of the legitimacy of the action of someone placing limits on the opportunities of others may be appropriate in cases in which limits on voluntariness are balanced with other considerations (see, for example, R v Howe, 1987 in England and Wales outlining the law on duress), the legitimacy of limits has little to no bearing on the actual impact of those limits on defendant choice itself and therefore is inappropriate in many contexts.

Serena Olsaretti has used the example of a prisoner to demonstrate how voluntariness can be undermined even by legally permissible action (Olsaretti, 1998: 54-60). Imagine a prisoner who decides to escape from prison and is recaptured. When the prisoner is re-captured it would clearly be wrong to say that they voluntarily stay in prison, Even though the prisoner has no right to be outside prison and the guards have a right to keep them in prison. Although the limits on voluntariness are acceptable, the prisoner remaining in custody is not voluntary.

In the context of guilty plea decisions, what is important is the reality of defendant choice rather than the legality of what constrains that choice. The defendant must truly have access to a fair trial since that access is a human right (recognised, for example, by the European Convention on Human Rights). Olsaretti provides an alternative definition of voluntariness that is more appropriate in this context. She argues that voluntariness should be determined by the presence of acceptable alternative choices, with a choice being non-voluntary where there is no acceptable alternative to that choice (Olsaretti, 1998; 54). Thus "things other than threats may undermine voluntariness. Choices made in response to offers, warnings, or other situations of constrained choice may all be non-voluntary where there is no acceptable alternative" (Olsaretti, 1998; 54).

Adopting this conception of voluntariness in the context of guilty pleas, a guilty plea decision is only voluntary where taking a case to trial is an acceptable alternative choice (in light of the sentence available by pleading guilty). Since sentence reductions can prevent trial from being an acceptable alternative, sentence reductions can clearly undermine the voluntariness of defendant choice. Consider the Definitive Guidelines on Reduction in Sentence for a Guilty Plea in England and Wales (Sentencing Council, 2017). These guidelines provide for a one-third sentence reduction when defendants plead guilty at the earliest opportunity, and explicitly allow this reduction to result in the imposition of a non-custodial rather than custodial sentence (Sentencing Council, 2017: E1). Thus, defendants can end up facing a risk of a custodial sentence if they go to trial that can be definitively avoided by pleading guilty. For many defendants, ironically particularly defendants who are innocent, risking a custodial sentence may not be viewed as acceptable. As a result, defendants facing a choice of no risk of custody vs. a risk of custody are left with no acceptable alternative but to plead guilty. This reality can be demonstrated in practice by looking at the recent Post Office Scandal in the UK. The Post Office scandal involved the conviction of a large number of sub post masters and mistresses (SPMs) on the basis of evidence from a computer system known as Horizon which was later found to have been faulty (see Evidence-Based Justice Lab, nd). Over 85% of the 72 SPMs who have since been acquitted of all offences had initially pleaded guilty to those offences. Those who have discussed why they did so have explained that pleading guilty was their only option to avoid a risk of prison (see Helm, 2021).

Defendants in this situation may have children, precarious employment, or difficult financial circumstances and feel unable to risk custody. Some work has argued that actually these reductions do not undermine voluntariness but provide defendants with a good deal that, should they accept it, benefits both themselves and the state (e.g. Bowers, 2007). However, this argument neglects the fact that "good deals" can deprive the defendant of what might be their ultimate aim and what they think they ultimately deserve – recognition of being not guilty. Defendants may want to take this risk, but feel that when they are offered certain reductions they can no longer personally justify doing so, for example due to obligations to family or work. Going to trial becomes a huge gamble that, in reality, only a privileged few may be able to take.

Assumption 2: There is a Dichotomy Between Incentives and Pressure

Resolving cases via guilty plea has become a necessary part of the administration of criminal justice in many legal systems because of perceived benefits to the state and trial participants (e.g. victims, see Manikis, this volume). Perhaps most important in this regard is the relative efficiency of resolving cases via plea compared to a full trial. As Lord Justice Hughes stated in the case of *R v David Caley and others* in England and Wales, if all defendants who pleaded guilty insisted on a full trial "the administration of criminal justice would be in danger of collapse" (R v David Caley and Others, 2012: 6). As a result, many jurisdictions explicitly recognise and allow sentence reductions as incentives to plead guilty. This motivation is recognised in the relevant sentence reduction guideline in England and Wales, which states that the rules surrounding sentence reductions seek to "provide an incentive to those who are guilty to indicate a guilty plea as early as possible" (Sentencing Council, 2017). So, states are seeking to modify the choices of defendants to plead guilty or go to trial by altering the risks and benefits involved in these choices. However, systems simultaneously require that the choices made by defendants are made in the absence of constraint or pressure leading them to make the decision a certain way. For example, the European Convention on Human Rights requires that guilty pleas must be made without constraint to constitute valid waivers of the right to a fair trial guaranteed by Article 6 of that convention (see Deweer v Belgium, 1980). In England and Wales, the guideline discussed above also states that "Nothing in the guideline should be used to put pressure on a defendant to plead guilty" (Sentencing Council, 2017). However, the presence of any incentives to plead guilty increases the appeal of the plea option compared to the trial option, essentially creating pressure for a defendant to plead guilty. Saying that sentence reductions act as incentives but do not create pressure is appealing, but, in reality, it creates a false dichotomy between incentivisation and pressure, which refer to different aspects of the decision process. Incentivisation is a type of control over the behavior of others. Pressure is the impact of this control.

Incentivisation refers to a method for influencing the behavior of another person. An incentive is "an offer of something of value, sometimes with a cash equivalent and sometimes not, meant to influence the payoff structure of a utility calculation so as to alter a person's course of action" (Grant, 2006: 29). Incentives are effectively an exercise of power in the sense that they are a tool that can be used by one person or institution to influence the behavior of another person or institution (see Grant, 2006). While this tool can help push decision-makers towards one option when they otherwise feel relatively indifferently towards their options, it can also put pressure on decision-makers to act a particular way. Specifically, incentives can give a decision-maker strong reasons to act against their better judgment or create a conflict between values such as obligations to family and protection of self.

A related argument suggests that offers (or promises) and threats can be distinguished based on the baseline against which they are made, and that offers are permissible while threats are not. According to this argument, incentives to plead guilty should be considered against the baseline position of a defendant's post charge predicament, against which they likely appear a welcome and desirable prospect (e.g. Wertheimer, 1979). However, while this distinction between an offer and a threat may have some impact on the level of pressure a defendant feels with all else being held equal (as discussed below), the form of constraint on decision making as an offer or a threat does not necessarily determine the pressure it places on a defendant. A threat of something that matters very little to a defendant (e.g. a threat of a small monetary loss) could create significantly less pressure than a hugely compelling incentive (e.g. the offer of no possible prison time). Incentives and offers may typically be seen as more ethically

acceptable ways to influence the decision-making of others than threats, but their impact is not always more benign in practice.

In the case of guilty plea decision-making, the effect of sentence reductions as incentives is complicated. Absent any sentence reductions (and ignoring other pressures to plead guilty) a purely rational defendant would prefer the trial option to the guilty plea option, since trial involves a possible conviction and sentence but the guilty plea involves a certain conviction and sentence. As a result, guilty pleas have traditionally been considered admissions against a defendant's own interest. In that sense, any incentive that pushes people towards the plea option is an incentive pushing people against what would otherwise be in their best interests. Thus, any sentence reductions create some pressure for defendants to plead guilty rather than go to trial. The level of pressure created by reductions is likely to vary based on a number of factors, including those discussed below.

The size of a reduction in sentence length. Clearly, the larger the reduction, the more pressure will be placed on a defendant to plead guilty. The size of a reduction can be influenced by both the specific reduction given in sentence length, and by the impact that this reduction might have on the ability of a person to end their sentence early, for example through eligibility for parole.

Any categorical difference between plea and trial created by a sentence reduction. Categorical differences have the potential to create more psychological pressure in pushing defendants towards a guilty plea, specifically in adults, due to decision processes thought to be relied on. One psychological theory of memory and decision making, Fuzzy Trace Theory (FTT), highlights the importance of meaningful categorical distinctions in adult decision-making, suggesting that decisions are driven by these distinctions where possible (for more information and descriptions of tests of the theory, see Reyna, 2012). Where a categorical distinction is created between plea and trial, this distinction is likely to drive decision-making (and can do so even in innocent defendants). This suggestion has been discussed and supported in experimental work (Helm, 2021b; Helm & Reyna, 2017). Categorical distinctions could be between different types of sentence such as a custodial sentence, community sentence, and fine, but could also result where differences in sentence length become large enough to cross categorical boundaries (e.g. so that a sentence that is considered long or difficult becomes a sentence that is considered short or easy).

Whether a sentence differential is seen as a sentence reduction when pleading guilty or a penalty for going to trial, with the trial penalty likely to create more pressure to plead guilty than the reduction for pleading (Lippke, 2011). Whether a differential is seen as a sentence reduction or trial penalty will depend on the assumptions of the default position, which will provide a reference point for the defendant (see, for example, Yan & Bushway, 2018). Legal procedures have the potential to influence which sentence is seen as the reference point by a defendant. Importantly, procedures that allow a defendant to know the sentence if they plead guilty while leaving the sentence if convicted at trial uncertain, such as Goodyear hearings in England and Wales (see R v Goodyear, 2005), increase the possibility that the guilty plea sentence will be seen as a reference point, and thus that defendants will perceive the likely additional sentence at trial as a trial penalty. Similar arguments based on reducing pressure on defendants underlay the previous law in England and Wales, according to which sentence indications could not be given (R v Turner, 1970).

Recognising that any incentives to plead likely apply some pressure to defendants is important since it demonstrates the necessity of engaging in a meaningful discussion as to the amount of pressure that it is normatively acceptable to apply to defendants, and what sentence reductions that will apply that level of pressure look like. Procedure can then be tailored, bearing in mind the considerations above, to ensure that the pressure placed on defendants is not too high based on the level of pressure that is normatively justified.

Assumption 3: Choice Can Ensure Equality

Equality of treatment for different defendants is an important normative goal in criminal justice systems (see, for example, Griffin v Illinois, 1956 in the US context). By presuming that offering all defendants the same choice will ensure equality, systems make implicit assumptions about autonomy and freedom of choice that are not justified. Importantly, restrictions on voluntariness and levels of pressure created by sentence reductions, discussed above, will often differ depending on individual characteristics and circumstances.

While a significant amount of policy has aimed to ensure that all defendants have equal respect and protection in the trial process (see, for example, Fisher, 2019; Bennett, 2010; R v Ford, 1989), equal respect and protection in guilty plea systems seems to be assumed where all defendants are offered the same choice (ie. the same sentence discounts apply to all defendants). All defendants have an equal right to insist upon trial, and therefore might be assumed to be equally protected by access to the protections afforded by trial (for a discussion on this issue see Nobles & Schiff, 2019). However, the complex range of influences on human decision-making, and differences in those influences among defendants, means that this presumption is unlikely to reflect reality.

Martha Finemann's Vulnerability Theory illustrates the limitations on human autonomy as a result of our embodiment (our existence as embodied beings that interact with the world) and embeddedness (our place within relationships and institutions in the world) (Finemann, 2013: 20). The decisions that we make are not made in a vacuum. Instead, people's choices are influenced in both obvious and subtle ways by their positions within various institutions and relationships. Different people have different opportunities open to them, and different constraints on their decision-making processes. As a result, Finemann concludes that absolute autonomy is a myth, and that we must rely on the state to minimize harmful depletions of autonomy. In fact, the concept of autonomy as a myth is consistent with philosophical conceptions of the concept, which view it as a metaphysical ideal that is not attainable in practice (Dworkin, 1988; Helm et al., 2022). The fact that the guilty plea decision is not a fully autonomous choice made in a vacuum means that a sentence discount offered to one defendant may well have a different impact on their decision-making than a sentence discount offered to another defendant. A discount that might not have a strong influence on the decision making of one defendant may have a coercive impact on the decision making of another.

Consider, for example, the presence of a reduction that means a defendant can get a non-custodial sentence by pleading guilty but will face a short custodial sentence if convicted at trial. This reduction is likely to place greater pressure to plead guilty on defendants who cannot cope with a prison sentence, however short, for example defendants who have caring responsibilities or insecure employment. Thus, the decisions of those defendants will be more constrained than the decisions of defendants who are not in those circumstances. Some defendants may not be as free as others, despite having been offered the same choice. This reality is reflected in work showing that pressures to plead guilty, including those resulting

from sentence reductions, may be greater in woman than men. Work has suggested that women often have particularly strong reasons to want to avoid jail including more frequently being primary caregivers who will suffer themselves and cause suffering to their families if incarcerated, and facing greater stigma if handed a prison sentence (Jones, 2011). Research has also examined how vulnerabilities might influence guilty plea decision making, resulting in systematic differences in outcomes for defendants with enhanced vulnerability (Peay & Player, 2018).

These limitations on true autonomy in decision-making mean that guilty plea choices are likely to be determined by a range of complex factors, with the potential to lead to significant inequality in outcomes for different groups. Inequalities are also likely to result from internal differences in defendant cognition. One important set of differences that are not accounted for by current procedures are age-based cognitive differences. Research suggests that differences in cognitive style means that children are more likely than adults to plead guilty on the basis of relatively short sentence discounts, even when they are innocent (Helm et al., 2018; Helm, 2021c). Thus, utilising small sentence discounts to protect defendants from pleading guilty when innocent may protect adult defendants but not child defendants.

Equality in a system based on defendant choice cannot be ensured by treating people the same. Robust and individualised consideration must be given to sentence reductions that are appropriate for different classes of defendant, and which sentence reductions being offered are likely to result in group differences in decisions and to exacerbate inequalities and vulnerabilities. The protections of trial (and, relatedly, the decision to refuse to plead guilty) must be equally accessible to all defendants, should they wish to contest their guilt.

Case Studies: England and Wales and the USA

(1) England and Wales

An examination of procedure in England and Wales shows how even a sentence discount system that appears quite modest, particularly in comparison to the US plea bargaining system (see Brooks, this volume), can end up operating in a way that has the potential to significantly constrain defendants and to result in unequal outcomes. In England and Wales, a relatively formal regime regulates sentence discounts granted when defendants plead guilty. The Definitive Guideline on Reduction in Sentence for a Guilty Plea, discussed above (Sentencing Council, 2017), provides that the maximum level of reduction in sentence for a guilty-plea is one-third. Generally, where a guilty plea is indicated at the first stage of proceedings, a reduction of one-third of the sentence should be made, subject to some exceptions. This reduction gets smaller the further along in proceedings a guilty plea is entered, up to a maximum reduction of one-tenth of sentence where a guilty plea is entered on the first day of trial. The Guideline explicitly provides that this reduction in sentence can make a difference in sentence "type", for example it can convert a sentence from a custodial sentence to a community sentence or from a community sentence to a fine. In reality, sentence reductions in exchange for a guilty plea may well end up being larger than this guideline suggests. Although there is no widely acknowledged charge-bargaining practice, prosecutors are able to accept a guilty plea to a lesser charge and as a result drop additional charges (often more serious charges) against a defendant. Doing so can have a significant impact on sentence. For example, a defendant charged with inflicting grievous bodily harm with intent (with a sentencing starting point of four to 12 years in custody) might be able to agree to plead guilty to a charge of simple

grievous bodily harm (with a sentencing starting point of a high-level community order to three years in custody) (Sentencing Council, 2011).

Therefore, under this sentencing regime while some sentence reductions are relatively modest, others are more significant. Reports from real defendants highlight how these incentives can undermine voluntariness, and place pressure on defendants to plead. A good example of the pressures defendants can face in this system is provided by the recent post office scandal, discussed briefly above. In that scandal, defendants who have now been acquitted, pleaded guilty to offences against them based on financial shortfalls that they knew they were not responsible for. However, the sentence reductions that they could obtain by pleading guilty were compelling. One of the victims of what has now been acknowledged as a large miscarriage of justice who pleaded guilty, Christopher Trousdale, has described his decision to do so - he has reported that he would have to have risked seven years in prison if he went to trial but faced a community sentence if he was willing to plead guilty (Boëda, 2022). The pressure that available sentence discounts placed on defendants is clear from the fact that some defendants were willing to forgo any criticism of the Horizon system (the system we now know was faulty and produced misleading evidence against them) – something they would clearly not have done otherwise – so that they could obtain the discounts associated with pleading guilty (see Hamilton and Others v Post Office, 2021. Note that requiring them to forego this criticism has now been recognised as an affront to justice).

Empirical research also supports these suggestions that incentives to plead guilty are undermining voluntariness and creating pressure in England and Wales, and suggests inequalities may be resulting from plea decisions. This work provides evidence that sentence length discounts (particularly where they are exacerbated by factors like eligibility for early release) and the ability to avoid a custodial sentence if they plead guilty, can dominate the minds of defendants making plea decisions (Helm et al., 2022; 151-155). In addition, this work suggests that plea-based sentence reductions can interact with sentence reductions for personal mitigation, to result in even more significant discounts (Hough & Jacobson, this volume). Research in England and Wales also suggests that sentence discounts (and the guilty plea regime more generally) may be leading to disparate outcomes for defendants of different ethnicities. This research suggests that defendants from minority groups are pleading guilty less often than White defendants, potentially due to having less confidence in the system offering sentence discounts (Hood, 1992; Lammy, 2017). This difference has the potential to result in defendants from minority groups receiving longer sentences than White defendants.

(2) The USA

The USA provides an example of a system in which benefits defendants receive for pleading guilty are far less regulated and consistent than they are in England and Wales. The system essentially involves negotiations on aspects of the case, including charge, sentence, and plea, between the parties (i.e. the defence and the prosecution) (Brook et al., 2016: 1163-1164). In this system, the prosecution can offer a variety of benefits to a defendant in exchange for a guilty plea, including limiting the number of charges brought or changing the type of charges brought against a defendant. Changing the charges brought can have a significant impact on the sentence a defendant is given. For example, a prosecutor might agree to dismiss a drug distribution count carrying a mandatory minimum sentence of ten years and to replace it with a charge of using a communication facility to further a drug crime, carrying a maximum sentence of four years and the possibility of probation (Brook et al., 2016: 1165). In this system, defendants can agree to enter “fictional” pleas, so that convictions via guilty plea involve

offences which bear little or even no resemblance to the offences that they were initially charged with (Johnson, 2019), and, in some jurisdictions, can plead guilty while explicitly maintaining innocence (see Shipley, 1986).

Empirical research has examined the offers made to defendants, and highlights the huge sentence reductions that can be obtained by defendants who plead guilty in this system. For example, in one survey response, a lawyer reported a client being charged with sexual assaults and being threatened with a 40-year prison sentence being able to plead guilty to disorderly conduct and be sentenced to pay only court costs (Helm et al., 2018b: 923). Thus for some defendants, going to trial is transformed into a gamble that many can't afford to take. One lawyer surveyed in an empirical study articulated this sentiment, stating: "Faced with decades of prison and offered a year or two, rational people don't even gamble" (Helm et al., 2018b: 923). These decisions are not voluntary or free from pressure in a meaningful sense. While many defendants may feel they have done well out of guilty plea decisions (reducing a sentence they deserved based on factual guilt to a much lesser one), innocent defendants are unlikely to feel this way, particularly where they realise that the chance of conviction is low or that charges against them could even be dropped should they be able to pursue trial. This possibility is likely for innocent defendants, since research suggests that more compelling offers are made to defendants where the probability of conviction is low (see Bushway et al., 2014). The National Registry of Exonerations has described the discrepancies between sentences at plea and trial as having "virtually eliminated the constitutional right to a trial" (National Registry of Exonerations, nd). The pressure to plead guilty in the US system can be seen by the huge number of defendants pleading guilty (around 98% of defendants in Federal cases pleaded guilty in 2019, see United States Sentencing Commission, 2019 Sourcebook of Federal Sentencing Statistics, Table 11) and the significant role of guilty pleas in wrongful convictions (National Registry of Exonerations, nd).

As in England and Wales, evidence from the United States suggests that incentivised guilty pleas may also have a role in creating inequalities in the criminal justice system. For example, a recent analysis of data from the Maryland Commission on Criminal Sentencing policy found that Black and Latino defendants were substantially less likely to plead guilty than White defendants (Testa and Johnson, 2020) and thus were less likely to benefit from sentence reductions. Thus, again, the presence of choice in guilty plea decision making does not appear to be ensuring true voluntariness, eliminating pressure, or protecting equality.

Conclusions: Taking Constraint on Choice Seriously

Sentence reductions have the potential to interfere with defendant choice, and their relationship with psycho-legal constructs of voluntariness, autonomy, pressure, and constraint is complicated. Systems utilising plea-based sentence reductions tend to mask this complexity by relying on superficial definitions of relevant constructs and, as a result, assume that plea decisions are voluntary and free from pressure in all but the most extreme circumstances, and that giving all defendants a choice is protective of equal rights. This treatment has created a system in which legal rhetoric is increasingly detached from practical reality, where legal regulation appears to protect defendants but does very little in practice.

To provide defendants with meaningful protections in practice, rather than jury in theory, meaningful engagement with underlying constructs is necessary. In this essay, I have suggested that (contrary to current assumptions) sentence reductions can undermine voluntariness, incentives to plead guilty create pressure to plead guilty, and merely giving everyone the choice

of guilty plea or full trial does not ensure equality. Given these realities, it is important to closely consider the extent to which it is acceptable for sentence reductions to influence choice and to regulate sentence reduction regimes to ensure that they do not have an unacceptable impact on plea decisions.

The question of the extent to which it is acceptable for sentence reductions to influence choice is a difficult one. It is clear, as argued above, that decisions to plead guilty should be voluntary in the sense that defendants should have another acceptable option available to them. But, the amount of pressure that it is acceptable for reductions to create is less clear.
A helpful way to determine what level of pressure should be considered acceptable
is to consider the role that defendant choice plays in legitimising convictions via guilty plea. Essentially, defendant autonomy – the ability of a defendant to live their own life in accordance with their own second order goals (the desires they have reflectively about what they want or what is good) – can justify allowing criminal convictions via guilty plea without meaningful scrutiny of the evidence against a defendant (and even in light of evidence showing innocent defendants plead guilty). This notion is in line with affirmation of the self-respect of defendants in the guilty plea process and the criminal justice process more generally (see Watson, this volume). Sentence reductions can therefore be considered acceptable provided that they don't themselves deplete autonomy.

A sensible starting point is therefore one proposed by prior work – that sentence reductions are acceptable provided they do not prevent plea decisions from being driven by a defendant's relevant second order goals (see Helm et al., 2022). Importantly, second order goals driving a plea decision should be those relating to the central plea decision itself – the decision to self-incriminate. Where sentence reductions draw defendants away from these second order goals (for example by invoking a whole new set of second order goals not relevant to the core plea decision), these reductions undermine rather than promote defendant autonomy and thus should be seen as creating impermissible pressure. On the other hand, reductions that assist a defendant in making a choice between two relevant second order goals – e.g. the good of owning up and the good of avoiding punishment – can be seen as preserving autonomy whilst still nudging a defendant towards the guilty plea option. This approach also has the benefit of ensuring that reductions only influence defendants who are at least influenced by the good of owning up, and thus are arguably more clearly eligible for some reward in the form of a sentence reduction.

Empirical work has the potential to inform the development of sentencing guidelines that operate in the way described above – nudging defendants between two second order values relevant to the core plea decision rather than drawing defendants away from those second order values. Two promising ways in which plea decisions might be brought more in line with relevant second order values are (1) ensuring that discounts do not result in outcomes from pleading guilty that are categorically different from those received if convicted at trial (see Helm, 2021b), and (2) avoiding the provision of concrete information to defendants prior to plea on the sentence they will face if they plead guilty. Providing this information has the potential to change the reference point that defendants work from when making plea decisions through providing a benchmark against which a sentence at trial can come to be viewed as a penalty. Providing this information also contributes to transforming the plea decision into a tactical one based on trading off risks and rewards, where pressure created by balancing those risks and rewards can draw decision-makers away from the central plea decision. It is also necessary to closely consider equality when regulating incentives to plead guilty, recognising that offering all defendants a choice does not guarantee equality in a meaningful sense.

Sentence reductions should be accompanied by individualised protection to retain the ability of all defendants to act in accordance with relevant second order values. This protection might be provided in a number of ways, depending on defendant need, for example through the provision of robust financial support, legal advice from a trusted source, or greater utilisation of house arrest.

By drawing on these suggestions and taking psycho-legal constructs seriously, states can continue to benefit from defendant guilty pleas (although potentially not on the same scale), while providing appropriate protection for defendants in their criminal justice systems – protection that many states already claim to be providing in theory, but are not providing in practice.

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