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The Challenge of 'Factual Hard Cases' for Guilty Plea Regimes

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This article examines how defendant self-conviction via guilty plea changes the application of criminal law, specifically in cases in which there is no right answer as to whether a defendant is guilty prior to trial, despite agreement over descriptive facts. These cases are referred to as 'factual hard cases'. It suggests that defendants trying themselves in these cases creates risks for defendants and criminal justice systems – the application of law becomes driven by defendant judgement, with accompanying imprudence, vulnerability, and subjectivity, and an expressive function of the criminal trial is stifled. The results of an original empirical study are presented to demonstrate these risks. The article argues that as a result of these risks, and the decoupling of guilty pleas from ethical behaviours, factual hard cases present a challenge to existing plea-based reduction regimes and demonstrate the need for careful thought about what guilty pleas are and why we reward them.

INTRODUCTION

In the early nineteenth century, Jeremy Bentham urged criminal justice systems to rely on careful and rigorous examination of a defendant rather than acceptance of guilty pleas, in order to guard the defendant against undue conviction, brought upon him by his own (imbecility and) imprudence.[1] This statement was made in the context of a criminal justice system where there was no effective system of appeal.[2] Courts were relatively reluctant to accept guilty pleas and, when they were entered, would generally encourage defendants to retract them.[3] This system was also one that was rapidly evolving. Between 1730 and 1770 the adversarial trial had begun to develop and judges started, for the first time, to allow the defendant to have a lawyer.[4] This involvement of lawyers had a significant impact on the jury trial, largely due to the increased

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1 Jeremy Bentham, *Rationale of Judicial Evidence* (London: Hunt and Clarke, 1827) 316.
2 L. B. Orfield, 'History of Criminal Appeal in England' (1936) *1 Missouri Law Review* 326.
3 William Blackstone, *Commentaries on the Laws of England, Vol 4* (Oxford: 1765-69) 329. See *Hallinger* v *Davies* 146 US 314 (1892) for the US context.
4 John H. Langbein, 'The Criminal Trial Before Lawyers' (1978) 45 *University of Chicago Law Review* 263, 307-314.

importance of evidential rules.[5] These changes created a new jury trial that was undoubtedly fairer, but that was also slower and more expensive than its predecessor.[6] Today, case numbers and the time and costs involved in jury trials have created a situation in which many world jury systems would collapse without the majority of defendants pleading guilty.[7] In this context many jurisdictions, including, for example, Australia, England and Wales, the United States of America (USA), Mexico, Scotland, Poland, Spain, Georgia, and Canada, offer sentence or charge reductions when defendants plead guilty, and many, often the majority of, defendants choose to plead guilty in these systems.[8] Many defendants are therefore being convicted based on their own judgement and, in at least some cases, their own recognition of culpability, rather than careful and rigorous examination. Concerns surrounding defendant judgement and self-conviction are worth re-visiting.

Although existing work has examined pressures on defendants to plead guilty,[9] no work to date has examined how defendants judge whether they are guilty or not, a fundamental puzzle piece in understanding self-conviction. This paucity of examination is likely a result of a widely believed myth in criminal justice systems – that defendants always know whether they are guilty prior to trial, at least when they have received competent legal advice.[10] This article will suggest that defendants do not (and in fact cannot) always know whether they are guilty prior to trial. Of course, the defendant will usually know what they did and what their knowledge and intentions were when they did it. However,

5 J. M. Beattie, *Crime and the Courts in England 1600-1800* (Oxford: OUP, 1986) 363.

6 Langbein, n 4 above, 277, describing evidence from the Old Bailey during the late seventeenth and early eighteenth centuries showing that jury trials were so fast that 12 to 20 cases could be heard in a day.

7 See for example *R* v *David Caley and others* [2012] EWCA Crim 2821; [2013] Crim LR 342 at [6]; *Santobello* v *New York* 404 US 257 (1971), 260.

8 'The Disappearing Trial' (Fair Trials International, 27 April 2017) at https://www.fairtrials.org/articles/publications/the-disappearing-trial/ [https://perma.cc/24UW-TGY5] (including statistics from the 2010s to show approximate percentages of criminal defendants who plead guilty in a range of jurisdictions including Australia (61.1 per cent), England and Wales (70 per cent), the USA (97.1 per cent), Scotland (85 per cent), Poland (43 per cent), Spain (45.7 per cent), and Georgia (87.8 per cent)).

9 In the context of England and Wales, see for example John Baldwin and Michael McConville, *Negotiated Justice: Pressures to Plead Guilty* (London: Martin Robertson, 1977); Rebecca K. Helm, 'Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial' (2019) 46 *Journal of Law and Society* 423. In the context of the USA, see for example Albert W. Alschuler, 'The Changing Plea Bargaining Debate' (1981) 69 *California Law Review* 652; Richard L. Lippke, *The Ethics of Plea Bargaining* (Oxford: OUP, 2011). In the context of other jurisdictions, see for example Kevin K. Y. Cheng, 'Pressures to Plead Guilty: Factors Affecting Plea Decisions in Hong Kong's Magistrates' Courts' (2013) 53 *British Journal of Criminology* 257 (Hong Kong); Alejandro Gámez Selma, 'El Increíble Juicio Menguante' (Blog de Red Jurídica, 22 November 2021) at https://red-juridica.com/juicio-menguante/ [https://perma.cc/HB2Q-BJRY] (Spain); Caitlin Nash, Rachel Dioso-Villa and Louise Porter, 'Factors Contributing to Guilty Plea Wrongful Convictions: A Quantitative Analysis of Australian Appellate Court Judgments' [2021] *Crime and Delinquency* (Australia).

10 See 'Incentivised Legal Admissions in Children, Part 2: Guilty Pleas' (Evidence Based Justice Lab, 2021) 13 at https://evidencebasedjustice.exeter.ac.uk/wp-content/uploads/2021/09/ChildGuiltyPleas_FullReport.pdf [https://perma.cc/8PMV-MA3E] (providing evidence of this belief in the context of child guilty pleas through reports of practitioners that judges often presume defendants always know whether they have committed an offence).

this knowledge is not always sufficient to determine legal guilt (for example when a determination of legal guilt involves determining whether behaviour was 'dishonest'). In hard cases judging a case involves not only knowing what happened, but also whether what happened should be considered to amount to a breach of the law, given legal standards designed to be considered by community representatives. This reality raises problems for guilty plea systems. To plead guilty is (in its most fundamental sense) to determine one's own guilt, and thus to authorise the court to adjudicate one's guilt. When defendants make these determinations in cases where guilt is not clear even given knowledge of relevant descriptive facts (in this context facts relating to empirical matters in a case including what a defendant did and what their mindset was when they did it),[11] they are not just deciding whether to admit to what they have done, they are attempting to determine whether they are guilty, a task that can be metaphysically or epistemologically impossible prior to trial. In performing this task, defendants make complex judgements, and terms that were intended to be interpreted by the community (for example dishonesty) instead rely on judgement by the individual defendant. Allowing, and even advocating for, criminal convictions to be driven by this judgement is highly problematic and raises questions about convictions via guilty plea and justifications of plea-based sentence or charge reductions.

The first part of this article considers the notion of factual guilt or innocence, specifically in the context of jurisdictions utilising the criminal law jury, and discusses a subset of cases where 'factual guilt' independent of adjudication at trial either does not exist, or is unknown to the defendant (which I will refer to as 'factual hard cases'). The second part of the article examines the implications of this lack of guilt status (or lack of clear guilt status) prior to trial for criminal justice systems in which defendants plead guilty even in hard cases. It notes how convictions via guilty plea come to represent defendants' own opinions on guilt, rather than guilt in a meaningful sense. The ethical compasses of defendants, rather than community standards, come to drive the interpretation and application of law, with negative consequences for some defendants and for the legal system. The next part of the article presents the results of an empirical study specifically examining these potential negative consequences in the context of a theft case. Results provide support for arguments made in the preceding sections by showing the lack of a clear right answer relating to factual guilt even in a case where all descriptive facts are known, the potential for inequalities to occur where defendants interpret legal concepts themselves, and the benefits of lay judgements in elucidating legal standards. The final part of the article considers the desirability and justifiability of defendant self-determination of guilt and plea-based sentence or charge reduction regimes in light of preceding discussion and empirical data. It suggests that awarding reductions in factual hard cases raises significant questions about normative justifications underlying plea-based sentence and charge reductions. The article concludes by considering a relatively simple policy change with the potential to recognise specific

11 See Mark Greenberg, 'On Practices and the Law' (2006) 12 *Legal Theory* 113, 114.

considerations relevant in factual hard cases, and by calling for more a nuanced approach to guilty pleas and associated reductions more generally.

FACTUAL HARD CASES AND THE MYTH OF OBJECTIVE GUILT

In a system that seeks to 'acquit the innocent and convict the guilty', it is important to have clear conceptions of what guilt and innocence mean. A distinction is often drawn between a person being 'factually' guilty, meaning that they have carried out an act that breaches the law, and 'legally' guilty, meaning the prosecutor can prove that they committed a crime in court. The idea that a clear guilt status exists independently of trial is at the heart of the Criminal Procedure Rules in England and Wales, which commit all official participants in the criminal justice process to 'acquitting the innocent and convicting the guilty' as they seek to deal with cases 'justly'.[12] This idea that there is a clear concept of factual guilt prior to trial is consistent with public discourse which presumes an objective 'truth' relating to guilt or innocence, independent of the judgement of a judge or jury.[13] In fact, reality can be more complicated than this presumption suggests. In at least some cases, community judgement is a central component of guilt through the interpretation of legal terms, and therefore it is not clear that any guilt status exists prior to the determination of a jury (I focus primarily here on juries but note that this role is performed in less serious cases in many jurisdictions by lay or professional judges, for example in the magistrates' courts in England and Wales). In these cases, knowing guilt prior to trial can be metaphysically or epistemologically impossible. To get greater clarity on what guilt might mean prior to trial in these cases, it is necessary to examine the role of the jury beyond determining what they believe the defendant did (or did not do).

The role of the jury

The central role of the jury is to judge whether they can be sufficiently certain (typically 'sure') that a defendant committed the *actus reus* and had the necessary *mens rea* of an alleged criminal offence, and has no applicable legal defence. Thus, the role of the jury is often seen as determining truth, or at least reaching a verdict ('guilty' or 'not guilty') linked to propositions ('she did it' or 'she did not do it') grounded in truth.[14] However, the role of the jury has long been more complex than a simple truth finding role.

The jury, as a democratic institution, also has a role in reflecting community principles and norms in interpreting legal terms and in applying the law.

12 Criminal Procedure Rules, Rule 1.1.

13 See Richard Nobles and David Schiff, 'Miscarriages of Justice: A Systems Approach' (1995) 58 MLR 229; Rachel Gimson, 'The Mutable Defendant: From Penitent to Rights-Bearing and Beyond' (2020) 40 *Legal Studies* 113.

14 See for example Z. Bankowski, 'The Jury and Reality' in Mark Findlay and Peter Duff (eds), *The Jury Under Attack* (London: Butterworths, 1988).

Even the very early forms of the modern criminal law jury (originating in the 1200s) are thought to have had some discretion, partly due to the expertise of jurors at that time (who were drawn from the community in which a crime occurred, and who were chosen precisely because they would 'know' what went on in the neighbourhood) and partly due to the ability of the jury to reflect social understanding of a community when judging others.[15] There is historical evidence of jurors finding defendants guilty of lesser offences than those they were charged with, for example cases from the 1600s showing jurors artificially reducing the value of stolen goods in order to avoid 'undeserving' defendants being given the death penalty.[16] The role of juror discretion developed significantly in seventeenth century England. During that time, the role of the jury became increasingly politicised, at a time of political crisis.[17] Political reformists argued for a decentralised system of law where neighbours would judge each other and shared experience and context would guarantee fairness even where formal law itself was not fair.[18] This democratic role of the jury is arguably why many common law systems retain trial by jury, and why jurisdictions such as Spain and Argentina have relatively recently adopted trial by jury, despite the obvious difficulties and potential inaccuracies that may arise from non-experts making complex factual judgements.

Today, jury discretion manifests itself in two primary ways. Most obviously, some law calls (explicitly or implicitly) for the application of community principles and norms when determining whether particular conduct or behaviour is criminal. In a subset of cases, the jury not only decide what happened, but also have a significant role in applying the principles and norms of the community to determine whether the factual behaviour of the defendant amounts to a breach of the law. As John Gardner noted in the context of judgements of reasonableness, the use of terms requiring community interpretation incorporates flexible standards into the law.[19] Reasonableness judgements, where jurors must determine whether a defendant's conduct or beliefs were 'reasonable', are one example of judgements that clearly call for infusion of community norms and principles. These judgements are relevant in a range of defences including self-defence[20] and duress,[21] but also in other legal judgements, for example in determining whether a person took reasonable steps to find the owner of property in cases of alleged theft,[22] or whether a person had a reasonable belief in consent in the context of sexual offences.[23]

Another example of a legal term clearly requiring the infusion of community judgement is the concept of 'dishonesty', a *mens rea* requirement for finding

15 Thomas A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago, IL: University of Chicago Press, 1985) 19-20.
16 Beattie, n 5 above, 419-424.
17 See Leonard W. Levy, *The Palladium of Justice: Origins of Trial by Jury* (Chicago, IL: Ivan Dee, 1999) 55.
18 Green, n 15 above, 185-186.
19 John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 LQR 563.
20 *AG's Reference (No 1 of 1975)* [1976] 2 All ER 937, 947.
21 See Keith J. Smith, 'Duress and Steadfastness: In Pursuit of the Unintelligible' [1999] Crim LR 363.
22 Theft Act 1968, s 2(1)(c).
23 Sexual Offences Act 2003, s (1)(c).

liability for many property law offences, including theft. The current standard of dishonesty in England and Wales is defined by a combination of statute, which gives examples of where a defendant should not be considered to have behaved dishonestly,[24] and case law which states that a defendant should be considered to have behaved dishonestly where, given their understanding of the descriptive facts, their conduct was dishonest *by the standards of ordinary decent people*.[25] Thus, the jury must determine not only what the defendant did and their state of mind when they did it, but, unless the circumstances fall within specific areas outlined in the statute, must also determine the standards of ordinary decent people, and compare their judgement as to the behaviour of the defendant to those standards.

Jurors also exercise community judgement in determining whether particular behaviour is criminal through the interpretation of (sometimes deliberately) vague legal terms. For example, in a UK House of Lords judgment considering the meaning of 'intention' (a *mens rea* component of many offences), Lord Bridge stated that 'the golden rule should be that, when directing a jury on the mental element necessary in a crime of specific intent, the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent'.[26] In fact, in some situations, where an outcome was virtually certain and the defendant appreciated that this was the case the jury is *entitled to* but *does not have to* find intent,[27] thus leaving the jury with a significant amount of what has been referred to as 'moral elbow room'.[28] So, while a person shooting someone in the head with the aim of disabling them to steal a wallet may be found to intend to kill that person, a person providing contraception to a child with the aim of protecting her from pregnancy may not be found to have intended to encourage underage sex.[29]

The second way that jury discretion manifests itself in modern systems is through the power of jury equity, also known as jury nullification.[30] Even in cases where it is clear that a defendant has technically broken a law, for example where a defendant has knowingly sold alcohol to an underage person, juries have an implicit power to find the defendant not guilty. Put simply, the jury can acquit defendants who have broken the formal law, since 'it is the conscience of the jury that must pronounce the prisoner guilty or not guilty'.[31] The power has been used effectively in the past to safeguard justice in the face of unjust laws. For example, in the USA, juries refused to convict abolitionists who had

24 Theft Act 1968, s 2.

25 *Ivey* v *Genting Casinos Ltd* [2017] UKSC 67; [2017] 3 WLR 1212; *R* v *Barton and another* [2020] EWCA Crim 575; [2020] WLR(D) 264 (confirming the applicability of *Ivey* v *Genting Casinos Ltd* in the criminal law).

26 *R* v *Moloney* [1985] AC 905, 926.

27 *R* v *Woollin* [1999] AC 82.

28 Jeremy Horder, 'Intention in the Criminal Law – A Rejoinder' (1995) 58 MLR 678, 687.

29 See John Child and David Ormerod, *Smith, Hogan, and Ormerod's Essentials of Criminal Law* (Oxford: OUP, 3rd ed, 2019) 101-102.

30 Simon Stern, 'Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell's Case' (2002) 111 *Yale Law Journal* 1815, 1819.

31 Matthew Hale, *The History of the Pleas of the Crown* (Philadelphia, PA: Robert H. Small, 1847) 312.

violated fugitive slave laws by helping slaves.[32] Examples in England and Wales include the case of Clive Ponting (a whistle-blower who was found not guilty under the Official Secrets Act after leaking documents about the Prime Minister having misled Parliament regarding the deliberate sinking of a retreating warship during the Falklands War),[33] and Extinction Rebellion protestors (who were found not guilty of causing criminal damage to Shell's London headquarters despite the judge directing jurors that the protestors had no defence in law).[34] This power of the jury to find a defendant not guilty against the evidence is traced to Bushell's case in England in 1671,[35] although in reality this judgment was not translated into the ability to return a not guilty verdict against the evidence until the early 1680s.[36] The power has been described as serving as a check on government by adding a level of discretionary review and human experience to moderate potentially rigid application of law.[37] It should be noted that the power is not necessarily always used in a positive way – juries may return verdicts that reflect prejudiced or bigoted community attitudes, such as racist attitudes.[38] Where evidence suggests that nullification is being used in such a way, the benefits of trial by jury, and particularly the power of nullification, should be reconsidered. If juries are prone to make decisions in this way, knowledge of that may be helpful in informing intervention. However, work in the US context has provided some evidence to suggest that concerns relating to racist nullification may, generally, be overstated and that in fact acquittals based on race may, in some contexts, be helpful in combatting broader racism.[39] In any case, for now, at least in the majority of current jury systems, even where it is clear what a defendant has done and it is clear that they meet the requirements for legal liability, the defendant may still be found legally not guilty.

Because juries are not required to give reasons for their verdicts, it is not always clear whether the conclusions that they have reached are due to their interpretations of legal standards or their power to nullify the law. A good example of this lack of clarity is the recent case of the 'Colston Four'.[40] In

32 Jeffrey Abramson, *We the Jury: The Jury System and the Ideal of Democracy* (Cambridge, MA: Harvard University Press, 1994) 82.

33 David Hewitt, 'Not Only a Right, but a Duty: A History of Perverse Verdicts' *The Justice Gap* 1 May 2018 at https://www.thejusticegap.com/not-only-a-right-but-a-duty-a-history-of-perverse-verdicts/ [https://perma.cc/S2RU-G3HQ].

34 PA Media, 'Jury Acquits Extinction Rebellion Protestors Despite "No Defence in Law"' *The Guardian* 23 April 2021 at https://www.theguardian.com/environment/2021/apr/23/jury-acquits-extinction-rebellion-protesters-despite-no-defence-in-law [https://perma.cc/V2LS-ND4C].

35 Stern, n 30 above.

36 *ibid*, 1817.

37 See Aaron McKnight, 'Jury Nullification as a Tool to Balance the Demands of Law and Justice' (2013) 4 *Brigham Young University Law Review* 1103.

38 See Irwin Horowitz, Norbert L. Kerr, and Keith E. Niedermeier, 'Jury Nullification: Legal and Psychological Perspectives' (2001) 66 *Brooklyn Law Review* 1207, 1210; Thom Brooks, 'A Defence of Jury Nullification' (2004) 10 *Res Publica* 401, 413-415.

39 Irwin A. Horowitz, 'Jury Nullification: An Empirical Perspective' (2008) 28 *Northern Illinois University Law Review* 425, 431-432; Paul Butler, 'Racially Based Jury Nullification: Black Power in the Criminal Justice System' (1995) 105 *Yale Law Journal* 677.

40 See 'Edward Colston Statue: Four Cleared of Criminal Damage' *BBC News* 5 January 2022 at https://www.bbc.co.uk/news/uk-england-bristol-59727161 [https://perma.cc/F5K2-MCFK].

that case, four defendants who pulled down a statue of Edward Colston and threw it into Bristol's harbour were acquitted of criminal damage. It is unclear whether the jury acquitted the defendants as a result of agreeing with their legal arguments (for example that they had a lawful excuse due to the prevention of crime or the owners' consent) or whether they exercised their power to nullify the law due to a belief that the law that would have seen the defendants convicted of criminal damage was not appropriate to apply in the case.[41]

Although the jury may have weaknesses in its role as a representative of community values (for example in sometimes becoming dominated by particular viewpoints rather than representing the community fairly,[42] and in allowing problematic community values to influence legal decision-making),[43] it seems clear that the jury, as a randomly selected group of community members would be more effective in representing the views of the community as a whole than one individual self-convicting defendant would be.

Factual hard cases

Finders of fact can be required to make difficult determinations in considering evidence and arriving at a verdict. The precise nature and magnitude of problems that might be faced depends on the nature of the case. First, there are cases in which descriptive facts are in dispute (for example there is a dispute about the actions a defendant undertook, or their reasons for committing particular actions). In these cases, there exists a 'right' answer as to what happened that the finder of fact must seek to determine. While determining what happened may be challenging, disputes as to legal liability can be clear or at least relatively clear once the descriptive facts are determined. When this is true, even when terms requiring the exercise of discretion are included in relevant legal criteria, it is clear how that discretion should be exercised – the defendant who shot another person wanting them to die, the defendant who stole property to keep for themselves or to sell for profit, the defendant who knowingly sold drugs to another person, and so on. In these cases, while the finder of fact may face challenges in determining what happened, the defendant is in a strong position to make a judgement about whether they are guilty or not, provided they have good legal advice as to the criteria for an offence and any available defences, since they know what happened (ie they know what they did and did not do). They are therefore in a strong position to make a decision about whether they

41 For an analysis see 'Do the Verdicts in the Trial of the Colston 4 Signal Sometime Wrong With our Jury System?' *The Secret Barrister* 6 January 2022 at https://thesecretbarrister.com/2022/01/06/do-the-verdicts-in-the-trial-of-the-colston-4-signal-something-wrong-with-our-jury-system-10-things-you-should-know/ [https://perma.cc/XL7G-P5PQ].

42 See for example Dennis J. Devine, *Jury Decision Making: The State of the Science* (New York, NY: New York University Press 2012) 166-167.

43 For a discussion in the context of rape myths, see James Chalmers, Fiona Leverick, and Vanessa E. Munro, 'Why the jury is, and should still be, out on rape deliberation' [2021] Crim LR 753; Cheryl Thomas, 'The 21st century jury: Contempt, bias, and the impact of jury service' [2020] Crim LR 987; Ellen Daly and others, 'Myths about myths? A commentary on Thomas (2020) and the question of jury rape myth acceptance' (2022) 7 *Journal of Gender Based Violence* 1.

should be convicted (and relatedly to choose to self-convict), even though they do not know whether the jury would convict them. In these cases, defendant decisions may even be more informed than decisions made by a judge or jury, and there is clear value to defendants 'owning up' (admittedly, in these cases there remains a possibility that the finder of fact would not make accurate determinations relating to disputed descriptive facts, but the defendant can still make their decision to plead guilty based on what they have done and whether it corresponds to the criteria for legal offences).

However, there are other cases where uncertainty over how discretion should or would be exercised means that the guilt status of a defendant prior to trial may not exist, or at least may not be knowable to a defendant. These cases can be described as involving normative facts since they involve comparing behaviour to an evaluative standard or norm (for example honesty or reasonableness).[44] In these cases, the defendant is significantly less informed than a judge or jury in making decisions relating to conviction. These cases raise questions relating to the limits of normativity. In some ways, these cases parallel the so called 'hard' or 'open-textured' cases that have been the subject of significant jurisprudential debate. These are cases in which what is traditionally recognised as law is insufficient to provide an answer as to what the law is, as in H. L. A. Hart's famous example of a law providing that vehicles are not allowed in a park, which does not provide a clear answer as to whether bicycles or emergency ambulances are permitted.[45] In the same way as in that example the law does not provide a clear answer to the relevant legal question (whether specific conduct is permitted by law), the descriptive facts may not always provide a clear answer to the relevant factual question (whether a defendant is guilty). We (or a defendant themselves) may know the descriptive facts, but still not know whether the defendant is guilty. In cases involving theft, for example, there may be no right answer as to whether a defendant has acted dishonestly in some cases – environmental campaigners taking genetically modified crops that they believed to be harmful from a produce company; a customer at a shop taking (as a 'bargain') an item that is marked more cheaply than other items; a person who befriends a vulnerable person partly, but not entirely, because of financial benefits; a person who keeps money found on the floor without significant steps to find its owner; or a person who keeps winnings from a slot machine despite suspecting that those winnings were paid out in error. This lack of right answer may also be apparent in considering offences integrating other normative terms, such as reasonableness.[46] Other cases where the descriptive facts may not provide a clear answer as to whether a defendant is guilty include cases in which current societal norms mean that a defendant may not be considered guilty by the community despite having breached a law from a technical perspective. I refer to cases where the descriptive facts (even when known) do not provide an answer as to defendant guilt as 'factual hard cases'.

The determination of guilt in factual hard cases is complicated. Decision-makers deciding a case are clearly intended to be guided by community values

44 See Greenberg, n 11 above.
45 H. L. A. Hart, *The Concept of Law* (Oxford: OUP, 1961) 125-132.
46 See for example *R* v *Bowen* [1996] 2 Cr App R 157.

rather than idiosyncratic personal preferences in exercising their discretion. For example, a juror determining whether a particular behaviour is honest according to the standards of *ordinary and decent* people should presumably set aside their own conceptions of honesty if they believe that they are not ordinary and/or decent. The role of decision-makers is clearly, in some sense, to represent the views of the community. The views of the community, at least technically, could be knowable prior to trial (for example through surveying a sufficient sample of community members), but it is important to note that such standards are complex, are influenced by a range of factors, and are likely to change over time.[47] In many cases there may be no clear view of the community prior to the community actively deliberating on specific facts through a trial. The community may have no set viewpoint on whether a person who takes advantage of a potentially faulty pay out at a casino is dishonest prior to actively considering the issue. They are even less likely to have a set viewpoint on more specific facts – whether a person who takes advantage of a potentially faulty pay out of £20/£50/£200 more than what was expected when playing on a slot machine at a large casino and knowing that the casino is aware machines regularly make such pay outs is dishonest, for example. Community standards of honesty in this type of case can be thought of as inseparable from the process of creating those standards through community deliberation. There is no community viewpoint on specific fact patterns until the community has deliberated on those fact patterns to reach a conclusion.[48] The viewpoint of a community may not exist in a meaningful way prior to these deliberations. Therefore, in at least a subset of cases, guilt cannot exist (let alone be known) prior to a determination by a jury or judge – guilt only comes into existence after the jury (or judge(s)) deliberate. Even in cases where there is a community viewpoint prior to trial, there are obvious epistemological challenges with identifying that viewpoint prior to deliberations. These cases raise significant challenges for guilty plea regimes.

CHALLENGES FOR GUILTY PLEA REGIMES RAISED BY FACTUAL HARD CASES

Modern research grounded in psychology and law suggests that decisions to plead guilty can be relatively complex tactical decisions, rather than simple admissions of guilt.[49] These decisions can involve a range of considerations including sentence and charge discounts, the time and cost involved in trial, and the potential to reduce time on remand.[50] However, unsurprisingly, defendants who believe they are guilty are significantly more likely to plead guilty

47 See for example Cass R. Sunstein, 'Discerning Blue from Purple: How Prevalence Affects what is Perceived as Normal' (2023) 44 *Evolution and Human Behavior* 250.

48 For a similar discussion in the context of morality suggesting that similar arguments may apply even for individual judgements, see Leo Zaibert, 'Figuring Things Out, Morally Speaking' (2021) 96 *Philosophy* 553, 560-561.

49 See for example Rebecca K. Helm, 'Cognitive Theory and Plea Bargaining' (2018) 5 *Policy Insights from Behavioral and Brain Sciences* 195.

50 See for example Helm, n 9 above.

than defendants who believe they are innocent.[51] In many cases where guilt is clear or relatively clear given particular descriptive facts it may be a simple task for a defendant to determine whether they are guilty, particularly since they are likely to have the best knowledge relating to the descriptive facts. In factual hard cases, this process of determination has the potential to be significantly more complex and significantly more problematic for defendants themselves and for criminal justice systems.

Threats to defendants

When defendants self-convict in factual hard cases, criminal convictions become determined by the ethical compasses of defendants themselves, as individual citizens in a relatively vulnerable position, rather than by community judgement. While the full trial process provides a sensible way to assign a guilt status to defendants in these cases through creating or revealing community judgement, the guilty plea process does not. When a defendant assigns a guilt status to themselves, all that the resulting status can mean is that the defendant *thinks* they should or would be found guilty (and are therefore willing to change their status from a defendant to a convicted person), it cannot be seen as an accurate reflection of community judgement.[52] This reality has at least two inherent problems for defendants, discussed below.

First, convictions being driven by defendant decisions is problematic because defendants, as individuals with their own subjective opinions, differ from one another. The jury, as a body composed of a group of citizens sharing and debating a range of viewpoints, is quite resistant (although not entirely resistant) to the impact of individual differences and idiosyncratic perspectives on decisions, since a range of viewpoints is represented in its decisions. Importantly, decisions are generally driven by majority preferences (with a bias towards acquittal), reducing the impact of unrepresentative viewpoints.[53] However, when defendants interpret legal terms such as dishonesty, reasonableness, and intention, and what the community might think about those terms, their interpretations will

51 See for example Avishalom Tor, Oren Gazal-Ayal, and Stephen M. Garcia, 'Fairness and Willingness to Accept Plea Bargain Offers' (2010) 7 *Journal of Empirical Legal Studies* 97; Rebecca K. Helm and Valerie F. Reyna, 'Logical But Incompetent Plea Decisions: A New Approach to Plea Bargaining Grounded in Cognitive Theory' (2017) 23 *Psychology, Public Policy, and Law* 367; Rebecca K. Helm, 'Cognition and Incentives in Plea Decisions: Categorical Differences in Outcomes as the Tipping Point for Innocent Defendants' (2021) 28 *Psychology, Public Policy, and Law* 344; Miko M. Wilford and others, 'Guilt Status Influences Plea Outcomes Beyond the Shadow-of-Trial in an Interactive Simulation of Legal Procedures' (2021) 45 *Law and Human Behavior* 271.

52 Note that in some cases defendants may believe they are not guilty but decide to plead guilty based on their assessments of the risks of trial, including what decision the jury may make and the potential sentence faced at trial. See for example Richard Moorhead, Kevin Nokes, and Rebecca K. Helm, 'The Conduct of Horn Prosecutions and Appeals' (The Evidence Based Justice Lab Post Office Scandal Project, Working Paper 3, 7 October 2021) 16-18 at https://evidencebasedjustice.exeter.ac.uk/wp-content/uploads/2022/10/WP3-Prosecutions-and-Appeals-Oct-2021-2.pdf [https://perma.cc/9A88-FFLC].

53 Devine, n 42 above, 158-163.

be hugely susceptible to differences based on the particular defendants making them (even when defendants are advised by lawyers). What one defendant perceives as honest may be very different from what another defendant perceives as honest. These differences may be driven by different demographics, differences in experiences, and differences in opinions. Importantly, these differences create a lack of stability in legal judgments which is likely to result in a lack of horizontal equity in convictions, undermining a fundamental moral principle according to which like cases should be treated alike.[54] This lack of stability is demonstrated in the results of the empirical work described below.

Importantly, interpretations of legal terms in case context typically involve ethical judgements. Convicting defendants based on their own ethical viewpoints may result in those with more stringent ethical standards being convicted more often than those with less stringent ethical standards. Imagine a set of distinct cases in which it is questionable whether conduct by each defendant would be dishonest according to community standards, and imagine that roughly 80 per cent of the population would not consider the conduct dishonest and 20 per cent of the population would consider the conduct dishonest. The 20 per cent with higher ethical standards would end up convicting themselves, when in reality what they did would not be considered dishonest by the majority of the community. On the other hand, the 80 per cent with lower ethical standards would plead not guilty and likely be acquitted at trial (presuming, for illustrative purposes, that the majority opinion drove the relevant jury judgement).[55] Put simply, those with stringent standards of honesty and a tendency to be self-critical will perceive themselves as guilty and thus will likely plead guilty and be convicted. Those with less stringent standards of honesty will perceive themselves as not guilty and thus many will go to trial, resulting in many being acquitted. This problem has parallels with so-called 'Robin Hood' problems described in debates over the definition of dishonesty, where having low standards of honesty could come to benefit a defendant.[56] This undesirable result was addressed by the shift in the definition of dishonesty in criminal law from the standard set out in *Ghosh* (which meant a defendant would not be liable if he or she did not realise that their conduct was dishonest according to the ordinary standards of reasonable and honest people) to the standard set out in *Ivey* v *Genting Casinos* (which asks whether the defendant's conduct was dishonest by the standards of ordinary and decent people, given the defendant's knowledge or belief as to relevant facts).[57]

Importantly, different groups of people may differ systematically from one another in their ethical judgements, meaning that the subjectivity discussed above has the potential to result in systematic inequalities in outcomes between

54 See for example Henry Sidgwick, *The Methods of Ethics* (London: MacMillan, 1877).

55 Note that research suggests that as a very general rule that the probability of a jury reaching a particular verdict is roughly proportional to the initial number of jurors favouring that verdict, but with a bias towards acquittal; see Devine, n 42 above, 158-163.

56 See Zach Leggett, 'The New Test for Dishonesty in Criminal Law – Lessons from the Courts of Equity' (2019) 84 *Journal of Criminal Law* 37.

57 See Adam Jackson, 'Goodbye to Ghosh: The UK Supreme Court Clarifies the Proper Test for Dishonesty to be Applied in Criminal Proceedings' (2017) 81 *Journal of Criminal Law* 448.

individuals from different groups, including along the lines of protected characteristics under the Equality Act 2010. For example, there is a significant amount of research demonstrating differences in moral and ethical reasoning based on gender (a social construct based on norms and behaviours associated with being male, female, or another gender identity and often related to the protected characteristic of sex),[58] with women more often (but not always) adopting a stricter ethical stance on questionable behaviours than men.[59] Relatedly, evidence suggests that on average, men tend to view morally questionable behaviours as more permissible and/or more ethical than women do,[60] that women are more likely to feel guilty and accept blame than men,[61] and that women are prone to greater guilt and shame when compared to men. This partially explains women's stronger tendency to condemn actions.[62] These differences are important when considering defendants determining their own guilt in factual hard cases. Juries are typically composed of both men and women, at least in theory resulting in reasonably fair representation of viewpoints from people of both genders, given a rough balance (although not equality) of representation on juries.[63] In contrast, individual defendants rely on their own viewpoints, which will often be associated with their gender and other biological, social, and psychological aspects of themselves. In the case of gender, the research above highlights a

58 For more information on the definition of gender and its interaction with sex, see World Health Organisation, 'Gender and Health' at https://www.who.int/health-topics/gender#tab=tab_1 [https://perma.cc/9R9R-WL8L].

59 For example A. Catherine McCabe, Rhea Ingram, and Mary Conway Dato-on, 'The Business of Ethics and Gender' (2006) 64 *Journal of Business Ethics* 101 (finding that, on average, men view bribery as more ethical than women do); William A. Weeks and others, 'The Effects of Gender and Career Stage on Ethical Judgment' (1999) 20 *Journal of Business Ethics* 301 (finding that in seven out of 19 vignettes studied females adopted a more strict ethical stance than their male counterparts, and in two out of 19 vignettes studied males adopted a more strict ethical stance than their female counterparts).

60 For example Susan. C. Borkowski and Yusaf. J. Ugras, 'Business Students and Ethics: A Meta-Analysis' (1998) 17 *Journal of Business Ethics* 17; George R. Franke, Deborah F. Crown, and Deborah F. Spake, 'Gender Differences in Ethical Perceptions of Business Practices: A Social Role Theory Perspective' (1997) 82 *Journal of Applied Psychology* 920; Saundra H. Glover and others, 'Gender Differences in Ethical Decision Making' (2002) 17 *Women in Management Review* 217; Jessica A. Kennedy, Laura J. Kray, and Gillian Ku, 'A Social-Cognitive Approach to Understanding Gender Differences in Negotiator Ethics: The Role of Moral Identity' (2017) 138 *Organisational Behaviour and Human Decision Processes* 28; Jessica A. Kennedy and Laura J. Kray, 'Who is Willing to Sacrifice Ethical Values for Money and Social Status? Gender Differences in Reactions to Ethical Compromises' (2013) 5 *Social Psychological and Personality Science* 52.

61 Stephen Jones, 'Under Pressure: Women Who Plead Guilty to Crimes They Have Not Committed' (2011) 11 *Criminology & Criminal Justice* 77. See also Jill Peay and Elaine Player, 'Pleading Guilty: Why Vulnerability Matters' (2018) 81 MLR 929, 947; Linda L. Carli, 'Gender, Interpersonal Power, and Social Influence' (1999) 55 *Journal of Social Issues* 81.

62 Sarah J. Ward and Laura A. King, 'Gender Differences in Emotion Explain Women's Lower Immoral Intentions and Harsher Moral Condemnation' (2018) 44 *Personality and Social Psychology Bulletin* 653.

63 Cheryl Thomas and Nigel Balmer, *Diversity and Fairness in the Jury System* Ministry of Justice Research Series 2/07 (2007) 144. Although see Jessica M. Salerno and Liana C. Peter-Hagene, 'One Angry Woman: Anger Expression Increases Influence for Men, but Decreases Influence for Women, During Group Deliberation' (2015) 39 *Law and Human Behaviour* 581; Conor Gallagher, 'Women Under-Represented on Juries in Serious Criminal Trials' *Irish Times* 17 July 2017 at https://www.irishtimes.com/news/crime-and-law/women-under-represented-on-juries-in-serious-criminal-trials-1.3156886 [https://perma.cc/KS8S-QQLC].

risk that when female defendants assess their behaviour against legal standards in factual hard cases, they will be more likely than male defendants to view their behaviour as unethical, condemn their actions, and accept guilt.[64] The potential for inequality to result from individuals determining their own guilt is demonstrated in the results of the empirical work described below.

A related problem with defendant self-determination of guilt is that asking defendants to make ethical judgements alone has the potential to exacerbate the difficulties faced by those with enhanced vulnerabilities in the criminal justice system. All defendants in the criminal justice system face some vulnerabilities by virtue of their position as defendants, in a battle against the significantly more powerful state.[65] However, many defendants face enhanced vulnerabilities as a result of individual characteristics, in the same way as some enhanced vulnerabilities make defendants susceptible to false confession.[66]

Enhanced vulnerabilities in the guilty plea process might arise from a range of factors including age, education, gender, ethnicity, caregiving responsibilities, intellectual disability, and neurodivergence.[67] Defendants with certain enhanced vulnerability may be particularly susceptible to weaknesses in seeking to determine themselves whether their behaviour constitutes a breach of the law. Decision-making processes in these defendants may be particularly likely to diverge from those processes in the community, creating a real risk that defendants would judge themselves to be guilty based on interpretations of legal standards that are not consistent with how those standards would be interpreted by the community (these can be thought of as wrongful convictions in this context, although note that they can be impossible to identify in cases in which there is no real guilt status prior to the full trial).

One group with enhanced vulnerability is children. The risk of problematic exercise of discretion leading to wrongful conviction is particularly strong in the context of child defendants, who are likely to struggle to make determinations in ways that mirror how they would be made by adults in the community.[68]

64 Note that in practice current statistics in England and Wales suggest that female defendants plead guilty less often than male defendants in the Crown Court; see 'Statistics on Women in the Criminal Justice System 2021' (Ministry of Justice, 24 November 2022) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1119965/statistics-on-women-and-the-criminal-justice-system-2021-.pdf [https://perma.cc/K9NU-LJRN]. However these statistics are limited in the insight that they can offer since they don't control for relevant factors such as prior convictions and offence type and do not relate to factual hard cases specifically.

65 For further discussion of inherent defendant vulnerability, see Rebecca K. Helm, Roxanna Dehaghani, and Daniel Newman, 'Guilty Plea Decisions: Moving Beyond the Autonomy Myth' (2022) 85 MLR 133.

66 See for example Allison D. Redlich, 'The Susceptibility of Juveniles to False Confessions and False Guilty Pleas' (2009) 62 *Rutgers Law Review* 943; Gisli H. Guðjónsson, 'The Effects of Intelligence and Memory on Group Differences in Suggestibility and Compliance' (1991) 12 *Personality and Individual Differences* 503.

67 For a discussion of vulnerabilities in the guilty process more generally, see Peay and Player, n 61 above; Helm, n 9 above; Rebecca K. Helm, 'Conviction by Consent? Vulnerability, Autonomy, and Conviction via Guilty Plea' (2019) 83 *Journal of Criminal Law* 161.

68 For work examining guilty pleas in child defendants specifically, see Tina M. Zottoli and others, 'Plea Discounts, Time Pressures, and False Guilty Pleas in Youth and Adults who Pleaded Guilty to Felonies in New York City' (2016) 22 *Psychology, Public Policy, and Law* 250; Rebecca K.

Children lack a mature understanding of ethical concepts.[69] Research in cognitive and social psychology has shown that moral reasoning develops throughout childhood (although the foundations of moral judgement are present from a young age).[70] The youngest children appearing in criminal justice systems (aged 10 in the United Kingdom, and even lower in some other jurisdictions) may still, for example, rely on primarily rule-based moral reasoning (characterising what was described by Lawrence Kohlberg as the 'pre-conventional' stage of moral development). At this stage of development, morality is controlled by external rules set by authority figures, and conformed to in order to avoid punishment or obtain rewards, without real moral understanding.[71] So, for example, research has found that a child with moral reasoning in the pre-conventional stage might believe that it is wrong for a man to steal a drug that will save his wife's life because stealing is against the rules.[72] This type of moral reasoning is consistent with relatively superficial cognitive processes that have been associated with decision-making in childhood and adolescence.[73] In addition, children are generally more compliant than adults, meaning they are likely to be more willing to accept that they are guilty when this is alleged by prosecutors, despite not believing themselves that they have done anything wrong.[74] As a result, children may easily accept that their behaviour meets the criteria for legal offences in factual hard cases without meaningful engagement with relevant terms.

Another particularly vulnerable group are defendants who have experienced systematic abuse and therefore are more likely than others to have a tendency to self-blame or an internalised sense of blameworthiness. These defendants

Helm, 'Guilty Pleas in Children: Legitimacy, Vulnerability, and the Need for Increased Protection' (2021) 48 *Journal of Law and Society* 179; Rebecca K. Helm and others, 'Too Young to Plead? Risk, Rationality, and Plea Bargaining's Innocence Problem in Adolescents' (2018) 24 *Psychology, Public Policy, and Law* 180; Allison D. Redlich, Tina Zottoli, and Tarika Daftary-Kapur, 'Juvenile Justice and Plea Bargaining' in Vanessa A. Edkins and Allison D. Redlich (eds), *A System of Pleas: Social Science's Contribution to the Real Justice System* (Oxford: OUP, 2019).

69 Similar reasoning underlay the presumption of *doli incapax* (now controversially abolished in England and Wales), which required the prosecution to prove that a child under 14 knew that an act was 'seriously wrong' as opposed to being 'merely naughty or mischievous' in order for criminal liability to be imposed; see Kate Fitz-Gibbon, 'Protections for children before the law: An empirical analysis of the age of criminal responsibility, the abolition of doli incapax and the merits of a developmental immaturity defence in England and Wales' (2016) 16 *Criminology & Criminal Justice* 391.

70 See Larisa Heiphetz and Liane Young, 'A Social Cognitive Developmental Perspective on Moral Judgment' (2014) 151 *Behaviour* 315.

71 Lawrence Kohlberg and Richard H Hersh, 'Moral Development: A Review of the Theory' (1977) 16 *Theory Into Practice* 53.

72 Heiphetz and Young, n 70 above, 322.

73 See Valerie F. Reyna and S. C. Ellis, 'Fuzzy-Trace Theory and Framing Effects in Children's Risky Decision-Making' (1994) 5 *Psychological Science* 275; Valerie F. Reyna and others, 'Neurobiological and Memory Models of Risky Decision-Making in Adolescents Versus Young Adults' (2011) 37 *Journal of Experimental Psychology: Learning, Memory, and Cognition* 1125.

74 For information on compliance in children and similar reasoning related to false confessions, see Saul M. Kassin and Katherine L. Kiechel, 'The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation' (1996) 7 *Psychological Science* 125. For empirical evidence supporting this suggestion, see 'Incentivised Legal Admissions in Children' n 10 above, 17 (quoting one child defendant who had pleaded guilty as saying 'I still believe that I did not do the crime').

become susceptible to conviction based on this self-blame. Imagine a case involving a victim of domestic abuse (the defendant) being accused of an offence against his or her abuser. In such a case, the defendant may well have an internalised sense of blameworthiness and shame as a result of the abuse they have suffered.[75] These feelings make them susceptible to readily accepting guilt when accused by the state. Additionally, characteristics that have been associated with internalised false confession may also make individuals vulnerable to accepting guilt, including eagerness to please authority figures and trust and respect in those figures.[76]

One safeguard against the risks described above may be support from a legal representative, who can provide insight into how relevant legal terms might be interpreted by a judge or jury. However, in cases where there is really no right answer relating to guilt prior to trial, even lawyers may not have clear insight into the answer that the community would reach through deliberation.[77] Thus, even if all defendants had a lawyer, the problems described above would not be eliminated, particularly in the most difficult cases. In addition, the provision of a lawyer would not prevent more general harm to the criminal justice system resulting from defendants determining their own guilt in factual hard cases, discussed below.

Limiting expressive functions and the rule of law

The law can have an important role as a social institution – changing behaviour in society in desirable ways both through punishment and through changing social norms via its expressive function.[78] Criminal law can make a certain behaviour seem socially desirable (for example laws mandating recycling might promote approval of environmentally friendly social norms) or socially undesirable (for example laws prohibiting drink driving might promote a general disapproval of drink driving). In order to fulfil this function effectively, and to ensure compliance with the rule of law,[79] laws must be clear and relatively stable. The incorporation of flexible standards in the law and the power of the jury to nullify the law, particularly obvious in factual hard cases, has the potential to undermine this stability. As has been recognised in jurisprudential debate, it is essential to strike the right balance between allowing the law to evolve with societal norms and attitudes and retaining the values of clarity and stability required by the rule of law. As sociological jurisprudence pioneer Roscoe Pound

75 Beverly Engel, 'Why Shame is the Most Damaging Aspect of Emotional Abuse' *Psychology Today* 9 January 2021 at https://www.psychologytoday.com/gb/blog/the-compassion-chronicles/202101/why-shame-is-the-most-damaging-aspect-emotional-abuse-0 (last visited 21 June 2022).

76 See for example Gisli H. Guðjónsson, '"I'll Help You Boys As Much As I Can": How Eagerness to Please Can Result in a False Confession' (2008) 6 *The Journal of Forensic Psychiatry* 333.

77 'Incentivised Legal Admissions in Children' n 10 above (noting reports from lawyers relating to difficulty assigning guilt status prior to trial in the context of child defendants).

78 Cass R. Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021.

79 See Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979).

stated, 'the law must be stable, and yet it cannot stand still'.[80] The criminal trial has an important role in facilitating this balance through expressive statements, particularly in factual hard cases. This role is undermined when defendants determine their own guilt through pleading guilty.

First, through the criminal trial, community decision-makers construct and/or communicate standards relating to morality that can enhance the ability of the law to set social norms and the clarity of the law and thus the rule of law (despite not setting formal precedent). Although jury decisions are not formally reported or binding, decisions in high-profile cases are often reported in the press and principles of open justice mean that members of the public are, typically, free to observe court proceedings. Lawyers representing clients in cases heard by juries will also likely get a sense of the distinctions that are important to them (although admittedly members of the public may have less of a sense of this nuance in relatively low-profile cases).

As noted above, in factual hard cases, there is no clear notion of what legal determination is required by particular descriptive facts prior to trial. It may be unclear, for example, whether certain behaviour would be considered dishonest by the community. Although decisions of fact-finders do not set formal precedent, it is only through jury (or judge) decisions that we can learn how concepts such as dishonesty and reasonableness are likely to be interpreted at trial, and thus what they are likely to mean on a practical level. Through these decisions, the community (through the jury) clarify their own ethical standards, and individuals can determine community sentiment towards behaviours and actions. For example, through jury judgements indicating whether certain behaviours are dishonest, the community, and individuals within the community, clarify what they consider to be dishonest. One alternative to the jury in understanding such values might be opinion polling, however such polling would be limited in a number of ways. First, it would only capture individual opinions rather than opinions once the community have deliberated and taken into account each other's viewpoints. Second, it would be limited by the questions set by those designing the poll, which may not consistently capture nuances arising in real cases.

Understanding this sentiment is important in informing the social norms of community members in practice, and in allowing individuals to understand when their conduct is likely to amount to a breach of the law. It should be noted that in at least some cases (for example in cases where a single idiosyncratic juror refuses to convict in a system requiring unanimous verdicts) a jury verdict might obscure or deny the values of the community. However, particularly over a sufficiently long-run of cases decided by juries, the values of the community are likely to be shown or clarified.

Individual decisions to self-convict cannot provide the insight that jury decisions can since decisions made by individuals are inherently subjective and therefore unstable, and are not guaranteed, or even particularly likely to, reflect broader views. This process of community expression through the criminal trial is particularly important in ensuring a balance between stability

80 Roscoe Pound, *Interpretations of Legal History* (London: CUP, 1923) 1.

and development in the law, since it allows organic evolution of legal standards (without setting formal precedent) in line with community norms rather than abrupt changes to the law.

Where jurors never make rulings in factual hard cases, the way that the law will be interpreted and applied at trial is unclear and the way that standards may (or may not be) evolving is unclear, particularly since, as noted above, the community may have no sentiment relating to a particular fact pattern prior to consideration of relevant descriptive facts through deliberation. Even lawyers, who might be helpful in supporting defendants in evaluating their cases against legal standards, are unable to make reliable conclusions as to community sentiment if a significant number of cases are not taken to trial. It is important to note that jury determinations in a small handful of cases are unlikely to be sufficient to provide helpful insight. Case fact patterns differ from one another across multiple dimensions – the more cases are adjudicated the clearer the potential impact of each of these dimensions becomes. In addition, because standards evolve over time (usually incrementally) a large number of cases across a significant time period will be limited in the insight that they are able to provide. Interestingly, similar arguments have been made in the context of judicial decisions in civil cases where the benefits of judicial decisions (which have been said to have a 'radiating effect' on the legal system and wider society through the transparent evolution of case law) are lost when cases are settled outside of trial.[81]

Second, through the criminal trial, decision-makers can signal to law-makers when law is outdated or inappropriate, and therefore needs to evolve. This kind of signalling can occur through juries failing to apply laws in anticipated ways or clearly choosing not to apply laws. A good example of this occurred in Canada, where Dr Henry Morgenthaler was acquitted by four separate juries of violations of Canadian laws restricting the right to an abortion, despite the fact that his actions were in clear violation of Canadian law.[82] Shortly afterwards, the restrictive laws on abortion in Canada were revoked, leaving Canada with no laws restricting abortion.[83] If Dr Morgenthaler had pleaded guilty, messaging about community sentiment relating to abortion would have been lost. Although this example involves an inherently political issue, it clearly demonstrates how jury signalling can work. An example of this signalling in England and Wales concerns road traffic offences. Historically, in England and Wales, juries were reluctant to convict defendants involved in causing death in road-traffic accidents when charged with 'manslaughter'.[84] This unwillingness to convict led Parliament to bring in specific 'corrective' legislation reflecting community sentiment by creating a new offence – causing death by dangerous driving[85] – where juries showed no such innate inhibition. If defendants in these cases had

81 Linda Mulcahy and Wendy Teeder, 'Are Litigants, Trials and Precedents Vanishing After All?' (2022) 85 MLR 326.
82 See Valerie P. Hans, 'The Jury's Political Role: "To See With Their Own Eyes"' (1985) 4 *Delaware Lawyer* 20.
83 *R* v *Morgentaler* [1988] 1 SCR 30.
84 HC Deb vol 663 cols 334-335 17 July 1962.
85 *ibid*.

pleaded guilty, they would have been convicted of manslaughter against community sentiment as to appropriate offence labelling, and law-makers would not have been aware of potential problems with relevant law (although note that juries at that time were not necessarily fairly representative of the community as a whole as those who sat on juries then were a relatively narrow, and likely disproportionately car owning, section of the community). A recent example, which has not resulted in any legal change to date but which has resulted in an Attorney General's reference clarifying points of law,[86] is the Colston Four case, described above. That case, and specifically the jury acquittal of the defendants in the case, generated political debate over the legality of toppling statues of former slave owners.[87] Thus, through the jury process (or the decisions of judges) the community communicates with its members, and also with policy-makers. If defendants in these cases plead guilty, that communication, and the accompanying impact on behaviour and evolution of law, is lost.

In systems such as England and Wales and the USA where the majority (or even vast majority) of cases are resolved via guilty plea, the expressive function of the jury and the positive impact of that function on the rule of law are extremely curtailed, creating a lack of certainty and clarity in the law as well as the potential negative outcomes for defendants discussed above.

AN EMPIRICAL ILLUSTRATION

An online survey-based experiment was conducted in order to empirically examine the potential problems discussed in the preceding sections of this article. Note that this experiment is not intended to be a full-scale exploration of the issues in this area or an ecologically valid representation of defendant plea decision-making more holistically, but an illustrative proof of concept study to demonstrate the operations of the problems discussed in practice and to supplement theoretical arguments and potential real-world illustrations.

Design, materials, and procedure

Participants were given a vignette in which they were told to imagine that they had been shopping and had found a sum of money on the floor and had decided

86 *Attorney General's Reference on a Point of Law No 1 of 2022* [2022] EWCA Crim 1259; [2023] 1 All ER 549.

87 See for example Aubrey Allegretti, 'Minister Vows to Close "Loophole" After Court Clears Colston Statue Topplers' *The Guardian* 6 January 2022 at https://www.theguardian.com/uk-news/2022/jan/06/minister-grant-shapps-crackdown-court-colston-four-statue [https://perma.cc/34NY-KM69]; David Maddox, 'Tory MPs Push for "Anti-Woke" Changes to Law in the Wake of Colston 4 Trial' *The Daily Express* 8 January 2022 at https://www.express.co.uk/news/politics/1547046/Colston-4-trial-statues-woke-britain-priti-patel-tory-MPs [https://perma.cc/7ZNU-X8BG]; Jacob Thorburn, 'Calls for Attorney General to Review "Wrong" Colston Statue Verdict' *Daily Mail* 6 January 2022 at https://www.dailymail.co.uk/news/article-10374477/Grant-Shapps-slams-Bristol-jury-clearing-Colston-Four-as.html [https://perma.cc/XN46-XB6X].

to keep it. Each participant only saw one vignette, but the vignettes seen varied in terms of the amount of money involved (£20 or £200) and the efforts made to find the owner of the money (no efforts, or checking with people in the surrounding area). Participants were asked whether they believed the described behaviour was dishonest. They were then told that CCTV had shown them picking up the money and that they had been advised that *if* they acted dishonestly in picking up the money then they were guilty of theft. They were then asked whether they would consider themselves guilty of theft, and whether they would be willing to plead guilty to theft to receive a lesser sentence than the one they would receive if convicted at trial.[88] The fact pattern closely resembled a real case, reported in the press, in which a defendant chose to plead guilty, presuming that they had acted dishonestly.[89]

After answering questions in the online vignette that they saw, participants answered some questions about their demographics, including their gender, education, age, and race.[90]

Participants

Participants ($N = 402$, mean age = 38.66 years, $SD = 13.45$, 50 per cent male, 45.5 per cent female, 0.5 per cent other) were community members from England and Wales recruited via the Prolific survey platform.[91] The sample size (400) was selected to have 100 participants viewing each vignette.[92]

Results and discussion

Community Opinion

First results were examined in order to test the idea that there may be cases where there is no answer as to whether a defendant is guilty prior to trial. Results clearly supported this idea in the fact patterns described – showing an obvious lack of consensus as to whether behaviour described was dishonest.

88 In England and Wales, a case with these facts, if prosecuted, would be heard by a panel of magistrates or district judge, rather than a jury. However, the fact pattern was chosen as being one that would be easy to understand in a short online experiment without the assistance of a legal representative.

89 Catriona Harvey-Jenner, 'You Could Face a Criminal Record If You Find Money on the Floor' *Cosmopolitan* 28 February 2017 at https://www.cosmopolitan.com/uk/reports/news/a50163/criminal-record-find-pick-up-money-floor/ [https://perma.cc/Z5E2-VM39].

90 All materials from the study and the data collected from the study are available on OSF at https://osf.io/wm932/?view_only=1d4d7ae191c7434b8716cd5f0e21893c [https://perma.cc/HDN6-5QEV].

91 A platform shown to produce high quality data and to filter out bots and inattentive participants; see Eyal Peer and others, 'Beyond the Turk: Alternative Platforms for Crowdsourcing Behavioral Research' (2017) 70 *Journal of Experimental Social Psychology* 153.

92 Participants were required to have a Prolific approval rating of at least 90 per cent (meaning their responses had been approved in at least 90 per cent of surveys taken) and to have completed at least 10 previous Prolific submissions. Participants all received a small monetary amount to compensate them for their time.

Table 1. Participant categorisations of honesty by condition.

Condition	Number of participants categorising as dishonest (per cent)	Number of participants not categorising as dishonest (per cent)
£20, no attempt to locate owner	48 (46.2)	56 (53.8)
£200, no attempt to locate owner	77 (72.6)	29 (27.4)
£20, some attempt to locate owner	38 (36.9)	65 (63.1)
£200, some attempt to locate owner	54 (60.7)	35 (39.3)

Overall, 54 per cent of participants found the behaviour described in the vignette they saw to be dishonest, and 46 per cent considered the behaviour they saw not to be dishonest. This lack of consensus was also demonstrated within conditions, as illustrated in Table 1.

Importantly, these results suggest that the real defendant upon whose case the vignettes were based (who picked up and kept £20 which she found on the floor)[93] pleaded guilty when she probably would have been acquitted had she taken her case to trial. Comparing responses between conditions also provides insight into how soliciting community judgement can provide insight into the factors that are important to the community in interpreting the concept of dishonesty. A logistic regression, an analysis examining the strength of influence of predictor variables on an outcome or observed pattern, was run with value of money (£20 or £200), and effort to find owner (none or some) as predictors of whether the behaviour was considered dishonest by the participant (yes or no). Results revealed that both value ($B = -1.05$, $SE = .21$, $p < .001$, $OR = .36$) and effort (B = .46, $SE = .21$, $p = .029$, $OR = 1.58$) were significant predictors of whether the behaviour was considered dishonest (meaning they had a relationship with the honesty judgement that was unlikely to be the result of chance). As shown in Table 1, participants were more likely to categorise behaviour as dishonest when the vignette involved £200 being picked up than when it involved £20 being picked up and when no effort had been made to find the owner compared to when some effort had been made.

Discriminatory Outcomes

Next, the responses of participants as to whether they would consider themselves guilty of theft (given that this determination hinged on dishonesty) were examined in order to explore the argument that relying on defendant interpretations of terms to determine their own guilt has the potential to lead to discriminatory outcomes including along the lines of characteristics protected by the Equality Act 2010 in the United Kingdom. Differences in judgements relating to own guilt based on gender and age were examined in a logistic regression model including gender and age, and value and effort (to control for their influence) as predictors of participant indication of whether they would consider themselves guilty (yes or no).

93 Harvey-Jenner, n 89 above.

The analysis indicated that responses differed significantly based on both gender ($B = -.68$, $SE = .21$, $p = .001$, $OR = .51$) and age ($B = -.04$, $SE = .01$, $p<.001$, $OR = .96$). First, female participants were more likely to consider themselves guilty than male participants – 54.8 per cent of female participants considered themselves guilty compared to 39.8 per cent of male participants. Second, as the age of participants increased, the more likely they were to consider themselves guilty – the average age of participants who considered themselves guilty was 41.91 ($SD = 14.00$) and the average age of participants who considered themselves not guilty was 35.75 ($SD = 12.26$).

This pattern of results also replicated when the same predictors were used to predict participant indications of whether they would be willing to plead guilty – indications differed significantly based on both gender ($B = -.56$, $SE = .20$, $p = .006$, $OR = .57$) and age ($B = -.02$, $SE = .01$, $p = .044$, $OR = .98$). Female participants were more likely to indicate that they would plead guilty than male participants – 61.3 per cent of female participants indicated that they would be willing to plead guilty compared to 48.3 per cent of male participants. As the age of participants increased, they became more likely to indicate that they would be willing to plead guilty – the average age of participants who indicated that they would be willing to plead guilty was 39.84 ($SD = 13.47$) and the average age of participants who indicated that they would not be willing to plead guilty was 37.24 ($SD = 13.33$).

The data collected and examined in this short study provide support for the arguments made in the preceding sections of this article. They show that there is no clear answer as to whether behaviours in these scenarios are dishonest, and that defendants determining their own guilt in cases where there is no clear answer can lead to systematic differences in convictions based on gender and age. In these cases, female participants and older participants were more likely to indicate that they would plead guilty, including in scenarios in which the balance of opinion suggests conviction would have been unlikely at trial (since as noted above, jury verdicts are thought to be driven by individual preferences with conviction more likely when favoured by more jurors, but with a bias towards acquittal).[94]

Results also illustrate how soliciting community judgement through asking the community to determine whether a certain behaviour is dishonest can help to crystalise and communicate the dimensions of a case that are likely to influence community perceptions of honesty. These results therefore show, perhaps unsurprisingly, that picking money up off the floor is more likely to be considered dishonest when the amount of money is higher and where no efforts have been made to find the rightful owner. Observing real jury decisions in a range of cases would provide even more rich insight, for example showing the amount of money at which the majority of juries would be willing to convict under different conditions, and providing insight into how other variables, such as the location in which the money was lost, may influence honesty determinations. Thus, decisions in a range of cases are likely to start to effectively crystalise situations in which the community considers this behaviour dishonest.

94 Devine, n 42 above, 158-163.

It should be noted that this scenario differs from real guilty plea decisions in important ways. Participants did not have to experience the consequences of their decisions, and did not receive legal advice. In addition, participants in this study were not drawn from a population of people who had actually committed the behaviours in question, and while patterns would be expected to replicate in such a population, further work should examine that population specifically in order to enhance ecological validity. Despite these limitations, the study provides empirical support to supplement theoretical arguments and to demonstrate the potential for those theoretical arguments to be important from a practical perspective. Importantly, as noted above, the absence of a known community consensus on relevant issues prior to trial means that any protective effect of legal advice may be limited.

IMPLICATIONS FOR GUILTY PLEA REGIMES

Many modern criminal justice systems continue to universally recognise guilty pleas as desirable outcomes in all categories of legal case, and recognise this desirability through awarding sentence and/or charge reductions to defendants who plead guilty. There are two primary rationales for recognising guilty pleas in this way, which overlap to some extent. Neither rationale can explain or justify awarding reductions in factual hard cases. The reality of these cases should prompt us to reconsider how and when sentence reductions might be justified.

The first rationale traditionally used to justify plea-based sentence or charge reductions is that pleading guilty can be seen as a morally-positive behaviour, associated with ethically sound acts (potentially considered ethical duties) – telling the truth, and owning up.[95] Put simply, pleading guilty can be seen as the morally right thing, deserving of reward. In the majority of cases owning up and telling the truth go hand in hand with a guilty plea (ie not contesting guilt), although it should be noted that in many systems strong incentives to plead guilty can undermine the status of guilty pleas as ethically-sound acts, and turn plea decisions into self-interested tactical decisions not necessarily worthy of reward.[96] However, factually hard cases show that a defendant owning up or telling the truth does not necessarily always attach to waiving the right to a trial. In fact, a defendant may be willing to tell the truth and own up, but still reasonably want their guilt to be determined by a jury, for example for a jury to determine whether their behaviour was dishonest or whether the technical law that they have breached is one that should even be applied. They may even have a morally or politically important reason for wanting guilt to be determined in this way. If the plea discount attaches to ethically positive behaviour, the discount

95 Julian V. Roberts and Netanel Dagan, 'Rewarding Virtue: An Ethical Defence of Plea-Based Sentence Reductions' in Julian V. Roberts and Jesper Ryberg (eds), *Sentencing the Self-Convicted* (Oxford: Hart Publishing, 2022).

96 See for example Leo Zaibert, 'Guilty Pleas, Fools' Bargains and Wonderful Justice' in Roberts and Ryberg (eds), *ibid*. For further discussion on ethical obligations to plead guilty see R. A. Duff, 'When Should We Plead Guilty?' in Roberts and Ryberg (eds), *ibid*.

may be retained where a defendant tells the truth and owns up, but still exercises their right to trial (provided that it is sensible to do so).

The second rationale traditionally used to justify plea-based sentence or charge reductions recognises pleading guilty as necessary, or at least highly desirable, for criminal justice systems to function. Plea discounts can be recognised directly as incentivising defendants to plead (and thus changing behaviour) by changing the balance of risk and rewards involved in decisions to plead guilty. The savings of resources when a defendant pleads guilty benefits the state, and a sure but lesser sentence can benefit defendants (potentially even when innocent).[97] In England and Wales, the Sentencing Council's definitive guideline on reduction in sentence for a guilty plea states that an acceptance of guilt: '(a) normally reduces the impact of crime upon victims; (b) saves victims from having to testify; and (c) is in the public interest in that it saves public time and money on investigations and trials'.[98] Thus, defendants who plead guilty can be seen as co-operating with the criminal justice system in a way that benefits that system and is worthy of recognition and responsiveness in terms of sentence. In England and Wales that recognition and responsiveness is in the form of a sentence discount of up to one-third when a defendant pleads guilty at the earliest possible opportunity.[99] This benefit applies regardless of co-operation with investigators more generally and regardless of the strength of evidence against an offender,[100] and empirical work suggests that discounts awarded are largely in line with the guideline's recommendations.[101]

However, in the context of factual hard cases, this rationale may be undermined due to the negative impact of case resolution via guilty plea and reduced benefits of guilty pleas. In factual hard cases the balance of risks and rewards for criminal justice systems as a whole is different than in other cases. Any benefits in terms of efficiency and protecting complainants and witnesses need to be weighed up against the problems that are linked to defendants determining their own guilt in these cases – discriminatory and unfair outcomes and potential exploitations of defendant vulnerabilities, and negative consequences for expressive functions of the criminal trial and the rule of law. In conducting this balancing exercise, it is important to note that efficiency benefits and benefits to complainants and witnesses are likely to be significantly reduced in factual hard cases when compared to other criminal cases.[102] Where defendants are willing to agree descriptive facts with the prosecution, the task of the finder

97 See for example Josh Bowers, 'Punishing the Innocent' (2007) 156 *University of Pennsylvania Law Review* 1117.

98 'Reduction in sentence for a guilty plea: Definitive guideline' (Sentencing Council, 2017) at https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-Plea-definitive-guideline-SC-Web.pdf [https://perma.cc/27WZ-PDBT].

99 *ibid*.

100 *ibid*.

101 Julian V. Roberts and Ben Bradford, 'Sentence Reductions for a Guilty Plea in England and Wales: Exploring New Empirical Trends' (2015) 12 *Journal of Empirical Legal Studies* 187 (although note that this work examined outcomes under the previous sentencing guideline rather than the current sentencing guideline).

102 It should also be noted that existing work suggests that efficiency benefits associated with guilty pleas may actually be overstated for all cases, see Jay Gormley, 'The Inefficiency of Plea Bargaining' (2022) 49 *Journal of Law and Society* 277.

of fact is simpler and easier, and complainants and witnesses may not need to testify at trial at all (although in some cases they may need to testify in relation to normative facts). By telling the truth and owning up the defendant can create efficiency benefits for the system and spare the complainant and witnesses from trial while still exercising their right to a fair trial in which the community (or judge) determines their guilt.

Ultimately, the presence of plea-based reductions in factual hard cases suggests that the reduction does not attach to ethically positive behaviour and can only be justified as an incentive to encourage defendants to plead guilty. However, this justification is problematic since the incentive is encouraging defendants to act in a way that could have systematic disadvantages for the criminal justice system. Where no guilt status exists (or is knowable to the defendant) prior to community judgement, a conviction via guilty plea can only reflect a defendant's perception of guilt, and not guilt in a meaningful sense. However, the defendant's judgement is seen as sufficient to label them as legally guilty. Perhaps this reality can be justified on the basis of defendant autonomy – defendants should be able to choose to change their status to that of a convicted person without being put through trial, and preventing them from doing so might be seen as paternalistic or an infringement on their rights.[103] However, whether defendants should be allowed to plead guilty is a different question from whether defendants should be actively incentivised to plead guilty or rewarded for pleading guilty. If conviction via self-determination of guilt is a sub-optimal type of conviction in these cases, with important disadvantages, it is not right to encourage or reward defendants who choose to self-convict. The reality of factual hard cases highlights the presence of nuance in terms of when decisions to plead guilty should be incentivised or rewarded, that is glossed over in existing self-conviction regimes. The overlooking of relevant nuance is, to an extent, understandable in plea systems that have evolved largely as a result of pragmatism rather than principle.[104] Now, resulting systems need revisiting to ensure that they are based on a robust and justifiable normative framework.

CONCLUSIONS AND FUTURE DIRECTIONS

This article introduces the concept of 'factual hard cases', challenging the myth that defendants do, or even can, know their factual guilt status prior to trial.[105]

103 For discussions of autonomy in this context see Nobles and Schiff, n 13 above; Helm, Dehaghani, and Newman, n 65 above.

104 See for example Albert W. Alschuler, 'Plea Bargaining and Its History' (1979) 1 *Columbia Law Review* 1; John H. Blume and Rebecca K. Helm, 'The Unexonerated: Factually Innocent Defendants Who Plead Guilty' (2014) 100 *Cornell Law Review* 157; Michael McConville and Chester L. Mirsky, *Jury Trials and Plea Bargaining: A True History* (Oxford: Hart Publishing, 2005).

105 Note that this reality is also important when considering appeals procedure since the ability to appeal following a guilty plea often also rests on perceptions of factual guilt independent of trial. For example in England and Wales, where a defendant pleads guilty on the basis of alleged facts that do not constitute the alleged offence, their appeal will be allowed. See *R* v *Malik* [2018] EWCA Crim 1693 at [13].

These cases raise important questions about what guilty pleas are, and why we reward them. The article highlights problems with defendants self-determining their guilt in factual hard cases. Convictions via plea come to represent a defendant's own belief that they are guilty based on highly subjective interpretation and potential vulnerability, rather than to reflect any independent guilt status. The guilty plea process in these cases can result in inequalities, unfairness, and the exploitation of vulnerability, and impairs any expressive function of the criminal trial as well as the rule of law. As a result of these harms, and the decoupling of guilty pleas from morally-positive behaviours in such cases, there is no clear ethical justification for rewarding defendants who plead guilty, or to incentivise defendants to plead guilty, that covers factual hard cases. The presence of reductions in factual hard cases therefore undermines suggested justifications for sentence or charge reductions more generally. Future work might consider how these arguments could apply more broadly to other types of hard case, for example cases in which descriptive facts are in dispute, particularly given the potential for factual error in judicial and jury determinations.

The primary purpose of this article is to acknowledge the existence of factual hard cases, and the challenges that they pose for guilty plea regimes. Broadly, the cases should cause us to think about whether guilty plea reductions in their current form can be justified from a normative perspective. In a narrower sense, policy change might be considered to address factual hard cases in particular. For example, the specific problems raised in this article could be addressed by recognising that sentence or charge reductions should attach to owning up to behaviour that may constitute a breach of the law, rather than to the waiver of the right to a full trial through a guilty plea. In the majority of cases, the reduction would remain synonymous with guilty pleas due to the close association between owning up and foregoing the right to contest guilt at trial. However, in factual hard cases, discounts could be retained due to 'owning up' despite exercising the right to trial. These discounts would broadly mirror the discounts available to defendants who plead guilty. So, for example, in England and Wales, a defendant who is willing to admit to actions and a mindset alleged by the prosecution that could amount to a criminal offence (subject to community discretion) would receive an up to one third sentence reduction where they made this admission at the earliest possible opportunity, consistent with relevant sentencing guidelines.[106]

The primary potential difficulty with such an approach would be effectively identifying factual hard cases (ie cases in which there is a genuine question over guilt despite agreed descriptive facts).[107] In fact, difficulties identifying cases that should be treated differently were noted by the Sentencing Council in England and Wales as playing a part in their decision not to reduce the sentence discount in cases in which there was 'overwhelming' evidence of guilt. However, identifying factual hard cases may be easier than identifying cases involving 'overwhelming' evidence of guilt. These cases would be those in which there were agreed descriptive facts between the defendant and the prosecution

106 See 'Reduction in Sentence for a Guilty Plea: Definitive Guideline' n 98 above.
107 *ibid*, 6-7.

but arguments about how a particular term requiring the exercise of discretion should be interpreted, and where the defendant had a reasonable argument relating to how the term should be interpreted. This determination might be made by a judge in a hearing utilising a similar procedure to *Goodyear* hearings in England and Wales (through which a defendant can get an indication of the sentence that they will receive if they plead guilty).[108] Such hearings might be utilised to provide the defendant with the opportunity to argue that their case is one in which guilt is not clear despite agreed descriptive facts. More ambitiously, procedures might seek to involve the community in the guilty plea acceptance process to expand the protective features of community judgement to once again cover the majority of cases in the criminal justice system.[109] These suggestions are merely examples of procedural reform that might help to ensure that convictions via guilty plea, and the procedure surrounding them, are normatively justified and to advance the goals of the criminal justice system, most importantly the pursuit of justice. As the presence of factual hard cases demonstrates, current thinking around guilty pleas can fall short in this regard. Regrouping and reconsideration are necessary.

108 *R* v *Goodyear* [2005] EWCA Crim 888; [2005] WLR 2532.

109 For a potential solution aimed at retaining community involvement and control in criminal justice systems largely reliant on guilty pleas, see Laura I. Appleman, 'The Plea Jury' (2010) 85 *Indiana Law Journal* 731 (proposing that a panel of citizens would listen to the defendant's allocution and determine the acceptability of plea and sentence).