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I wish to submit the thesis detailed above for examination in conformity with the regulations for the degree given above. I declare that the thesis embodies the results of my own research or advanced studies and that it has been composed by myself. Where appropriate, I have made acknowledgement to the work of others.

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**Abstract** 6

**Introduction** 7

**PART 1: The Nature Of Sentence Discounting** 11

**Chapter 1: The Rationales For Sentence Discounting**

Why Explore The Rationales? 13

The Efficiency Rationale 14

The Remorse Rationale 23

The Victim Rationale 31

Conclusion On Rationales 38

**Chapter 2: Is Sentence Discounting Unjust?**

Objections To Sentence Discounting 41

Punishing Those Who Go To Trial 41

Inducing The Innocent To Plead Guilty 48

Process Costs On The Accused: Remand 50

Penal Parsimony 55

Conclusion: Is Sentence Discounting Unjust? 57

**PART 2: The Extent Of Sentence Discounting** 59

**Chapter 3: The Expected Extent Of Sentence Discounting**

The Expected Extent Based On The Law 61

A Brief History Of The Law On Sentence Discounting 62

Recent Developments In The Law 63

Will Lord Gill's Comments Prevail? 67

Conclusions On The Law 70

**Chapter 4: The Empirical Extent of Sentence Discounting**

Empirical Research 73

The PDSO Study 74

Studies Corroborating The PDSO Findings 77

Explaining The Possible Lack Of A Discount 80
Measuring Sentence Discounts For Guilty Pleas 83
Conclusions On The Extent Of Sentence Discounting 85

**PART 3: Knowledge And Resistance 87**

**Chapter 5: Knowledge And Understanding**

Knowledge And Understanding 89
Knowledge Of Accused Persons 92
Legal Consciousness 94
A Plea At The First Opportunity 96
Conclusions On Knowledge And Understanding 97

**Chapter 6: Resistance To Sentence Discounting**

Resistance 100
Furtive Resistance 102
Methods Of Resistance 104
Method 1: Rule Manipulation 105
Method 2: Perceptual Manipulation 111
Methods 3 And 4: Protests And Lobbying 114
Is Resistance Beneficial To Sentence Discounting? 117
Acknowledging Resistance 119
Conclusions On Resistance 121

**Conclusion 123**

Summary 123
The Need For Research 125
Final Words 128

**References 130**

# Abstract

This thesis explores the nature and extent of Sentence Discounting in Scotland. The nature of Sentence Discounting is explored in Part One, firstly, by analysing the rationales for Sentence Discounting. There are three main rationales, however, all are found to be limited. Given this, Part One then explores the objections to Sentence Discounting, and whether Sentence Discounting is unjust. Part One concludes that, the weak rationales and the strong objections mean, Sentence Discounting is unjust.

Part Two, explores the extent of Sentence Discounting. This begins by, assessing what the extent of Sentence Discounting should, be based on the law. Although the law is uncertain, it suggests discounts could be expected in most cases. Following this, Part Two analyses the existing research on Sentence Discounting in Scotland. While there is limited research, it appears possible that Sentence 'Discounting' is not real, and that headline sentences could be increased to negate any stated discounts. Consequently, Part Two concludes there is potentially a gap between the law and the empirical reality.

Part Three explores why Sentence Discounting may be limited. First, the uncertainty in the law is drawn upon to analyse how Sentence Discounting could be affected by limitations in legal actors' knowledge and understanding of the law. Next, considering the normative objections discussed in Part One, it is questioned whether legal actors resist Sentence Discounting. Part Three concludes that both these factors could explain the potentially limited extent of Sentence Discounting.

The thesis concludes that the nature of Sentence Discounting is complex, and that (on balance) it is unjust. It also concludes that genuine Sentence Discounting may not exist in Scotland. This means that, accused persons may be foregoing their right to trial, in the expectation of a discount that does not materialise. This has significant implications for law, justice, and policy.

# Introduction

This thesis explores the nature and extent of Sentence Discounting for guilty pleas in Scotland as it stood on 1 September 2013. At its simplest Sentence Discounting is the reduction to a sentence, applied by the sentencer, because of a guilty plea.[1] In Scotland Sentence Discounting is statutory as the Criminal Procedure (Scotland) Act 1995[2] mandates that sentencers 'shall'[3] take a guilty plea into account. However, the statute is vague. Consequently, much of the law on Sentence Discounting has been developed in the Courts. The three leading cases in this regard are Du Plooy,[4] Spence,[5] and Gemmell.[6] The importance of these Guideline Judgements is hard to overestimate. They have elaborated several aspects of Sentence Discounting and have, for example, stated that the rationale for Sentence Discounting is based on the efficiency which guilty pleas are said to bring. This means understanding these cases is vital to understanding Sentence Discounting in Scotland.

Based on the the brief description above, it may appear that the question in this thesis is a relatively simple one. Indeed, it might be thought that the nature and extent of Sentence Discounting could be discovered through a simply survey,[7] and by reading the 1995 Act and relevant Case Law. However, this oversimplification neglects the various normative and empirical issues regarding Sentence Discounting. These issues mean that reading the law and carrying out a survey will not answer the question. To answer the question it is necessary to addresses these, often latent, issues regarding Sentence Discounting.

The first of these issues explored in this thesis regards the complex nature of Sentence Discounting and whether it is, on the principled arguments, unjust. The thesis next explores the issue that

[1] C.f. Du Plooy v HM Advocate (2003), and section 196 of the Criminal Procedure (Scotland) Act 1995.

[2] Hereinafter, 'the 1995 Act'.

[3] Section 196(1) of the Criminal Procedure (Scotland) Act 1995.

[4] Du Plooy v HM Advocate (2003).

[5] Spence v HM Advocate (2007).

[6] Gemmell v HM Advocate (2011).

[7] E.g. Steeples and Bell (2011). These surveys ask for information on things such as the stage of a plea, and (as a percentage) 'approximately what guilty plea discount was given'. This would appear to be an effective method of discovering things like the size of a sentence discount (since the survey actually provides a figure). However, as is discussed in Chapter 4, this approach is questionable.

sentencers may not be awarding discounts, or that they may be inflating headline sentences to negate discounts.[8] This possibility is significant as it would mean that accused persons might be foregoing their right to trial for a benefit they do not receive.

Unfortunately, addressing these issues is complicated by the dearth of research on Sentence Discounting. This lack of research is surprising, given the importance of Sentence Discounting: it is not an obscure area of law, as despite stereotypical perceptions of cases (e.g. that they are often contested and involve a jury), most result in a guilty plea.[9] Ultimately, the only way to answer these questions is through an empirical study of Sentence Discounting. While such a study is not undertaken here, this thesis aims to provide some food for thought, for such a study.

## Sentence Discounting And Plea-Bargaining

At the outset, it is useful to clarify the link between Plea-Bargaining and Sentence Discounting, as the two interact as part of a mechanism that induces guilty pleas. Plea-Bargaining is a broad term, covering an 'inducement to plead guilty for a Sentence Discount, and a system of informal charge bargaining'.[10] Thus, Sentence Discounting is only one of the ways an accused can be offered a (real or perceived) reward for pleading guilty, and only one form of Plea-Bargaining. This is important as it means that Sentence Discounting often raises issues of Plea-Bargaining. Additionally, in practice, Sentence Discounting is likely to be accompanied by some other form of (implicit) Plea-Bargaining. This means that despite the focus on Sentence Discounting, some issues of Plea-Bargaining must be considered.

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[8] Bradshaw et al (2012), Para 6.9.

[9] Bottomley and Bronitt (2006), p.133 and Tata (2010b).

[10] Leverick (2004), pp.360-363.

# Structure

The thesis is divided in three parts, each containing two chapters. Part One is concerned with the nature of Sentence Discounting, and whether the practice is just or unjust. The rationales advanced in support of sentence discounting are crucially important in this regard. Not only do these rationales shed light on the nature of sentence discounting (e.g. what is the point of Sentence Discounting), but they also represent how policy makers and judges attempt to argue the practice is just (e.g. how and why Sentence Discounting is just, or at least not unjust). Thus, chapter One begins by assessing the three rationales commonly used to justify Sentence Discounting in Scotland: the Efficiency Rationale, the Remorse Rationale, and the Victim Rationale. While, as noted above, case law states that efficiency is the rationale for Sentence Discounting, the other two rationales are still highly influential - and thus important to Sentence Discounting in Scotland. However, since analysing the rationales for Sentence Discounting invariably focuses on the positives of Sentence Discounting, it is prudent to also explore the principled objections to Sentence Discounting: that it punishes those who exercise their right to a trial, and that it might induce the innocent to plead guilty. Through analysing these objections the thesis is able to better explore the nature of Sentence Discounting. It also allows the rationales to be weighted against the objections. This ultimately allows the argument to made that, on the basis of the principled arguments, Sentence Discounting is unjust.

Part Two of the thesis is concerned with the extent of Sentence Discounting in Scotland. One way to estimate the extent of Sentence Discounting is to try to make predictions based on the law: since the law should dictate how Sentence Discounting operates. Thus, Chapter Three analyses the law on Sentence Discounting to estimate what the extent of Sentence Discounting should be. However, this law-first view is limited as reality can differ from what the law suggests. As a result Chapter Four focuses on analysing what the empirical extent of Sentence Discounting might be. This is done by looking at various pieces of research on the issue. The advantage of looking at both the expected and the possible empirical extent of Sentence Discounting is that it allows a comparison to be made between what ought to be, and what might actually be. This leads to the interesting possibility that the expected Sentence Discounts may not actually exist, or that headline sentences may be inflated

to negate the expected discounts. If this does occur it is significant as would compound the injustice of Sentence Discounting: it would mean that accused persons are pleading guilty for a benefit they are are not receiving. However, this is only a possibility and more research is needed to shed light on this.

Part Three brings Parts One and Two together to analyse why the expected extent of Sentence Discounting could differ from the actual extent. The first possibility considered is that limitations to legal actors knowledge and understanding of the law may explain the possible difference: for the law on Sentence Discounting to be effective legal actors must know and understand it. Thus, Chapter Five explores the potential weaknesses to the knowledge and understating of legal actors, and how this may affect Sentence Discounting. However, more is required than just knowledge and understanding. For the law to be effective legal actors must also comply with the law. Yet, given that Sentence Discounting is arguably unjust, legal actors may be disinclined to comply fully. This means that *if* the law on Sentence Discounting is not working as expected then it is possible that resistance to Sentence Discounting is playing a part. This possibility is explored in chapter Six, which analyses how and why resistance to Sentence Discounting might occur. Thus, in sum, Part Three explores possible reasons for the potential deviation between the law and practice.

# PART 1: The Nature Of Sentence Discounting

Part One explores the nature of Sentence Discounting. This begins by analysing the rationales for justifying Sentence Discounting, as these will provide insight into the nature of the practice. The three rationales explored are: the Remorse Rationale; the Victim Rationale; and the Efficiency Rationale.

Given the problems identified with the rationales, the thesis next explores whether Sentence Discounting is unjust. This is done by exploring the objections to Sentence Discounting, but also how Sentence Discounting may minimise unjust process costs.

# Chapter 1: The Rationales For Sentence Discounting

# **Why Explore The Rationales?**

The fundamental rationale underlying Sentence Discounting will provide a deep insight into the nature of the practice. In Scotland, there are three main rationales, which have been advanced as the basis for justifying Sentence Discounting. The first, is the Efficiency Rationale. This is the dominant rationale, and it supposes that Sentence Discounting is justified as, it induces guilty pleas, thereby saving resources. The second, is the Remorse Rationale. This supposes that Sentence Discounting is justified as guilty pleas demonstrate remorse, and this remorse warrants a reduced sentence. The third, is the Victim Rationale. This supposes that Sentence Discounting is justified on the basis that the guilty pleas it induces, spares victims from the ordeal of giving evidence at trial.

It could be questioned why three rationales are explored here, given that in Scotland the Efficiency Rationale is purported to be *the* rationale.[11] However, despite the High Court repeatedly affirming the Efficiency Rationale, the other rationales still feature strongly in the discourse on Sentence Discounting. This suggests there is still controversy in this area, and means that the Efficiency Rationale may be challenged by the other rationales in practice. Thus, this chapter explores the three rationales for Sentence Discounting, and questions whether they can justify Sentence Discounting.

## The Fallacy of Rationales

At the outset, it is worth noting that these theoretical rationales may operate to allow legal actors to explain Sentence Discounting, rather than provide the actual reasons for Sentence Discounting.[12] This is, perhaps, unsurprising as these theoretical rationales may be too complex, abstract and indeterminate, to practically dictate decisions on Sentence Discounting. Additionally, 'there are significant bodies of both psychological and sociological literature on discretionary decision

[11] Du Plooy v HM Advocate (2003), Spence v HM Advocate (2007), and Gemmell v HM Advocate (2011).

[12] Tata (2002).

making by judges and other professionals',[13] that better explains how and why sentencing decisions are reached.

This means that other factors may form the true basis for Sentence Discounting. For instance, Heumann[14] argues that Sentence Discounting may exist for reasons other than efficiency. This raises questions about the role of other factors such as 'habitus',[15] Work Groups,[16] caseload pressures, etc. Thus, for example, it may be that a 'presumption of guilt'[17] leads to the desire for Sentence Discounting to promote guilty pleas: as 'clients are assumed to be guilty...there are no legal issues worth taking to trial'.[18]

If this is correct, then the difficulty accepting the Efficiency Rationale, in Scotland, could relate to its limited usefulness for 'account ability'.[19] It may be that sentencers require the other rationales to maintain the flexibility to explain their decision (reached for whatever reason). Thus, in practice, it may be that all the rationales are used, as this best allows sentencers to explain their decisions. However, this point is returned to later. For now, exploring the three espoused rationales provides insight into the nature of Sentence Discounting.

## **The Efficiency Rationale**

In Scotland, the Courts have stated (perhaps begrudgingly) that the rationale for Sentence Discounting is the Efficiency Rationale. This rationale is based on the fact that guilty pleas save considerable resources, that would otherwise be expended in a trial. The extent of the savings

[13] Hutton (2013).

[14] Heumann (1981).

[15] Hutton (2006).

[16] C.f. Schulhofer (1984); and Provine (1998).

[17] Darbyshire (2000), p.904.

[18] Schulhofer (1984) pp.1043-1044.

[19] Tata (2002), p.416.

brought by guilty pleas are recognised in cases such as Du Plooy,[20] Spence,[21] and Gemmell.[22] Similarly, the Definitive Guidelines in England and Wales recognise, 'cost' and the 'effective administration of justice' as a significant basis for a discount.[23] Thus, at its most basic, the Efficiency Rationale suggests the accused should be offered Sentence Discounts, to encourage a guilty plea: so that the Justice System can reduce the resources it uses.

Leverick has argued, that since the other rationales are largely ineffectual, it could be welcomed that the High Court has accepted efficiency, as the primary rationale for Sentence Discounting[24]. This is argued to be both more transparent and more effective. For instance, by recognising efficiency, Scotland can apply discounts in cases where there is overwhelming evidence against the accused. This is beneficial as, just because conviction is extremely likely, a trial can still be expensive. Indeed, cases where guilt is not in question may be the ideal cases to deal with 'efficiently'[25] without a trial. However, if the Court adopted another rationale, then discounts may not be available on these occasions: thereby limiting Sentence Discounts to those cases where the likelihood of innocence is greater. In this regard, Sentence Discounting in Scotland is better than in England and Wales: where discounts can be withheld on the basis that there is overwhelming evidence.[26]

## Difficulty Accepting Efficiency

Efficiency may be accepted, as the rationale for Sentence Discounting,[27] however, it is easy to get the impression this acceptance is not through choice. For instance, in Gemmell Lord Gill stated:

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[20] E.g. Du Plooy v HM Advocate (2003), paras 8-15.

[21] E.g. Spence v HM Advocate (2007), para 14.

[22] E.g. Gemmell v HM Advocate (2011), paras 33-35.

[23] Sentencing Council, 'Reduction in Sentence for a Guilty Plea: Definitive Guideline Revised 2007'. Para 2.2

[24] Leverick (2003).

[25] Leverick (2003), p.836.

[26] Leverick (2003), p.836.

[27] Leverick (2008), p.3: 'efficiency considerations are...firmly entrenched as the primary justification...since Du Plooy the Efficiency Rationale has dominated case law'.

*The euphemism 'utilitarian value' may be thought to give the principle of discounting some ethical content; but Sentence Discounting is not...based on any high moral principle...On the contrary, it involves the court's [sic] passing a sentence that, in its considered judgment, is less than the offence truly warrants.*[28]

The critical nature of comments such as this, suggests disapproval of the Efficiency Rationale. Indeed, it could be argued that the High Court[29] is both arguing against the normative merit of the Efficiency Rationale, and laying the blame on Parliament for mandating they follow this unjust practice.[30] Thus, it appears that, at least one, of the Senior Judiciary strongly objected to the Efficacy Rationale.

The views of the lower courts, which deal with the majority of cases, are harder to ascertain. However, it is known that the views of the Senior Judiciary do not always reflect the views of judges in the lower courts. For instance, appellate courts' negative views regarding guidelines are not always matched in the lower courts, where there are indications that some judges desire guidelines.[31] Thus, while some Appeal Court judges disapprove of the Efficiency Rationale, other sentencers may feel differently. For instance, lower courts may appreciate the efficiency benefits, given their 'caseload pressures'.

## **The Other Rationales**

It may be that the High Court is moving away from the Efficiency Rationale. In Gemmell, Lord Gill concluded Sentence Discounting should be used 'sparingly' and 'only for convincing reasons'.[32] What these 'convincing reasons' are is not made clear. However, from the context it would appear, 'convincing reasons' require justifications other than efficiency: such as, sparing victims or remorse. It is unfortunate Lord Gill does not go into more detail on this point as, prima facia, the

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[28] Gemmell v HM Advocate (2011), para 34.

[29] Lord Gill may not be representative of the Senior Judiciary. However, no opinions to the contrary have been expressed: though Lord Eassie did seem inclined to increase certainty in Sentence Discounting, to promote guilty pleas for the efficiency benefits.

[30] This point will be returned to in the Resistance Chapter.

[31] C.f. Macfadyen (2006), para 8.35.

[32] Gemmell v HM Advocate (2011), para 75.

requirement for 'convincing reasons' appears contradictory to the Efficiency Rationale. Indeed, if efficiency is recognised as *the* rationale for Sentence Discounting, then a guilty plea should be a convincing enough reason for Sentence Discounting. This being the case, it can be questioned why further 'convincing' reasons are needed?

## **One Rationale To Rule Them All?**

None of the rationales identified here are beyond reproach, particularly when the arguments against Sentence Discounting are considered.[33] Thus, it may be, that part of the Judiciary's problem with the Efficiency Rationale, is that Scotland has picked *a* rationale, rather than a 'smorgasbord'[34] of options.

While research shows there is 'little criminological support for...an unranked list of sentencing purposes',[35] this research assumes the goal of these sentencing purposes is ensuring consistency, informing sentencers, etc. However, the 'judicial account of sentencing practice should not be mistaken for an accurate, evidence based account of how sentencing decisions are made'.[36] Consequently, the purpose of the rationales for Sentence Discounting may never have been to ensure consistency or inform sentencers, but instead to offer a way for legal actors to account for their decisions, and increase their legitimacy.[37]

Thus, while a smorgasbord of aims is limited (in terms of promoting consistency, etc), it allows greater flexibility to justify Sentence Discounting in acceptable terms. Additionally, multiple rationales protect decisions from criticism, as *the* rationale for the discount cannot be pinned down: picking *one* rationale excludes the possibility of other rationales (e.g. discounts for sparing witnesses or for remorse) justifying the discount, and facilitates critical analysis.

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[33] This is discussed in Chapter 2.

[34] Hirsch and Roberts (2004) p.642.

[35] Hirsch and Roberts (2004) p.642.

[36] Hutton (2013), p.88.

[37] Hutton (2013).

# Is Sentence Discounting Necessary?

Subsumed within the efficiency justification appears to be an assumption by sentencers and policy makers that Sentence Discounting is necessary. This assumption seems based on the belief that without Sentence Discounting, the currently high proportion of guilty pleas would decrease,[38] and the Justice System would be overwhelmed. However, there is limited evidence that without Sentence Discounting accused would not plead guilty.[39] Indeed, 'firm evidence of the success of Sentence Discounting in obtaining guilty pleas is difficult to obtain'.[40] Furthermore, in practice, there are many reasons for pleading guilty that have nothing to do with Sentence Discounting:[41] such as the pressures that arise from 'the uncertainty and worry caused by delay and repeated court diets'.[42] This raises the possibility that Sentence Discounting is not as necessary to secure guilty pleas, as might be assumed.

There are some jurisdictions that manage without Sentence Discounting. For instance, it has been said Germans find Plea-Bargaining 'incredulous'.[43] That a jurisdiction, geographically close to Scotland, has avoided all forms of Plea-Bargaining gives some credence to the idea that it is not inevitable. However, there are some important caveats to this point. The first is that Germany, as with the rest of Europe, operates an inquisitorial system. This fundamental difference may be what allows it to operate without Sentence Discounting. Secondly, there may be differences in crime rates, local cultures, etc that allow Germany to operate without Plea-Bargaining: indeed, Langbein argued that, if Germany had crime rates similar to America, they would struggle.[44] Finally, despite appearances, Germany may have the 'functional equivalent'[45] of Plea-Bargaining. Though this point is debated, it does have analogous processes for minor crimes. Additionally, the prevalence of

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[38] This belief is evident from Du Plooy v HM Advocate (2003), Gemmell v HM Advocate (2011), Macfadyen (2006) (e.g. para 6.8), etc.

[39] Schulhofer (1984), p.1039.

[40] Leverick (2004), p.378.

[41] See Section on 'Process Costs'.

[42] Goriely et al (2001), pp.126-127.

[43] Langbein (1979), pp.212-213.

[44] Langbein (1979), pp.209-210.

[45] Langbein (1979), pp.213-214.

confession evidence in Germany has led to questions of whether some informal incentive is offered,[46] as it once was in Scotland.[47]

Looking to an adversarial system, in Philadelphia,[48] when Plea-Bargaining was banned, most felony accused did go to trial.[49] This may suggest that without Sentence Discounting, the Scottish Justice System would be overburdened. However, the effect of Sentence Discounting on guilty pleas may vary depending on factors such as the seriousness of the case. Indeed, the significance of a discount is less when the sentence is minor: for instance, a discount on a custodial sentence is different to a discount on a fine.[50] Thus, guilty pleas in less serious cases[51] may not depend on Sentence Discounting, as much as might be expected. Consequently, while care must be used when comparing an American jurisdiction to Scotland, this does raise the possibility that Sentence Discounting is not inevitable/necessary.[52]

## Fallacy Of Efficiency: What is Efficient?

As it stands, the Efficiency Rationale is only skin-deep. It is not clear what is deemed to be 'efficient'. While Sentence Discounting may facilitate pecuniary savings, it is only 'efficient' if it facilitates justice. The significant controversy and embarrassment surrounding Sentence Discounting - it is 'one of the most controversial practices in the Criminal Justice System'[53] - indicates it is not 'efficiently' achieving desired goals.[54] Thus, if Sentence Discounting leads to injustice - no matter how cheaply it does so - then it is not efficient. Indeed, far more resources

[46] Langbein (1979), pp.213-214.

[47] Sentence Discounting probably occurred in Scotland despite being rejected by *Strawhorn* v *McLeod (1987)* as 'objectionable'.

[48] During an experiment with 'Bench Trials' (an expedited trial process not involving a jury).

[49] Schulhofer (1984) pp.1106-1107.

[50] Leverick (2004), p.379.

[51] A large proportion, of all cases, are not serious offences.

[52] While it is argued that serious cases may be the most affected by Sentence Discounting, this is not certain as there is contradictory evidence. For instance, it has been noted that: 'all else being equal, cases with more serious charges...tend to have lower rates of early guilty pleas' (Bradshaw et al (2012), para 6.13).

[53] Bar-Gill and Gazal-Ayal (2006), p.353.

[54] Indeed, in Chapter Two it argued that Sentence Discounting is damaging to justice.

could be saved if the right to trial was removed altogether. This would save tremendous resources, but it would certainly not efficiently achieve justice. Thus, it may be that Sentence Discounting is not efficient, as it does not achieve desired goals, and is inherently damaging to the system in terms of integrity, justice, legitimacy, and public confidence.

Views such as this, have led some to argue that the costs associated with trials are actually worth bearing, and it is not beneficial to avoid them.[55] Thus, it may be that, under the Efficiency Rationale, Sentence Discounting should be abolished, or at least curtailed to specific types of cases: for example, 'caught red-handed' cases (where guilt is not doubted) may be the ideal cases to deal with 'efficiently', as there is less risk of compromising justice.[56]

## The Latent Morality Of Efficiency

While the Remorse and Victim Rationales appeal to some 'high moral principle',[57] the Efficiency Rationale does not. This, partly, explains the difficulty some have in accepting the Efficiency Rationale. For instance, Lord Gill states:

*The euphemism 'utilitarian value' may be thought to give the principle of discounting some ethical content; but Sentence Discounting is not an exercise in Benthamite philosophy. It is not based on any high moral principle.*[58]

These remarks clearly reject the idea that the Efficiency Rationale has any moral/justice benefits. However, despite Lord Gill's proclamations, there may be a latent moral component to the Efficiency Rationale. Utilitarianism is, after all, a moral philosophy. Indeed, Lord Eassie uses the term 'utilitarian' throughout his judgement in Gemmell.[59]

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[55] For instance, Alschuler (1983).

[56] There is still some risk of injustice. Indeed, one reasons the 'Caught Red-Handed' exception is rejected in Scotland is that, predicating the outcome of a trial, that never occurred because the accused plead guilty, is unreliable.

[57] Gemmell v HM Advocate (2011), para 34.

[58] Gemmell v HM Advocate (2011), para 34.

[59] There is perhaps a discord, between Lord Eassie and Lord Gill, on this fundamental issue.

Thus, efficiency may have a moral component as it maximises the benefit to society. Indeed, in the present climate, when public funds are strained, efficiency is more important than ever. While it would be ideal if budgets were unlimited, in reality, public finds that are spent (perhaps needlessly) on the Justice System cannot be used to build schools, treat disease, save the Polar Bears, etc.

However, it has been argued that the Efficiency Rationale is not entirely sufficient to justify Sentence Discounting[60]. Indeed, given the value the Liberal Rule of Law places on individualism, a morality based on maximising good for society is limited in this context. In criminal matters, it is the individual that is threatened with state sanction, not the wider population. Thus, if the Rule of Law is suspicious of state power, or seeks to protect individuals, then it will rightly find issue with the Efficiency Rationale: if it serves the greater good at the expense of the individual.[61]

## The Fallacy Of Sentence Discounting: Is it more efficient?

In most debates regarding Sentence Discounting, it is accepted that it promotes efficiency by inducing guilty pleas.[62] However, the empirical information relied on for these estimates is not particularly detailed: often the costs of a trial are noted and it is assumed Sentence Discounting reduces them. This assumption is worth challenging as, there are questions regarding the resources Sentence Discounting saves.

It has already been questioned how effective Sentence Discounting is at inducing guilty pleas: this would limit the resources saved by Sentence Discounting. However, an additional issue is that, the commonly referenced figures from Scotland (suggesting that a case concluding before trial saves money)[63] do not account for the potential inefficiencies that may be caused as a result of Plea-Bargaining and Sentence Discounting.

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[60] Leverick (2008), pp.3-4.

[61] Collective punishment would be rejected for similar reasons (despite any benefits it may bring).

[62] C.f. Du Plooy v HM Advocate (2003), Gemmell v HM Advocate (2011), etc.

[63] Leverick (2004), Table 1.

It may be that the incentives designed to induce early guilty pleas, actually encourage ‘phenomena aimed at delaying the progress of cases’.[64] Though the extent of delay is hard to calculate,[65] it is notable that a number of reforms have been introduced to reduce the number of late guilty pleas and cracked trials. These reforms have included: the introduction of an intermediate diet,[66] reforms to the High Court, and recently changes to prosecutorial disclosure.[67] These reforms have a cost in themselves.[68] Additionally, it can be assumed that certain processes, such as pleading diets, use ‘no/little court resources’.[69] However, in reality delays occur waiting: for witnesses and lawyers to appear, for case files to be provided, etc. Schulhofer concluded that delays such as these meant, that the average case involved 35 minutes of waiting, and the ‘average guilty plea proceeding in fact required 55 minutes of courtroom time for the conviction stage alone’.[70] Furthermore, these processes are a waste of time in those cases where an accused pleads not guilty.[71] Additionally, research indicates the effectiveness of these diets at promoting earlier pleas is limited.[72] Thus, given the costs it incurs, the true efficiency of Sentence Discounting can be doubted.

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[64] McInnes (2004), chapter 28. Also see Bradshaw et al (2012), para 6.14 (this discusses reasons to delay a guilty plea).

[65] Several factors may contribute to delays.

[66] McInnes (2004), chapter 20.

[67] Incidentally, the reform was of limited success in improving efficiency. C.f. Bradshaw et al (2012).

[68] For instance, implementing and evaluating reforms requires resources.

[69] Schulhofer (1984), p.1039.

[70] Schulhofer (1984), pp.1056-1057.

[71] In these cases it would be more efficient to skip this and go to trial.

[72] For instance, see Bradshaw et al (2012), especially para 7.29.

# The Remorse Rationale

There is something intrinsically appealing about the Remorse Rationale. It appeals to what Lord Gill referred to as a 'high moral principle'.[73] Using remorse to justify Sentence Discounting relies on the presupposition that a contrite offender is less deserving of punishment, or that the contrite offender is more worthy of mercy.[74] However, there are problems with this rationale, in both practice and theory. The first practical problem is that identifying genuine remorse is problematic. The second issue is why, all things being equal, remorse merits a lesser sentence.

## Identifying Remorse

Perhaps the biggest problem with the Remorse Rationale is that identifying genuine remorse is difficult.[75] A particular difficultly is that, as long as Sentence Discounting, and other incentives for pleading guilty exist, it cannot be determined whether a guilty plea indicates remorse, or a desire for a reduced sentence. Additionally, even if all the potential reductions to a sentence for guilty pleas were removed, there are still other reasons for pleading guilty. For instance, attrition and 'process costs'[76] provide reasons to plead guilty.

Consequently, a court cannot reliably identify remorse.[77] Indeed, this difficulty is recognised by the judiciary. However, despite this, some judges suggest that cases may provide convincing evidence of remorse.[78] Thus, judges may feel they can reliably identify remorse for the purpose of Sentence Discounting.

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[73] Gemmell v HM Advocate (2011), para 34.

[74] See Murphy (1997), for a discussion of the link between mercy and contrition. However, note that remorse may also have an instrumental role for the Justice System, in allowing displays of benevolence.

[75] Leverick (2004), pp.370-372.

[76] Feeley (1979).

[77] Leverick (2008), p.45.

[78] For instance, Gemmell v HM Advocate (2011), paras 9, 139,164.

# Why Does Remorse Justify A Discount?

Even if the judiciary feel they can identify remorse, it can be questioned why remorse justifies Sentence Discounting.[79] Maslen and Roberts argue that, proportionality and 'desert theory provide the primary theoretical basis for sentencing'.[80] If this is correct, then remorse is questionable as it does not affect culpability or harm.[81]

## Origin of Remorse: Mercy

Given the above issue, it can be questioned how and why remorse entered the legal domain as a rationale for Sentence Discounting. While this question cannot be explored in detail, one explanation could be theological.[82] The 'idea that repentance may open the door to mercy is a common theme in Christian thought'.[83] This might mean that the concept of remorse, as something that justifies mercy or a lesser punishment, has bled through into the modern legal domain from elsewhere.

## Remorse And Society

Regardless of the origin of remorse, and its link to mercy, it is clear that 'remorse is considered important by the general population...the public favour less severe punishment when the offender is described as being remorseful'.[84] Additionally, while support for the universal application of

[79] Leverick (2004), pp.370-372.

[80] Maslen and Roberts (2013), p.125 .

[81] Leverick (2004), p.370.

[82] Walker (1995), p.27-28.

[83] Murphy (1997).

[84] Maslen and Roberts (2013), p.124.

Sentence Discounts is low (at just 21%);[85] support for discounts in 'some cases' is higher (at 45%).[86] It may be that one factor generating support for Sentence Discounting, in 'some cases', is remorse. Even in Scandinavia, where Plea-Bargaining and Sentence Discounting do not exist, reductions for cooperation occur, and are 'rationalised in terms of contrition or acceptance of responsibility'.[87] However, 'the public have a sophisticated view of the aims...of sentencing'.[88] Thus, it may be that factors other than remorse (such as the nature of the offence), also influence the acceptability of Sentence Discounting.

While it is good that legal actors reflect society, in considering remorse important,[89] it still does not answer the question of why remorse ought to be important, under the theoretical foundations for sentencing. This is not a question that can be comfortably left unanswered, as it leaves open the possibility that remorse (despite its importance in Scotland, and being 'the traditional justification for Sentence Discounting in England')[90] has little place in the legal system from the Liberal Rule of Law's normative perspective.

## Remorse And Normative Legal Issues

Remorse clearly has value to society. However, failure to reconcile what appears to be the normative views of society with the normative aims of sentencing (thus far assumed to be proportionality and desert theory) is not good practice. If the two are not reconciled then we are left with a normative paradox where: 'if [discounting for remorse] is just the law is wrong, but if the law is not wrong [discounting for remorse] is'.[91] This paradox leads to the conclusion that, as long

[85] Dawes et al (2011), para 3.1.

[86] Dawes et al (2011), para 3.1.

[87] Tonry and Lappi-Seppälä (2011), pp.16-17.-17

[88] Dawes et al (2011), para 2.1.

[89] Maslen and Roberts (2013), p.122.

[90] Leverick (2004), pp.370.

[91] Walker (1995), p.27.

as Sentence Discounting for remorse satisfies some normative ideal then, something is inevitably wrong.[92]

To overcome this paradox 'the justifications for a particular...factor [reducing a sentence] should emerge from the theoretical foundations underlying the system of sentencing'.[93] Thus, *if* the Justice System seeks proportionality and desert sentencing, then there are a number of factors that may appropriately reduce a sentence. For instance, if there are elements of coercion involved in an offence, this could justify a reduced sentence: since it goes to the offender's culpability.[94] However, remorse and other 'personal mitigating factors',[95] not affecting culpability or harm,[96] are 'contentious'.[97]

Indeed, focusing on the 'objective gravity of the offence',[98] all personal mitigating factors are objectionable; unless, proportionality is not only about the offence, but the offence because it has been committed by the particular accused.[99] This would allow for consideration of 'the offenders response to the charge'.[100] Although there would still be 'several important problems and dilemmas[101], O'Malley argues that this is not an issue with remorse, but is: 'attributable to the inadequacy of various sub-principles that are applied when assessing offence gravity and identifying the weight to be accorded to certain mitigating factors'.[102] Thus, on this view, remorse could justify Sentencing Discounting, though it would still be open to criticism.

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[92] I.e. If a discount from what legal theory suggests is the appropriate sentence is 'just', then something is wrong with the legal theory of sentencing. Conversely, if the sentence is 'just' then reducing the sentence is unjust.

[93] Maslen and Roberts (2013), p.122.

[94] Maslen and Roberts (2013), p.122.

[95] Maslen and Roberts (2013), pp.123.

[96] For instance, the Sentencing Council's Guidelines make allowances for 'exemplary conduct'.

[97] Maslen and Roberts (2013), pp.122-124 .

[98] O'Malley (2013), p.224.

[99] O'Malley (2013), p.224.

[100] O'Malley (2013), p.224.

[101] O'Malley (2013), p.226.

[102] O'Malley (2013), p.226.

## **Censure**

Another potential way for remorse to justify Sentence Discounting, is by arguing that under proportional desert sentencing 'what is deserved is not punishment per se, but censure'.[103] Under this view, the criminal sanction is a medium for communicating disapproval of offenders' conduct.[104] Thus, if an accused demonstrates remorse, then this is an indication that less 'communication' (i.e. sanction) is required.[105]

Additionally, if the aim of punishment is communication, then the communication is not directed only at the offender, but also to society. While this may mean that sufficiently high sanctions are needed to 'communicate' with society, Maslen and Roberts argue that the 'legitimacy of...state censure is maximised when a dialogical approach is taken, in which the message of censure responds to the offender's expressions of remorse'.[106] This raises the possibility that Sentence Discounting for guilty pleas (if viewed as signs of remorse) maximises the perceived legitimacy of state censure.[107] If this is correct, then the guilty plea may justify Sentence Discounting.

Furthermore, the desire for guilty pleas to increase legitimacy is strong as:

*Criminal processes are at odds with the Liberal Rule of Law values of careful fact-finding, and the dignity of the unique individual being protected against insidious state power. Summary court processes are swift to the point of abruptness.*[108]

This creates unease among legal actors who wish to avoid being in 'bad conscience'[109]. However, if an accused does not accept their guilt (thereby challenging the system) then the concerns of legal actors, and the public, can be highlighted. Furthermore, if an accused presents an 'innocent guilty

[103] Maslen and Roberts (2013), p.126.

[104] Maslen and Roberts (2013), p.126.

[105] Maslen and Roberts (2013), p.126.

[106] Maslen and Roberts (2013), p.126.

[107] Thus, Sentence Discounting can be how the 'message of censure responds' to the accused's remorse. Maslen argues this increases legitimacy as it treats the accused as a 'moral agent': as the Justice System should.

[108] Tata (2007c), p.31.

[109] C.f. Tata (2010), and Tata (2007c).

plea', (whereby they plead guilty, but claim their moral innocence by not demonstrating remorse) this can also damage public confidence, and challenge the legitimacy of the Justice System. This creates further issues for legal actors, who are aware[110] of the shortcomings in the Justice System.

One way to 'mollify'[111] this issue, is to have the offender demonstrate remorse by pleading guilty. Such a demonstration means the offender is not challenging the legitimacy of the Justice System, but actually reinforcing it: by pleading guilty, it *appears that* the offender is remorseful and accepts the censure as legitimate. Thus, Sentence Discounting may be justified, if it encourages displays of remorse (i.e. guilty pleas), because these increase the perceived legitimacy of the Justice System: this can have advantages, such as improving public confidence in the system.

## Should Remorse Be Tied To Sentence Discounting?

The appeal of remorse is hard to deny. It is 'a powerful source of personal mitigation at sentencing'.[112] However, some, argue that 'if remorse is to be taken into account at all, it should be a separate consideration from the discount for a plea of guilty'.[113]

Indeed, case law in Scotland argues that Sentence Discounting does not depend on mitigating factors, like remorse:[114] the argument is that these factors are part of the headline sentence calculation. The reason for this apparent separation, of remorse from Sentence Discounting, may lie in the statutory nature of Sentence Discounting. However, it should be noted that, the relevance of remorse to Sentence Discounting cannot be completely dismissed. As discussed above, case law suggests that efficiency is the rationale for discounting, but *also* that 'convincing reasons' are required: what is a convincing reason is not clarified, but it is likely remorse is one.

[110] Tata (2007c), p.4 and p.31.

[111] Tata (2008) and Tata (2010).

[112] Maslen and Roberts (2013), p.122.

[113] Justice Michael Kirby, as cited by MacKenzie (2006) pp.4-5.

[114] For instance, Gemmell v HM Advocate (2011), para 50.

Interestingly, this use of remorse as a mitigating factor may mean that, despite the criticisms above, the courts consider remorse a valid reason to reduce a sentence.[115] Yet, it may be that any use of remorse in Sentence Discounting is objectionable, as it raises the issue of 'double counting': if remorse is considered in setting the headline sentence and the Sentence Discount. However, this could be 'legitimate' as it 'simply reflects [its] relevance to both stages of the sentencing process'.[116] Thus, remorse could have a role in Sentence Discounting in Scotland.

## Would A Lack Of Remorse Inflate A Sentence?

It may be remorse is expected in most cases, and that in cases where there is no remorse sentences are increased. The link between remorse and guilty pleas makes this possible as, if the accused does not plead guilty they lose their chance of a 'discount': resulting in a higher sentence. Additionally, if after conviction, accused do not accept their guilt (by showing remorse) then the odds of a custodial sentence increase, because they are 'in denial'.[117] Thus, remorse considerations may operate to increase sentences.[118]

### Multiple Aims Of Sentencing

Another possible way to accommodate remorse is to look at other aims of sentencing. Although 'desert theory provides the primary theoretical basis for sentencing',[119] it would be wrong to suggest that it is the only basis. Indeed, there are a 'plethora of [sentencing] purposes', creating other possible theoretical foundations for remorse.[120]

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[115] Suggesting courts do not have an issue with 'why, all things being equal, remorse justifies a lesser sentence'.

[116] Gemmell v HM Advocate (2011), Para 122. Note, however, that this opinion was not shared by all.

[117] Tata (2008), pp.16-17.

[118] That Sentence Discounting may increase a sentence is discussed in the next chapter.

[119] Maslen and Roberts (2013), p.125.

[120] Maslen and Roberts (2013), p.125.

In particular, remorse may justify a discount if it is an indication that the offender will not reoffend. If remorse were such an indication, then it would theoretically be of relevance to sentencing that was concerned with public protection, desistance, rehabilitation, etc. However, in the empirical reality remorse is a 'weak predictor of desistance'.[121] This weakness probably relates to the difficulty of identifying remorse in practice. Yet, regardless of why remorse is a weak indicator, the fact remorse does not predict reoffending, all but removes any instrumental value it may have: though sentencers belief that they can identify genuine remorse may mean this argument persists.

## The Practical Limitations Of Remorse

While remorse is considered important, justifying Sentence Discounting based on remorse is not easy. More effort is needed to understand exactly why people instinctively feel remorse justifies a lesser sentence, and what legal sentencing principles this fulfils. In particular, it is worth questioning whether the effectiveness of the Remorse Rationale varies depending on the nature and severity of the offence.[122] For instance, it is hard to imagine the Remorse Rationale operating the same for a non-violent shoplifter, and a violent sexual predator.

However, ultimately, remorse is still a weak rationale for Sentence Discounting, in practice, due to the real world constraint of not being able to identify genuine remorse. This does not necessarily mean the remorse argument is bad in theory (though the theory is incomplete). It also does not mean that remorse will not influence future sentencing decisions, as there will be judges who believe they can identify genuine remorse. What it does mean, is that remorse is not a convincing basis for Sentence Discounting in Scotland.

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[121] Maslen and Roberts (2013), p.125.

[122] Maslen and Roberts (2013).

# The Victim Rationale

## The Importance Of Victims

Increasingly, at both a domestic and international level, the impact of criminal cases on victims is a key issue.[123] Domestically, the importance of victims can be seen, inter alia, in the Victims and Witnesses (Scotland) Bill. Internationally, it can be seen in Directive 2012/29/EU[124] ('establishing minimum standards on the rights, support and protection of victims of crime').

However, despite its importance, there are issues with Sentence Discounting based on sparing victims. One significant issue is that there are often no victims to spare. A second issue is that, Sentence Discounting may not actually spare victims, especially if the victim resents the reduced sentence for the offender. Additionally, it is unclear exactly what is meant by 'sparing victims'.

## Spare Victims From What?

A rationale for Sentence Discounting based on benefiting victims has 'found much favour in Scotland', in cases such as: Du Plooy, *Khaliq*, *Sweeney*, *Gemmell,*[125] etc.[126] This rationale inverts the standard notion that Sentence Discounting (excessively) benefits accused persons:

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[123] Baker (2009), p.843.

[124] Hereinafter 'The Directive'.

[125] In Gemmell v HM Advocate (2011), like Du Plooy v HM Advocate (2003), efficiency is the rationale for Sentence Discounting. However, despite this, sparing victims the ordeal of trial is still a feature of these cases.

[126] Leverick (2004), p.372.

*When initially thinking about the guilty plea concept, the first association for many was that it was a 'reduction' for the offender (rather than considering the wider picture in terms of impact upon costs and victims and witnesses). Therefore, offenders were often considered the main beneficiaries of the principle.*[127]

However, considering the process costs the system can place on victims, there can be advantages for victims, rather than offenders: indeed this thesis doubts whether, on balance, accused persons actually 'benefit' from Sentence Discounting.[128] The costs the criminal process places on victims is varied, but concerns over cross examinations and facing the offender are often raised.[129] For instance, research suggests that 'victims or witnesses of serious offences...particularly those for whom the prospect of having to testify was proving difficult to cope with',[130] may prefer Sentence Discounting if it saves them having to testify. Indeed, even a guilty plea on the day of trial may be preferable.[131] Thus, in these cases, there is an argument, although not perfect, for Sentence Discounting to encourage guilty pleas.

Examples of other issues that victims have faced in court are not hard to find. For instance, a 13 year old victim of child abuse was called 'predatory' in court, by the prosecution.[132] Indeed, it is notable that while in Scotland the Child Hearing System helps young offenders, by separating them from the criminal process, victims are still subject to court proceedings. While there are special measures that can be taken,[133] and these have improved the situation considerably,[134] it can be questioned whether these go far enough.

Ultimately, there is potential for sparing some victims. Additionally, while cases such as the example above may be the exception, it is the exceptions that tend to generate the most interest in the media. This means that future victims may perceive the experience, while never pleasant, as worse than it generally is. The fear of such consequences will weigh heavily on victims, and even if

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[127] Dawes et al (2011), para 3.1.

[128] Due to questions such as: whether Sentence Discounting amounts to a trial tax, whether Sentence Discounting encourages the innocent to plead guilty, whether Sentence Discounts are 'real', etc.

[129] Dawes et al (2011), para 3.2.

[130] Dawes et al (2011) para 4.4.

[131] Dawes et al (2011) para 4.4.

[132] BBC News, 'Barrister criticised for calling child abuse victim 'predatory' 7 August 2013 <http://www.bbc.co.uk/news/uk-23597224>.

[133] C.f. The Vulnerable Witnesses (Scotland) Act 2004.

[134] Smart (2009).

the fear never comes to fruition it is still a cost the victim has suffered. Thus, in some way, preventing the injustice of subjecting a victim to a further ordeal, helps offset the perceived injustice of Sentence Discounting. Furthermore, sparing victims from trial would be beneficial if it encourages victims to come forward: for example, reports suggest 83% of rapes go unreported.[135] Thus, discounted justice is, perhaps, better than no justice.

## Problems With The Victim Rationale: No Victims To Spare

Though there can be advantages for victims, in many cases there is no victim.[136] For example, Sentence Discounting is used for many 'victimless crimes',[137] where the only witnesses are Police Officers.[138] While there may be pecuniary benefits if police officers do not have to spend time in court, 'it can scarcely be said they are spared an ordeal'.[139] Additionally, even if there is a 'victim', they may not be vulnerable or find a trial distressing. In cases such as this there would be little use in Sentence Discounting for sparing victims.

The Victim Rationale is also weakened when, in the empirical reality, the distinction between victim and offender breaks down. For instance, in 'multi-layered conflicts involving numerous disputants', the dichotomy of victim and offender can be reversed, or break down. Thus, both parties can be offenders and victims[140]. Where this occurs sparing the victim becomes a more questionable rationale: though it is worth noting that the typification and standardisation that occurs in the legal process, may mean these complications are eschewed in legal proceedings (i.e. the system will construct clear roles of offender and victim by filtering out real world complications, which may not be just).

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[135] Mumsnet (2012). These results are consistent with Coleman et al (2011): note a change in question structure means later results are not comparable to previous years (c.f. Osborne et al (2012), p.111 footnote 3); also note that there is more detail to the statistics than can be reflected here (e.g. reporting to officials other than the Police).

[136] Leverick (2004), p.373.

[137] Page (2010), para 7.1.2.

[138] Leverick (2004), p.370-374.

[139] Gemmell v HM Advocate (2011), para 46.

[140] Walters and Hole (2011).

## Do Victims Want To Be Spared?

Even where there is a clearly identifiable victim, victims are not a homogeneous group. An essentialist concept of victims risks obscuring the fact that while Sentence Discounts may spare some victims, discounts could equally disadvantage others who would ironically benefit more from not be 'spared'.[141]

One reason victims may wish to proceed to trial is 'because this will lead to their learning more about the offence and the offender'.[142] This may help the victim obtain closure, though it depends on variables such as: the victim's personality, the nature of the offence, the type of evidence the victim must give, etc.[143] In some instances, the law manages to consider these variations: for example, the Vulnerable Witnesses (Scotland) Act 2004, makes provision for children to be present at a trial if they wish. However, in many others instances victims can be failed.

Additionally, victims may feel a trial offers an opportunity to be heard, and to convey their side of the story. While the suitability of a trial for expressing oneself is questionable (the system is controlled by legal actors and not accommodating to input from 'outsiders'), it is 'an opportunity of sorts and prevents the victim from being entirely marginalised within the Criminal Justice System'.[144] Indeed, theories regarding procedural justice suggest that, satisfaction with the criminal system largely depends on an opportunity to expresses oneself and be treated fairly. This Procedural Justice element is significant. Many lay persons will have difficulty evaluating the technical aspects of the system: resulting in their assessments being based largely on the factors highlighted by Procedural Justice Theory.

Finally, and perhaps most obviously, a victim may resent being spared, if it this results in the offender receiving a discount.[145] For instance, a victim may feel that if the offender receives a discount, it means they are 'getting off easy'. However, this can be balanced against the benefit that

[141] C.f. Darbyshire (2000), p.905. and 'Justiciary: procedure - Sentence - Discounting' (2012), p.400.

[142] Gemmell v HM Advocate (2011), para 45.

[143] Smart (2009), p.4.

[144] Leverick (2004), p.372.

[145] Darbyshire (2000), p.905.

a guilty plea at least ensures a conviction: 'trials can fail to convict the guilty for all sorts of reasons'.[146] Yet, despite this, it is unfortunate that victims are not considered more.[147] Indeed, Sentence Discounting can mean victims do not get the trial they want/need, and the offender gets a reduced sentence. This could disadvantage some victims significantly.

It is also possible that 'sparing the victim', as Leverick suggests, is the wrong course of action as it encourages the issues victims face to remain unaddressed.[148] For instance, it may be better to expand the Vulnerable Witnesses (Scotland) Act 2004, to cover more victims, or make the criminal process less daunting: such as by removing the need for victims to recount events around sixteen times.[149] Alternatively, Sentence Discounting could be used constructively as part of a restorative justice process. The advantage of restorative justice would be that, it does not merely seek to limit further damage to victims, but to mitigate the damage that has already been done. Indeed, if sentencing were based on a just deserts, then the reduction in the harm, resulting from restorative justice, could warrant a lesser sentence.

## Alternative Meanings For 'Sparing Victims'

So far it has been assumed that the Victim Rationale's justification 'lies in sparing the victim the distress of giving evidence at trial[150] to prevent greater 'damage'.[151] However, there are other meanings that can be attributed to the Victim Rationale. Discussion of these meanings has been triggered by section 120(11)(c) of the Coroners and Justice Act 2009. This requires the Sentencing Council to consider the 'impact of sentencing decisions on victims'. Ultimately, it will be interesting to see how this affects the guidelines on Sentence Discounting in England and Wales, when they are updated.[152] However, for now, commentators have suggested two requirements that

[146] Leverick (2004), p.374.

[147] Leverick (2004), p.374.

[148] Leverick (2004), p.374.

[149] As the Victims and Witnesses (Scotland) Bill aims to do.

[150] Leverick (2004), p.375.

[151] Smart (2009).

[152] Work on this is due to start in Autumn, with consultations planned for the middle of 2014.

may arise from the victim dimension: (1) preventing victimisation; and (2) promoting public confidence.[153]

## **Preventing Victimisation**

Sparing victims could mean ‘preventing offending and thus victimisation’, rather than focusing on individual victims and their ‘affective responses’.[154] If this meaning were adopted, it would require sentencing have a deterrent or ‘crime reductive’[155] purpose. Interestingly, this view of sparing victims, may not support Sentence Discounting: larger sentences may be more deterring. However, research suggests people are only deterred by high sentences, if they feel it is likely they will be caught/punished.[156] Thus, Sentence Discounting may not reduce the deterrent to commit a crime as much as might be assumed; though there are arguments[157] that higher custodial sentences reduce crime through incapacitating offenders. Indeed, a lesser articulated principle, that may motivate custodial sentences, is an ‘expurgatory’ purpose: ‘containing the unproductive people, ‘*the expelled*’’.[158]

[153] Edwards (2013).

[154] Edwards (2013), p.73-76.

[155] Edwards (2013).

[156] Wright (2010).

[157] Especially from actuarial and managerial perspectives.

[158] Nellis (2012).

### Public Confidence

The second interpretation of the Victim Rationale relates to public confidence: some have 'linked the possibility of an obligation towards victims with public confidence'.[159] On this understanding, victims are a subset of the general public, and helping the general public (by promoting public confidence) helps victims. Thus, in regards to Sentence Discounting, this interpretation of the Victim Rationale would require Sentence Discounting be used to promote public confidence in the Criminal Justice System.

One way to promote confidence is to increase the knowledge and understanding of the public: generally, the more knowledge a person has of the Justice System the more confidence they have in it.[160] This could also help victims by, for instance, generating an awareness that Sentence Discounting and guilty pleas are common, thus helping to manage victims' expectations.[161]

However, again, this interpretation is not necessarily accommodating of Sentence Discounting. It may be that in order to promote public confidence Sentence Discounting, should be curtailed. Indeed, this is the view taken by Lord Gill in Gemmell.[162] Similar concerns over leniency and public confidence have also been apparent in England and Wales: recently a proposed increase of Sentence Discounts to 50% was rejected after an outcry it was too lenient.[163]

## Conclusions On The Victim Rationale

This section has sought to demonstrate that there are several possible meanings that can be attributed to the Victim Rationale. Each of these potential meanings has a fundamental impact on

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[159] Edwards (2013), p.76.

[160] Hutton (2003).

[161] Unrealistic expectations may lead to disappointment at the final outcome.

[162] E.g. Gemmell v HM Advocate (2011), paragraphs 74-79.

[163] David Cameron, as quoted by BBC News, 21st June 2011 <http://www.bbc.co.uk/news/uk-politics-13847999>.

Sentence Discounting. However, no meaning is entirely supportive of Sentence Discounting. Additionally, there is no way to tell which meaning(s) would, or should, be used in practice. So far, the indication is that in Scotland the Victim Rationale focuses on individual victims and their affective responses. However, concerns over public confidence and deterrence, suggest other victim based concerns are influential: even if they are not yet acknowledged, or recognised, as part of the Victim Rationale. Thus, even though the process is not necessarily 'victim-centred',[164] victim concerns play an important part in Sentence Discounting. However, it appears victim concerns actually provide reasons to object to Sentence Discounting, rather than justify it: for instance, on the basis of public confidence.[165]

# Conclusion On Rationales

The rationale for Sentence Discounting indicates the fundamental nature of the practice. For instance, if the rationale was based on remorse or victims, then it would appear Sentence Discounting is concerned with some 'high moral principle'. However, for the reasons described above, the Remorse and Victim Rationales are 'particularly unconvincing'.[166] Consequently, it could be preferable that the Efficiency Rationale is stated as *the* rationale for Sentence Discounting in Scotland. However, there are significant limitations to the Efficiency Rationale: it unclear what is efficient, and it is questionable whether Sentence Discounting promotes efficiency, or produces delay.

Any concept of efficiency, regarding Sentence Discounting, must involve 'efficient justice'. However, the meaning of 'efficiency' is rarely discussed in detail - beyond the potential for pecuniary savings - and the justice element can be lost. This is problematic because if efficiency - rather than efficient justice - is the goal, then tremendous resources can be saved by doing away with trials and embracing a pure crime control model. While this would surely be deemed too unjust, it emphasises that if the criminal system does not achieve justice - regardless of how cheaply

[164] Edwards (2013), p.73.

[165] Leverick (2008) discusses public confidence issues as a reason to object to Sentence Discounting.

[166] Leverick (2004),p.362.

it does so - then it is not efficient: the due process elements, despite the cost, are crucial. Yet, aspirations towards efficiency, and 'an instrumental logic [protecting the innocent and punishing the guilty]', are 'salient features of crime control'.[167] Thus, Sentencing Discounting may be geared towards crime control, and better at saving time and money, than securing efficient justice.[168]

Consequently, accepting the Efficiency Rationale leads to the conclusion that, by nature, Sentence Discounting has less concern with justice than might be hoped.[169] Indeed, little in the Efficiency Rationale appeals to some 'high moral principle', in the same way as remorse and victim rationales can purport to. This partly explains why the other rationales maintain their relevance, despite the High Court repeatedly affirming the Efficiency Rationale. However, the difficulty accepting the Efficiency Rationale in practice - as *the* rationale for Sentence Discounting - owes both to the weakness of the Efficiency Rationale, and the normative objections to Sentence Discounting.

Indeed, perhaps the greatest failing of the Efficiency Rationale is that, it 'is rather weak when weighed against the principled objections' to Sentence Discounting.[170] This means that, despite being *officially* accepted as *the* rationale, it cannot justify Sentence Discounting. Instead, the Efficiency Rationale may simply be the best of a bad bunch. To explore this aspect of the nature of Sentence Discounting, it is necessary to analyse the objections to Sentence Discounting, and question whether the practice is unjust.

[167] Garside (2008).

[168] As argued above, efficiency may have a Utilitarian element.

[169] Efficiency has similarity to Utilitarianism, and it could be argued that the efficient use of public funds is just. However, it is argued above that, the Efficiency Rationale is not about 'efficiency' so much as it is about pecuniary savings regardless of justice.

[170] Leverick (2004), pp.386-387.

# Chapter 2: Is Sentence Discounting Unjust?

# Objections To Sentence Discounting

The controversy surrounding Sentence Discounting can, in part, be attributed to the limitations of the rationales used to justify the practice. However, a significant part of the controversy originates from, what Leverick calls, the 'principled objections' to Sentence Discounting.[171] The principled objections provide strong arguments against Sentence Discounting. When these principled objections are weighted against the weak rationales for Sentence Discounting, the practice becomes even harder to justify. This is problematic, as it raises questions regarding the nature of Sentence Discounting, and whether it is unjust.

This chapter explores the primary objections to Sentence Discounting: that it punishes those who exercise their right to trial; and that it induces the innocent to plead guilty. The chapter also seeks to balance the question of whether Sentence Discounting is unjust, by considering the injustices of the criminal process guilty pleas prevent: notably the unjust process costs an accused may face if going to trial. In doing so, the chapter aims to come to a rounded conclusion on the nature of Sentence Discounting, and whether it is just.

# Punishing Those Who Go To Trial

Nominally, the 'sentence differential' between those pleading guilty, compared to those pleading not guilty, is called a sentence 'discount'. Indeed, much of the discussion in the Courts and the media perceive it as such, and focus on concerns that Sentence Discounting is too lenient. However, this view is contested. Leverick, for example, identifies a 'principled objection' to Sentence Discounting,[172] based on the belief that it amounts to an increased sanction for those who go to trial: meaning Sentence Discounting may actually be a 'trial tax'.[173] Additionally, interviews with

[171] Leverick (2004), p.386; and Leverick (2008), p.45.

[172] Leverick (2004), p.382.

[173] 'Trial Tax' is a predominately American Term, but it captures the essence of the point being made here.

accused persons, have uncovered concerns that 'pleading not guilty and being found guilty might extend the level sentence'.[174] This section explores these concerns, to analyse whether Sentence Discounting in Scotland really is a 'discount', and what the normative implications of this are.

## Of Course It's A Discount...Isn't It?

In jurisdictions where there is a trial tax it is highly criticised. Some even go as far as calling it 'coercive':[175] for instance, Scott and Stuntz detail the 'duress argument'.[176] However, the normal coping mechanism of the courts, and policy officials, is to argue that the higher sentence an offender receives, following conviction at trial, is not a punishment for going to trial. Instead, it is often argued that it is, merely a missed opportunity to benefit from pleading guilty. Yet, this argument is questionable. Darbyshire is especially critical of this argument, stating:

*The discount undeniably punishes those who exercise their right to trial then are found guilty, however much the Court of Appeal tries to disguise a Sentence Discount as a reward for remorse. This is stunning hypocrisy in the Anglo-American legal systems, whose rhetoric trumpets the right to trial, especially jury trial, the burden of proof and the presumption of innocence as the hallmarks of the world's finest democracies.*[177]

It could be argued that, in practice, the distinction between a 'reward' for pleading guilty, and a punishment for exercising the right to trial is somewhat an issue of semantics:[178] whether it is the former or the latter, the accused still suffers the same fate. However, the distinction raises issues of the fundamental principles of the legal system: the potential 'hypocrisy' of guaranteeing a right to trial, but punishing those who exercise that right is extremely undesirable. Thus, there are serious normative questions resting on the distinction, and the question is worth pursuing.

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[174] Bradshaw et al (2012), para 6.10.

[175] 'Coercive' is a contentious phrase in this context. Some argue Sentence Discounting is 'coercive'. However, others argue it is not as, for instance, 'coercion' must involve a physical element such as the threat of violence. Thus, a better phrase may be that Sentence Discounting provides an undue incentive to plead guilty.

[176] Scott and Stuntz (1992), p.1920.

[177] Darbyshire (2000), p.901.

[178] Leverick (2004), p.383.

## What Is A Discount?

The OFT[179] is investigating 'fake' headline prices, where most transactions are at the 'discounted' price.[180] This raises an interesting philosophical question. Are Sentence Discounts, really a discount when most cases result in a guilty plea, thereby normalising the 'discounted sentenced'? If this were a consumer matter, the OFT would argue it is not, and that the 'discounted sentence' ought to advertised as the headline. This would mean that the sentence is adjusted upwards where the accused goes to trial. Indeed, this line of thought has been considered in England and Wales where:

*The established convention of modifying the Guidelines to reflect local circumstances has been adopted by some courts to suggest guidance based on a timely guilty plea. For example,...[modifying] Guidelines so that the entry points assumed a guilty plea and suggested an increase in the recommended sentence should there be either a late plea or a trial had been held.*[181]

Though using Guidelines this way is normatively troubling, it may have advantages. Firstly, it may be more practical. For instance, the guidelines are based on a first time offender, who is convicted following a trial. However, it has been noted that only 12% of offenders plead not guilty, 'and only 10% appeared for sentencing without any prior convictions'.[182] Consequently, the proportion of those sentenced that meet both these conditions is 'obviously much smaller than 10%'.[183] Thus, a criticism can be made of a guideline system that does not correspond to the vast majority of cases. Indeed, this concern partly motived the change to the guidelines referenced above as:

*The justices clerk in question suggested that, since the majority of defendants pleaded guilty, the alteration had been made to promote consistency in applying the discount.*[184]

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179 The Office of Fair Trading (OFT).

180 BBC News, 'Furniture stores used fake prices, says OFT'. 23 August 2013 <http://www.bbc.co.uk/news/business-23797882>. Also see, BBC News, 'Tesco fined £300,000 for Birmingham strawberry deal'. 20 August 2013 <http://www.bbc.co.uk/news/uk-england-birmingham-23765690>.

181 Henham (2000) p.439.

182 Ashworth and Roberts (2013), p.7.

183 Ashworth and Roberts (2013), p.7.

184 Henham (2000) p.439.

The second advantage, of recognising Sentence Discounting as a trial tax, is that it may be more honest and transparent. While transparency does not resolve the normative issues of Sentence Discounting, a more transparent approach allows the issues to be better analysed and addressed. However, transparency is a double edged sword. While transparency opens issues to discussion, it also increases the risk of criticism. In particular, it could be questioned how the public would react to a trial tax. The reaction would probably be negative, though there are indications a trial tax is preferable to a Sentence Discount:

*There was some consensus [among the public]...that...implying the sentence had 'increased' because a defendant did not enter a guilty plea was preferable to 'decreasing' it because they did.*[185]

Ultimately, this may mean that trial taxes improve public confidence in the system, compared to Sentence Discounting. Thus, recognising Sentence Discounts as such may be advantageous, given the concern the High Court has shown regarding public confidence.[186] Additionally, such a controversial move would also promote wider discussion of the issue, which may lead to a better outcome.

## Right To A Fair Trial

The closest the European Court of Human Rights has come to the question, of whether Sentence Discounting is a trial tax or discount, was in X v United Kingdom.[187] In this case, the guilty plea[188] was considered a mitigating factor. Thus, the sentence differential was not considered contrary to the right to a fair trial. However, there are two main issues that may affect the ability of this judgement to dissuade concerns regarding Sentence Discounting. The first is that, Sentence Discounts were not the main issue of the case.[189] The second issue is that, owing to Europe

[185] Dawes et al (2011), para 4.2.

[186] Gemmell v HM Advocate (2011).

[187] X v United Kingdom (1972).

[188] X v United Kingdom (1972), p.17 para 6(d). However, the Court used the term 'confession', rather than 'guilty plea'. This is interesting as, for example, despite the lack of Sentence Discounting in Germany, there is a high use of *confession* evidence. Thus, the use of the term 'confession' could suggest, that the Court did not fully grasp the nature of Sentence Discounting for guilty pleas in an adversarial system.

[189] Leverick (2004), p.382.

consisting of inquisitorial systems, European Legal Actors may have a limited concept of the nature of Sentence Discounting in adversarial systems.[190] Consequently, this case could be decided differently today, as European Legal Actors may be more familiar with the nature of the Scottish Justice System: due to more experience deciding UK matters, and perhaps because familiar 'inquisitorial aspects are creeping into the Scots trial'.[191]

While space precludes further discussion, the main point to note is that the position of Sentence Discounting, is open to debate. Indeed, the suggestion that the guilty plea is a mitigating factor, does not easily align with the Efficiency Rationale, dominant in Scotland. It also goes against the domestic position, where the discount for the guilty plea, is an issue apart from mitigation.

Thus, X v United Kingdom has limited utility in settling the debate over whether Sentence Discounting is a trial tax, or a discount. Indeed, in the future, it may be argued that Sentence Discounting should be rejected, because the binary dichotomy between a Sentence Discount and a trial tax is false: the issue depends on how it is subjectively 'framed'.[192] If this is correct, then allowing Sentence Discounts will always be problematic to a system that hopes to reconcile its practice with the Liberal Rule of Law values.

## **Sentence Indications**

Given the effect Sentence Discounting can have on an accused's sentence, it is a failure that certainty is lacking. In particular, it is unfortunate that accused persons cannot get indications of their likely sentence before pleading. This differs to many jurisdictions. For instance, in England Goodyear[193] (which changed the position laid down in Turner)[194] made it possible for a judge to indicate the maximum sentence that would be imposed following a guilty plea.

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[190] C.f. John Langbein (1979). Especially pages 212-213, on Germany's 'incredulous' reaction to Plea-Bargaining.

[191] Leverick and Stark (2010), para 3.1.2.

[192] C.f. Bibas (2004) for discussions on 'Framing' and 'Anchoring'.

[193] R v Goodyear (2005).

[194] R v Turner (1970).

While, there is concern that an indication may place undue pressure on an accused, this argument is nonsense in Scotland. Unless knowledge of Sentence Discounting is kept secret from accused persons (difficult, as even before Du Plooy accused persons expected discounts for guilty pleas),[195] there will be pressure on accused persons to plead guilty. All that happens by not providing an indication, is that the accused is forced to base their decision on estimates from their lawyer.[196] It could be hoped that the lawyer provides an accurate estimate, but given the inherent subjectivity and the number of variables involved (including what the sentencer had for breakfast)[197] this is not guaranteed.

Consequently, if Sentence Discounts are to be used to encourage guilty pleas, then accused persons should be provided as 'certain as possible an indication of the sentence which will be imposed'.[198] While some judges may not appreciate being bound by a previous indication (in case new facts emerge), indications could be changed in exceptional circumstances. Thus, all the indication does is hold the sentencer more accountable for their decision, as they must explain exceeding the indication. In practice, this would probably occur infrequently, and be of limited effect to sentencers, but it would benefit the accused tremendously.

[195] Goriely et al (2001).

[196] The lawyer will estimate both, what the sentence will be (e.g. will it be custodial and for how long), and what the discount will be (e.g. one-third).

[197] Danziger, et al (2011).

[198] Zeleznikow, et al, (2007), para 4.1.

## Even If It Is A Discount, Is It Just?

Even if Sentence Discounts were undoubtably true discounts, this does not necessarily resolve the normative issues. It could be questioned, why Sentence Discounting is excepted from the general rules operating in other areas. For instance:

*Law enforcement officials are not allowed to bargain for confessions during the pre-trial stage by offering release from custody or any other favours...as a confession made as a result of threats, inducement or undue influence is generally inadmissible.*[199]

Indeed, the normative difference between inducements for a confession, or for a guilty plea, are hard to differentiate. A guilty plea is similar to a confession, in that both help discharge the burden of proof on the prosecution.[200] It might be argued, that incentives for a guilty plea are accepted, because the involvement of legal actors (especially a defence lawyer for the accused), prevent inducements from crossing the line. However, this argument is tenuous. Instead, it may be that inducements at other stages do occur, albeit in a way that is less visible/formal than Sentence Discounting. For instance, there is a right to silence, but police have the ability to detain a person for *up to* 24 hours.[201] It is not hard to imagine a detainee inferring that aiding the police will result in an earlier release (or prevent the police from charging them).[202]

[199] Leverick (2006), p.4.

[200] Indeed, this similarity is part of the reason Germany's position, regarding Plea-Bargaining and Sentence Discounting (given its frequent use of confession evidence), is questioned by academics from adversarial Justice Systems.

[201] Section 14 of the Criminal Procedure (Scotland) Act 1995: 12 hours is the norm but a senior officer can extend this by 12 hours.

[202] Police Bail, as exists in England and Wales, was less important before Cadder v HM Advocate (2010): one of the most significant cases in recent history. Cadder v HM Advocate (2010), in brief, held that Police procedure violated the Right to a Fair Trial by denying detained persons access to a solicitor during interviews. Following Cadder v HM Advocate (2010) it is now necessary for a solicitor to be available during interviews. However, as getting a solicitor can take time, it was deemed necessary to increase the time a person can be detained for: this potentially makes Police Bail more important. However, it may be that Police Bail has been overlooked in the change and turmoil following Cadder v HM Advocate (2010).

# Inducing The Innocent To Plead Guilty

Punishing those who exercise their right to trial is troubling, given the normative underpinnings of the Scottish Justice System: while offenders 'playing the system' is a public concern, even a guilty party has the right to make the prosecution prove the case against them.[203] However, Sentence Discounting is even more troubling, if it 'encourages the innocent to plead guilty'.[204] Indeed, it is this fear of innocent persons pleading guilty, that 'animates the often heated' debate on Sentence Discounting.[205]

There are 'moral and pecuniary costs to society' when a person is wrongfully convicted, or when a person who is guilty (but not of the crime charged)[206] is wrongfully 'labelled'.[207] While this is an uncomfortable thought, it would be 'naive to suppose this never occurred'.[208] Consequently, the possibility that innocent people plead guilty, creates issues with Liberal Rule of Law values, which the Scottish Justice System relies on for legitimacy.

## Liberal Rule Of Law

That innocent people may be induced to plead guilty, raises issues with the Liberal Rule of Law's inherent suspicion of state power. It is this suspicion that requires the state prove its case beyond reasonable doubt, before an individual can be sanctioned.[209] In Scotland, this value is generally

[203] This does not entitle the guilty to avoid conviction, though due process rights do make this more likely. This is certainly unfortunate, but given the normative and practical importance of due process, it is a worthwhile risk.

[204] Leverick (2004), p.382.

[205] Bar-Gill and Gazal-Ayal (2006), pp.353-354.

[206] F. Andrew Hessick Ill and Reshma Saujani (2002), p.213.

[207] Schulhofer (1979), pp.1985-1986.

[208] Leverick (2004), p.381.

[209] This is a broad generalisation and there are exceptions in practice. Of particular note are the direct measures used by Police (e.g. fixed penalty notices). For example, one item of guidance for police using fixed Penalty Notices states the required burden of proof as 'sufficient proof to reasonably believe a penalty offence has been committed': this is somewhat short of 'beyond reasonable doubt' (c.f. Johnston (2008) - especially para 7.1 and page 15).

accepted as constitutional in nature, given it is reflected in the Article 6 of the ECHR, and in the corresponding sections of the Human Rights Act 1998.

Whether a 'fair trial' is effective at protecting individuals (as the Liberal Rule of Law, rightly or wrongly, assumes) is questionable. However, questions over the efficacy of the trial process aside, guilty pleas are common. Indeed, given the move towards guilty pleas and diversions:

*It would seem that the courts (with their accompanying safeguards of judicial scrutiny of evidence and legal representation for the accused) are no longer seen as the appropriate place to deal with minor offences.*[210]

This means that the trial process (important under the Liberal Rule of Law) is not being fully utilised in many cases: even some serious cases where the accused pleads guilty.[211] How this is tolerated by legal actor's, who rely on various forms of social capital such as professional ethics,[212] is an interesting question. In practice, it seems there is a presumption of guilt,[213] as it is assumed the innocent will be filtered out of the trial process: by the police investigation, the decision of whether to arrest and charge a suspect, etc.[214]

However, when exploring the filtering effect of the pre-trial stages, it is worth recognising the different roles of the police, prosecution, and judiciary. While they are all part of the Criminal Justice System, they operate under different constraints, and take different factors into account in their decision making.[215] For example, 'it is commonly understood that the main function [of the Police and Prosecution]...is crime control'.[216] Thus, while they are not entirely unconcerned with justice, their main goal is to prosecute. Consequently, it is unsurprising that the police and prosecution primarily operate to secure convictions by guilty pleas, as these reinforce the actors' crime control goals.[217]

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[210] Leverick (2006), p.23.

[211] E.g. In Petto v HMA (2009) Advocate the accused pled guilty to murder.

[212] Tata (2010).

[213] Darbyshire (2000), p.904.

[214] Leverick (2004), p.381.

[215] Baumgartner (1992), p.133.

[216] Bittner (1967), p.700.

[217] This limits how effective the police and prosecutors can be at filtering out the innocent.

By contrast, in theory, the trial process is more orientated towards due process. However, Sentence Discounting and guilty pleas largely bypass the courts: meaning the accused is dealt with mainly by crime control orientated pre-trial processes. It could be argued, the courts exert due process influences on the pre-trial processes, thereby ameliorating this issue. However, the ability of the courts to regulate pre-trial processes is limited as, ‘judicial control only encompasses those aspects of...activity that are directly related to full-dress legal prosecution of offenders’.[218]

Thus, processes orientated towards crime control, leading to guilty pleas, are not ‘determined by any legal mandate’ and are not ‘under any system of external control’.[219] This limits the extent to which the courts (and due process) can influence cases where a guilty plea is tendered. This means that a trial may be crucial to counter the crime control biases of pre-trial processes: even though at a trial there may still be presumptions of guilt,[220] etc. Ultimately, this means that pre-trial processes may not filter out the innocent, and that guilty pleas resulting from Sentence Discounting could induce the innocent to plead guilty more than legal actors believe.

## Process Costs On The Accused: Remand

So far, as part of the analysis on the rationales for Sentence Discounting, the thesis has touched upon process costs affecting victims. However, it is worth recognising that (unjust) process costs also weigh heavily on accused persons. Sentence Discounting, and the resulting guilty pleas, may offer a way for accused persons to avoid these costs. Thus, even if Sentence Discounting is unjust in itself, the injustices it ameliorates may counterbalance this.

While there are many process costs, one of the most significant is remand. Part of what makes remand so serious, is that it deprives an accused person of their liberty, in a similar way as a custodial sentence would: the most severe sanction possible in Scotland. The implications of being held on remand are severe, potentially meaning: loss of employment; being separated from family

[218] Bittner (1967), p.699.

[219] Bittner (1967), p.699.

[220] Leverick (2004), p.381.

and friends; concerns regarding childcare; etc. These process costs may also disproportionately affect certain groups. For instance, child related issues may disproportionally affect women,[221] as women are nine times more likely to be single parents.[222]

Additionally, it is worth noting that the time spent on remand is often 'considerable'.[223] This is problematic as 'backdating' in Scotland is discretionary,[224] meaning lengthy periods deprived of liberty can amount to 'dead time'.[225] Furthermore, conditions in remand can be worse than prison: it is striking that those held on remand make up only 15% of the prison population, but account for 50% of self-inflicted deaths in detention.[226]

Normatively, remand has serious implications as it is imposed on innocent (until proven guilty) persons. Remand also raises issues as, it can be detrimental to an accused person's ability to mount a defence, often making it 'harder to meet and strategise with...lawyers, and to track down witnesses'.[227] This is clearly a significant issue, however, this point must be balanced against the fact that 'accused persons at liberty often avoid all contact with their solicitor', and some had no permanent residence (making them difficult for lawyers to find).[228] Thus, in some cases the fact an accused is held on remand will help facilitate meetings with their lawyer, which may improve their ability to strategise.

While the costs of remand cannot be explored further here, it should be clear that they are significant. Dead time, and conditions worse than prison are two of the main concerns. However, it is also a concern that remand damages the ability of an accused to mount a defence: if an accused's ability to mount a defence is compromised too much, they might not receive a fair trial.

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[221] Prison Reform Trust (2011): quoting Ministry of Justice (2010) Offender Management Statistics Quarterly Bulletin, January to March 2011, Table 2.1c, London: Ministry of Justice

[222] One Parent Families Scotland (2009) <http://www.opfs.org.uk/files/one-parent-families_a-profile_2009.pdf>.

[223] Kellough and Wortley (2002), p.190.

[224] McCafferty v HM Advocate (2007).

[225] Kellough and Wortley (2002), p.190.

[226] Prison Reform Trust (2011): quoting Ministry of Justice (2011) Safety in Custody 2010, England and Wales, Table 8, London: Ministry of Justice.

[227] Bibas (2004), p.2493.

[228] Pleasence and Quirk (2001), para4.3.7.

# The Overuse Of Remand

It would be expected that remand is used *sparingly and only for convincing reasons*: such as detaining threats to the public until a trial can take place. However, it is interesting to note that an accused who is held in remand, is significantly more likely to plead guilty.[229] This creates the possibility that, 'pre-trial detention provides the context in which police overcharging can become a tool for coercing or encouraging guilty pleas'.[230]

Figures in Scotland are scarce, but in England statistics show less than 2.3% of those on remand are accused of violent crimes.[231] It could be argued that remand is necessary, to prevent an accused absconding. This may be relevant in some cases (e.g. cases involving serious fraud by individuals with the resources to relocate),[232] but such persons are probably rare. Indeed, while minor offenders may abscond, given the limited seriousness of their offence, remand would be disproportionate. In these instances, the Scandinavian philosophy for minor offences (*if they abscond they will turn up*)[233] is preferable.[234]

Issues with the overuse of remand have been recognised for some time, and reports have warned of 'the true extent of the problem where the law on bail is not observed'.[235] In particular, one of the most significant process costs arises where a person is remanded to custody, but is eventually given a non-custodial sentence.[236] While figures specific to Scotland are lacking, UK statistics show that an estimated 39% of people held in remand do not receive a custodial sentence.[237] Even if such

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[229] Kellough and Wortley (2002), p.199.

[230] Kellough and Wortley (2002), p.190.

[231] Prison Reform Trust (2011): quoting Ministry of Justice (2010) OMCS, Table 6.2, London: Ministry of Justice.

[232] For instance, Gary Bolton: BBC News, 'Businessman Gary Bolton jailed over fake bomb detectors'. 20 August 2013 <http://www.bbc.co.uk/news/uk-england-23768203>.

[233] For instance, open prisons are common in Scandinavian countries. The general view taken with the risk of absconding, is that (if it occurs) the person can be caught again. However, absconders are relatively rare, though it may be that there are cultural reasons for this, and consequently the philosophy may not work in Scotland: though Tayside's two open prisons provide cause for hope (C.f. The Courier, ' All Castle Huntly and Noranside prisoners return after festive leave'. 5 January 2011 http://www.thecourier.co.uk/news/all-castle-huntly-and-noranside-prisoners-return-after-festive-leave-1.27651).

[234] Pratt (2008).

[235] Report on the use of bail and remand (2005), para 2.1.

[236] Report on the use of bail and remand (2005), para 2.4.

[237] Prison Reform Trust (2011): quoting Hansard HC, 11 July 2011, c76W.

accused won their case at trial, it would be a ‘hollow victory, as there are no ways to restore’ the days already lost:[238] though the advantage of avoiding a criminal record could be significant.[239]

However, regardless, the use of remand in cases that do not warrant a custodial sentence is extremely unjust. It imposes the most severe sanction the sentencers can dispense (possibly worse) on those who do not deserve it. Consequently, pleading guilty (regardless of innocence) could be advantageous as it decreases the likelihood of unjust ‘detention pending the resolution of’ the case.[240]

Thus, the use of remand is a powerful process cost, and one that may be used to secure a guilty plea. Indeed, research suggests at least some accused may ‘plead guilty from the outset if bail is opposed, in order to avoid being remanded in custody’.[241] If accused do plead guilty to avoid being held on remand, for an offence that may not warrant a custodial sentence, this is not just - especially if the accused is innocent. Thus, Sentence Discounting may, at least, allow the accused to gain something from a guilty plea they are unfairly induced to give.

## Is The Accused The Focus Of The Justice System?

It was once said that, in America the concern with Sentence Discounting was primarily with accused persons ‘getting off easy’; while in the UK the primary concern was undue pressure being placed on the accused.[242] However, in recent Scottish case law, ‘it is clear that there is a strand of judicial thinking that discounts have become too generous and too readily given’.[243] Lord Gill even stated that, ‘perhaps the most fundamental problem...is the possible perception of injustice,

[238] Bibas (2004), p.2493.

[239] Avoiding a criminal record is probably only important for first time offenders: who make up a minority of offenders.

[240] Tata, et al, (2004), p.132.

[241] Bradshaw et al (2012), para 6.11.

[242] Mulchay (1994), p.413.

[243] Shead (2013).

particularly in cases where severe sentences are deserved' but offenders receive a sentence that is 'less by a matter of years'.[244]

This change in focus, away from concern for accused persons, is not limited to the UK. In other European countries there has been less focus on justice for the accused, and more focus on other issues, especially justice for victims.. For instance, Baker notes that:[245]

*It seems that addressing the needs of victims has found political favour when meeting traditional responsibilities for safeguarding the rights of alleged perpetrators has not.*

An interest in victims is not problematic in itself. Arguably, justice should be viewed in the wider context of fairness to accused persons, victims (if any), and society as a whole. Furthermore, it is not, in theory, a zero sum game. Justice for victims does not necessarily detract from justice for accused persons. For example, the presumption of innocence helps the accused, but it helps victims by increasing the chance that only the right person is convicted. However, in reality trade offs are often made, and justice for victims is sought at the expense of accused persons.

Given that all groups are important, one could argue a balance is needed. To an extent this is true. However, I am loath to leave such an ambivalent conclusion as they are seldom useful. Ultimately, my view is akin to that of the Liberal Bureaucrat. The Liberal Bureaucratic Model aligns with due process in that, 'the need for justice overrides the need to repress criminal conduct'.[246] However 'the Liberal Bureaucrat recognises that things have to get done' and that rights need limits.[247] Given our legal system's Liberal Rule of Law values, particularly the suspicion of state power, fairness to the accused is particularly important. After all, it is the accused who is threatened by the state. Thus, as Sentence Discounting results in a bypass, to what normative theory considers the necessary for protections for individuals (i.e. the trial processes), I would argue Sentence Discounting is not just in this regard.

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[244] Gemmell v HM Advocate (2011), para 76.

[245] Baker (2009), p.843.

[246] Bottoms and McClean (1976), p.228

[247] Bottoms and McClean (1976), p.228.

### Statistics And Perspective

In theory, a Sentence Discount in Scotland should be up to 33% off the notional headline sentence. This is similar to the situation in England and Wales: after a proposal to increase the discount to 50% was rejected after an 'outcry' it was too lenient.[248] However, if the 'discount' is actually a trial tax, then it means a 50% increase for those who go to trial.[249]

This difference is significant for several reasons. Firstly, in cases involving co-accused, the difference may offend 'against the principle of comparative justice between co-accused'.[250] Secondly, a potential 50% increase is excessive: especially considering a 50% discount prompted an outcry as excessive. That there has not been an outcry over the size of this potential increase, may be due to a variety of reasons: such as, it not being viewed as an increase. However, it may suggest that the accused is becoming less central in the justice debate. This is normatively troubling, considering the Liberal Rule of Law values.

## Penal Parsimony

The severity of sentences appears to be increasing over time. Scotland, while perhaps faring better than England,[251] has experienced stubbornly high custody rates.[252] Concerns regarding this have grown, and been reflected by calls for penal parsimony, and by the increased scholarly interest in Scandinavian countries, which exhibit 'penal exceptionalism' by bucking this trend.[253]

[248] Wintour et al (2011).

[249] Leverick (2004), p.369.

[250] Leverick (2004), p.369.

[251] Millie, et al (2007), p.244.

[252] Scottish Executive (2012), 'Prison statistics and population projections Scotland: 2011-12' <http://www.scotland.gov.uk/Publications/2012/06/6972/3>.

[253] C.f. Pratt (2008).

The calls for penal parsimony raise interesting questions when analysing whether Sentence Discounting is just. In particular, it can be asked: if Sentence Discounting results in lower sentences, and thus aids penal parsimony, does this make it (more) just? In some ways it arguably does. Issue may be taken because Sentence Discounting does not focus on reducing sentences because of important issues (such as allowing children to be with their parents).[254] However, the result is practically the same: for instance, the offender with a child still receives a reduced sentence. Additionally, while a focus on important issues (such as children) is understandable, and provides a normative basis for discounting,[255] reducing sentences more indiscriminately[256] better aids penal parsimony. It also reduces the risk of inequality that may occur if, for example, co-accused receive different sentences because one has a child. Indeed, while calls to use non-custodial sentences in 'borderline cases',[257] where offenders have children,[258] are understandable; arguably, non-custodial sentences should be used in *all* borderline cases: making custody a *last* resort. If Sentence Discounting helps with this, then it has some merit.

Thus, the problem with Sentence Discounts may not be lesser sentences per se (as the media suggests). Indeed, there are calls for lesser sentences in general.[259] Rather, the objection may be to the means through which the lesser sentences are delivered, and the issues this causes. However, given that Sentence Discounting may result in penal parsimony by reducing sentences, it may benefit justice to some extent.

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[254] C.f. Centre for Law Crime and Justice, 'Doing Children Justice Event'. In this event, it was suggested, by Tam Ballie (Scotland's Commissioner for Children and Young People) and Justice Albie Sachs, that the use of custody should be reduced where the offender has children.

[255] C.f. Centre for Law Crime and Justice, 'Doing Children Justice Event'. In this event, Justice Albie Sachs argued that a reduced sentence is justified based on 'the rights of the child': which includes the right to be with their parent.

[256] For instance, discounting in all cases where an early guilty plea is tendered, regardless issues such as children.

[257] Cases where a custodial or non-custodial sentence is possible.

[258] C.f. Centre for Law Crime and Justice, 'Doing Children Justice Event'.

[259] C.f. Ashworth (2013b); and BBC News, 'Do not jail thieves and fraudsters, law professor says'. 14 August 2013 <http://www.bbc.co.uk/news/uk-23686277>.

# Conclusion: Is Sentence Discounting Unjust?

The normative objections that can be made against Sentence Discounting are very strong. That it may punish those who go to trial, is problematic for a Justice System that purports to uphold Liberal Rule of Law values, and guarantee a right to a trial. This issue is compounded by the concern that Sentence Discounting may induce the innocent to plead guilty. While estimating the number of innocent people who plead guilty is difficult, it would be naive to assume innocent people did not plead guilty for Sentence Discounts. This is problematic as not only may it damage public confidence - by creating doubt 'whether innocent men are being condemned'[260] - it also violates the Liberal Rule of Law ideal that 'every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offence without convincing a proper fact finder of his guilt with utmost certainty'.[261]

These concerns are even more significant as the rationales for Sentence Discounting are limited, in their ability to justify the practice. In fact, considering the strong objections and the weak rationales, it appears there is little reason to support the current practice of Sentence Discounting in Scotland. For instance, the Efficiency Rationale is argued to be *the* rationale for Sentence Discounting in Scotland. However, 'efficiency alone' is a 'weak' justification when compared to the principled objections.[262] Indeed, given the strength of the objections, all the rationales are, by themselves, limited.

Consequently, overall, it does not appear that Sentence Discounting contributes towards justice. On the contrary, it may be that Sentence Discounting is unjust. Perhaps, one reason to prefer Sentence Discounting, on a normative basis, is that it may go someway to reducing the other wrongs of the Justice System: such as the unjust process costs on accused persons and high custody rates. If Sentence Discounting does this, it may be the lesser of two evils, and hence preferable. However, there is the danger Sentence Discounting compounds rather than ameliorates these issues.

[260] In re Winship, p.365

[261] In re Winship, p.365

[262] Leverick (2004), p.386.

Additionally, using Sentence Discounting to reduce the impact of process costs and other wrongs, may prevent the issues being addressed in the way that they should.

Thus, on balance Sentence Discounting appears unjust, and not a laudable feature of the Justice System. Indeed, the controversy surrounding Sentence Discounting means such a conclusion is hardly surprising: there are few issues that attract such criticism in the High Court. For this reason, it may be better if Sentence Discounting were abolished. However, it seems unlikely Sentence Discounts will disappear anytime soon, given the priority that seems to be accorded to efficiency. Indeed, Sentence Discounts are only part of what may be an efficiency culture: reforms to legal aid, and the increasing use of direct measures, all suggest the priority is money, not justice. Perhaps once the current financial crisis abates this position will change, but this seems unlikely. Thus, regardless of whether it is just, Sentence Discounting is probably here to stay.

# PART 2: The Extent Of Sentence Discounting

Part Two, explores the extent of Sentence Discounting. This begins by assessing, what the extent of Sentence Discounting *should* be, based on the law. In doing so, various issues with the law, such as uncertainty, are identified.

Since what ought to be does not guarantee what actually is, Part Two also analyses the existing research on Sentence Discounting in Scotland. While there is limited research, it is possible that Sentence 'Discounting' might not be real, and that headline sentences could be increased to negate any stated discount.

# Chapter 3: The Expected Extent Of Sentence Discounting

# The Expected Extent Based On The Law

Despite its significance, the extent of Sentence Discounting is largely unknown. This chapter explores what the extent of Sentence Discounting *should* be, based on the law. The law on Sentence Discounting has changed dramatically over the last twenty years. Analysing these changes helps to inform the analysis on the expected extent of Sentence Discounting in Scotland. Additionally, the history of Sentence Discounting is also relevant to the later chapter, concerning the potential for legal actors' resistance to Sentence Discounting.

However, it must be noted that the expected extent of Sentence Discounting, based on the law, focuses on a number of decisions from the senior judiciary. As the senior judiciary make up a small proportion of the judiciary, it cannot be assumed their views are representative (though in Scotland there are relatively few sentencers compared to England and Wales, possibly making the senior judiciary more representative). Furthermore, there is no guarantee that the 'publicly announced reasons' for a decision 'necessarily accord with the 'real' reasons for a decision'.[263] This means that what should be, based on the law, may represent the empirical reality. However, given that (in theory) precedent binds the lower courts, the decisions of the senior judiciary represent the law, and the theoretical position.

Unfortunately, in analysing the law on Sentence Discounting a number of limitations become apparent. In particular, issues include a lack of transparency and certainty in the law, as not all of the senior judiciary agree on all points: indeed there is a 'rift between members of the Court'.[264] This makes estimating what the extent of Sentence Discounting should be, difficult. Additionally, uncertainty is problematic, because of the limitations Scotland demonstrates in producing guidance to rectify uncertainty. This issue is particularly acute considering the uncertainty following Gemmell.

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[263] Padfield (2013), p.40.

[264] Leverick (2012), p.233.

# A Brief History Of The Law On Sentence Discounting

Twenty years ago the High Court disapproved of Sentence Discounting as an 'objectionable' practice, in Strawhorn v McLeod.[265] However, despite this official disapproval, Sentencing Discounting may still have occurred. Along with judicial comments, on the 'prevalence' of Sentence Discounting that occurred 'informally':[266]

*Lord McCluskey...expressed the view that...contra Strawhorn, judges already routinely took into account the stage at which a guilty plea was tendered when sentencing.*[267]

Eventually, Sentence Discounting was officially accepted with s.196 of the 1995 Act, although this was merely permissive of Sentence Discounting. However, the 1995 Act was vague regarding: the appropriate size of Sentence Discounts, the rationale for Sentence Discounting, etc. In this regard Scotland differed from England and Wales, where detailed Guideline Judgements, and Sentencing Guidelines were developed.

The next major development in Scotland was the Du Plooy case.[268] Du Plooy may have been an attempt to make the law on Sentence Discounting more transparent. However, it is possible that Du Plooy was triggered by discussions ongoing at the time: such as the Scottish Executive's proposals for High Court reform, and Lord Bonomy's report on the Justice System.[269] This context may have prompted Du Plooy, out of 'a concern to avoid the imposition of legislative Guidelines'.[270] Indeed,

[265] Strawhorn v McLeod 1987.

[266] Chalmers et al (2007), para 5.20.

[267] Leverick (2004), pp.363.

[268] Du Ploy v HM Advocate (2003).

[269] This argued for a more 'predictable' system of Sentence Discounting.

[270] Tata and Hutton (2003), p.4.

shortly after Du Plooy legislative changes[271] were made to section 196, which required a sentencer 'shall' consider a guilty plea. However, conveniently, the imposition of the legislative changes was minimised by Du Plooy preceding it. Additionally, in Du Plooy, the Appeal Court highlighted the limited effect of the legislative change. For instance, the Court stated the difference between 'may' and 'shall' made no 'practical difference'.[272] Furthermore, Du Plooy also (conveniently) doubted the significance of the statutory requirement for sentencers to give reasons for not allowing a discount:[273] citing Cleishman v Carnegie,[274] the Court suggested that this was already required,[275] as an appeal against a sentence could be successful if the judge gave insufficient reasons for not discounting.[276] Interestingly, on one reading, these statements served to undermine any notion that the statute would alter judicial behaviour in sentencing: instead, it suggested it merely reflected current practice.

## **Recent Developments In The Law**

There have been several issues raised regarding Sentence Discounting since Du Plooy. These issues have included: the size of discounts; the eligibility of penalty points and disqualifications for discounting; the eligibility of extended sentences for discounting; whether public protection elements of a sentence should be ring-fenced; etc. The answers to these questions will affect the expected extent of Sentence Discounting in Scotland. Spence and Gemmell are probably the two most important cases, since Du Plooy, addressing these issues.

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[271] Specifically, the Criminal Procedure (Amendment) (Scotland) Act 2004. This substituted the word 'may' for 'shall', thereby requiring the sentencer to consider the guilty plea, rather than merely permitting them to consider it.

[272] Du Plooy v HM Advocate (2003), para 5.

[273] Criminal Procedure (Amendment) (Scotland) Act 2004, section 20

[274] Cleishman v Carnegie (1999).

[275] Du Plooy v HM Advocate (2003), para 5.

[276] Section 20 did require reasons to be stated in open court, rather than on appeal.

## Spence v HM Advocate

In Spence,[277] the Court provided a rare Guideline Judgement, under section 118(7), in an attempt to remedy questions regarding Sentence Discounting, that remained following Du Plooy. In particular, the court re-emphasised the Efficiency Rationale, and gave guidance as to the appropriate size of Sentence Discounts. It held that: a guilty plea at a Section 76 Hearing could be discounted by up to one-third; a guilty plea at a Preliminary Hearing, or First Diet, could be discounted by up to 25%; and a guilty plea at trial should, if anything, not normally exceed 10%.[278] Interestingly, Leverick notes that whether by coincidence or design, this guidance is identical to that of the Sentencing Guidelines Council in England and Wales.[279] However, regardless of why the Court chose this Sliding Scale, all indications are that it was accepted without much issue. Indeed, the certainty provided by a sliding scale is laudable. It provides accused persons with a clearer idea of the merits of pleading guilty, and it also fits with the Efficiency Rationale: by increasing the certainty of Sentence Discounts, it can be expected that more people will plead guilty.

## Gemmell v HM Advocate

The most recent decision of significance to Sentence Discounting is Gemmell v HM Advocate.[280] This case (involving a bench of five judges) consisted of seven conjoined appeals. Though some aspects of the judgment conflict, and there is even a 'rift' in the Court on certain issues, there are many important questions addressed in the case.[281] In particular, the case explored two main issues: whether the parts of a

[277] Spence v HM Advocate (2007).

[278] Parts of the Gemmell case case conflict on this issue, with some taking issue with the 'rigidity' of a Sliding Scale.

[279] Leverick (2008), p.44.

[280] Gemmell v HM Advocate (2011).

[281] Leverick (2012), p.233.

sentence deemed to be for public protection are eligible for Sentence Discounting; and whether penalty points and disqualifications from driving are eligible for Sentence Discounting.[282]

While these issues cannot be explored here, one main point to note is the deviation Gemmell appears to make from the fundamentals of previous case law. In particular, Lord Gill questions the appropriateness of the Sliding Scale approach to Sentence Discounting.[283] This is interesting as, since Spence, this approach has been officially accepted, even if it is not always strictly applied in practice: for instance, Sheriffs may grant one-third discounts to those pleading on the morning of their trial.[284] Additionally, Lord Gill also questioned whether Sentence Discounts up to one-third could be too big.[285] This is interesting as, discounts of up to one-third have apparently been accepted since Du Plooy. However, perhaps the most significant feature of Gemmell is the suggestion that Sentence Discounting should be 'exercised sparingly and only for convincing reasons'.[286] This is problematic as it is not clarified how limited 'sparingly' is, nor is it clear what are 'convincing reasons'. Indeed, if the Efficiency Rationale is accepted, as it was by Lord Gill, these statements are puzzling: as the only limitation to Sentence Discounting, and the only reason needed, should be 'efficiency'.

The consequence of this is that, since Gemmell, the fundamentals of Sentence Discounting in Scotland must be questioned. Unfortunately, despite the questions it raises, Lord Gill's decision provides few answers. Part of the reason there are no

[282] This was interesting. Not only does it contrast with the position in England and Wales, but since many offences involving penalty points do not involve courts (e.g. Fixed Penalty Notices), no discount can be applied in most cases. Perhaps, the accused could contest the ticket and plead guilty at the trial to get a discount: though this would dramatically reduce any efficiency gains.

[283] At Para 78, Lord Gill cites the risk of rigidity with the Sliding Scale. Instead, he advocates the general principle that the earlier the plea the larger the discount. This would return the law to the position it was in before Spence: which was criticised for uncertainty.

[284] Bradshaw et al (2012).

[285] In an obiter paragraph (para 79), Lord Gill also questions whether the one-third discount contemplated in Du Plooy may be too great: given the early release provisions in Scotland. This is interesting as, if a future case were to decide one-third discounts are too great, it would be a significant change in Sentencing Discounting: which has allowed up to one-third discounts since Du Plooy v HM Advocate (2003).

[286] Gemmell v HM Advocate (2011), Para 77.

clear answers, is that Lord Gill argues his decision merely espouses the law as it has always been, and that any other view has been incorrect. For instance:

*Spence v HM Advocate...is not at odds with Gemmell itself so long as it is interpreted correctly.*[287]

However, given the preponderance of opinion to the contrary (from both case law[288] and legal commentators) this seems hard to accept. A more cynical view may be that by arguing this is the way the law has always been, a significant change can be effected without risking the perception a judge is changing the law. The desire to change the law on Sentence Discounting is not improbable as it has been noted that:

*Judges have expressed discomfort with the system. For example, at least two High Court judges...have questioned the appropriateness of the practice of Sentence Discounting.*[289]

Of course Lord Gill was not the only judge in Gemmell, and it would be wrong to simplify the matter as such. However, his decision is important as it was arguably the leading judgement, and one of only two that commented on the key issue of how common discounts should be. The other decision, from Lord Eassie, advocated a position more consistent with previous case law: to encourage confidence in Sentence Discounting and promote the *utilitarian*[290] benefits.[291] Thus, the question arises, will Lord Gill or Lord Eassie's judgement be accepted?

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[287] Murray v HM Advocate (2013), para 24.

[288] For instance: Du Plooy v HM Advocate (2003) supports the Efficiency Rationale; and Spence v HM Advocate (2007) (and all the cases following Spence) support the Efficiency Rationale, and the Sliding Scale.

[289] Leverick (2006), p.21.

[290] Lord Eassie uses the term 'utilitarian', despite Lord Gill's rejection of this.

[291] Gemmell v HM Advocate (2011), paras 145-147.

# Will Lord Gill's Comments Prevail?

The law on Sentence Discounting is far from clear. This is interesting given that this is not an obscure area of law: guilty pleas are extremely common and the question of whether a discount is warranted arises frequently. Until Gemmell, it could be expected that most cases would receive a discount for a guilty plea on a Sliding Scale. Following Gemmell, this position has to be questioned. However, Gemmell exposed a 'rift between members of the court'.[292] This means, it is not certain whether Lord Gill's opinion will prevail in changing the law.

Unsurprisingly, Lord Gill's decision in the case of Murray (Stephen) v HM Advocate[293] supported his decision in Gemmell. Regarding the extent of Sentence Discounting, it was reiterated that a discount should not be expected in every case. Ultimately, the discount given for the section 76 plea (which was noted to be two months after the offender's confession)[294] was less than expected: on the basis of the guidance in Spence v HM Advocate (2007). Additionally, it was noted that as a result of the confession there was no need for witnesses, and thus no witnesses to be spared.[295] This, interestingly, suggested a Victim Rationale for Sentence Discounting. It also raised the question that, had the accused not confessed and witnesses been consequently required, would his plea may have been viewed more favourably?

Furthermore, a controversial matter in this case was all three judges agreed, that where an accused appeals a Sentence Discount, the Court can review the entire sentence and increase it. This is objectionable where the prosecution does not object to the sentence initially imposed, enough to appeal itself.[296] This means that, had the accused not appealed, there would have been no opportunity for the increase. This

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[292] Leverick (2012), p.233.

[293] Murray (Stephen) v HM Advocate (2013).

[294] Murray (Stephen) v HM Advocate (2013), para 22.

[295] Murray (Stephen) v HM Advocate (2013), para 25.

[296] Shead (2008).

issue is exacerbated as, in the context of Sentence Discounting, it adds to the 'trial tax' as another deterrent against an accused exercising their right to trial. This is normatively questionable, and a reason against the Appeal Court, taking it upon itself, to increase a sentence when it has not been appealed by the prosecution.

However, excluding Murray, there has not been any indication of a dramatic change resulting from Gemmell. While there is actually little evidence either way, if there were a significant change, it could be expected that there would be some anecdotal evidence by now. This suggests that, in practice, Lord Gill's judgement may not have prevailed. Indeed, in Brian Lees v Her Majesty's Advocate, the Court (considering Gemmell) applied 'the *standard* one-third discount': suggesting the Sliding Scale remains the default approach to Sentence Discounting, and that Sentence Discounting is not to be used sparingly.[297] Similar results have been seen in other cases considering Gemmell.[298] Unfortunately, as there has been no detailed discussion of Gemmell in these cases, the operation of Sentence Discounting remains unclear.

Ultimately, it appears the situation may not have changed significantly as a result of Lord Gill's judgements,[299] though it is too early to know for sure. There is certainly enough ambiguity and dissenting opinions in the Gemmell for multiple interpretations. Thus, it could be, for example, that Lord Eassie's opinion is preferred, and that Gemmell may not be as dramatic a change as some feared it might be.[300]

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[297] Brian Lees v Her Majesty's Advocate (2012), para 8.

[298] For instance, see Gerald Docherty v Her Majesty's Advocate (2013). Here, the Court (considering Gemmell v HM Advocate (2012)) increased a discount from 12% to 25%, on the basis that there was a plea at the first Preliminary Hearing. While this is less than one-third, it cannot be determined if this is due to Gemmell or some other factor. However, regardless, it is still close to the previous pattern.

[299] The next chapter speculates on the possibility that Sentence Discounts might not be 'real'. *If* this were correct, then it would be difficult for Lord Gill's judgment to alter Sentence Discounting.

[300] E.g. Paul McBride, as cited in The Herald Scotland, 'Judges in warning on sentences'. 21 December 2011 <http://www.heraldscotland.com/news/crime-courts/judge-in-warning-on-sentences.16231473>.

## Policy Transfer

Scotland seems to follow on from England in various matters.[301] For instance, the Sliding Scale advocated in Spence, was very similar to the approach taken by the Guidelines in England and Wales: even Lord Gill, noted this similarity.[302] Additionally, the statutory provisions relating to Sentence Discounting 'are in near identical terms'.[303] Part of the reason for this similarity is that, although 'the law, procedures and practices are distinctive on either side of the border, they are not mutually unrecognisable'[304]. Thus, previously it may have been possible (with caution for differences, such as the caught red-handed exception)[305] to look towards England and Wales for answers to unknown questions of Sentence Discounting in Scotland.[306]

However, if Lord Gill's comments in Gemmell prevail, there is potentially a sharp break in similarity between England and Wales. Why this break may have occurred is a complex question that cannot be explored here: it is likely due to factors such as normative 'aspirations', differing histories of conflict between Government and the Judiciary, etc.[307] Yet, regardless of the reasons, it is notable that Lord Gill's comments would radically differentiate Scotland from England and Wales: the comments would create a presumption against Sentence Discounting (unless there are good reasons), which would contrast with the presumption for Sentence Discounts being given in England and Wales. This is not necessarily a bad thing, considering there are good reasons to object to Sentence Discounting. What may be

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[301] C.f. Tata (2013): Specifically Tata explores the guidelines model.

[302] Gemmell v HM Advocate (2011), para 78.

[303] Brown (2013), p.676.

[304] Tata (2013), p.237.

[305] The caught red handed exception applies in England and Wales. This exception means that where there is overwhelming evidence against an accused, the discount they receive for pleading guilty can be reduced.

[306] C.f. Brown (2013), pp.675-676. This discusses the 'extensive reference' that has been made to English authorities, in 'extremely important criminal appeals'.

[307] C.f. Tata (2013). Indeed, if these factors are causing differences, it may explain the apparent 'unwillingness' noted by Brown (2013), of the Court of Appeal (Criminal Division) to consider Scottish authorities.

unfortunate is that, if Scotland is diverging so much from England and Wales, it introduces uncertainty to the law. This uncertainty is problematic, given that Scots law may be slow to develop guidelines.

## **Conclusions On The Law**

The law on Sentence Discounting in Scotland is not entirely clear, and there are aspects that appear contentious. However, under the law, the expected extent of Sentence Discounting could be quite large. Indeed, sentencers have even expressed concerns that the extent of Sentence Discounting is too great: there is a concern that discounts are so great they will damage public confidence. Yet, looking at Gemmell as a recent case, there are some interesting conclusions about the expected extent of Sentence Discounting that can be drawn. For instance, in Gemmell a 3/2 majority agreed[308] that public protection is not 'ring fenced', and that for determinate sentences the whole period is eligible for the purposes of Sentence Discounting. This increases the expected extent of Sentence Discounting. Additionally, unlike in England and Wales, penalty points and disqualifications are regarded as punishments, within the meaning of section 196, and thus eligible for Sentence Discounting. This increases the potential extent of Sentence Discounting, given there were 320,282 driving offences in 2010/2011:[309] though, since a large number of penalty points involve Fixed Penalty Notices, they will never reach court.[310]

However, extended sentences were argued to be regulated by statute. Thus, the extended part (used for public protection) is not eligible for Sentence Discounting. This limits the extent of Sentence Discounting somewhat. Additionally, the

[308] Lady Paton and Lord Osborne dissented.

[309] 'Scottish transport Statistics No 30: 2011 Edition' <http://www.transportscotland.gov.uk/strategy-and-research/publications-and-consultations/j205779-37.htm>.

[310] In 2013 even more driving offences will become eligible for FPNs: including tailgating, and 'lane hogging'.

acceptance/rejection of Lord Gill's views on Sentence Discounting (such as his view that Sentencing Discounting should be used 'sparingly and only for convincing reasons') could dramatically affect the extent of Sentence Discounting. While it appears Lord Gill's comments have not been taken to heart, it is too early to know for sure. It also remains to be seen how the High Court respond to Sentence Discounting in the future.[311]

[311] For instance, Lord Gill indicated an issue with the one-third discount suggested in Du Plooy, but that Gemmell was not the 'opportune' place to discuss this: as Gemmell did not raise this question. Thus, in the future, it may be that when the moment is *opportune* the High Court may argue to reduce the extent of Sentence Discounting.

# Chapter 4: The Empirical Extent of Sentence Discounting

# **Empirical Research**

The previous chapter explored what the extent of Sentence Discounting should be, based on the law. However, what the law suggests ought to be, does not guarantee what actually is. Consequently, while Spence v HM Advocate (2007) implies that discounts could be expected in most cases,[312] this cannot be assumed. Thus, it is prudent to analyse the extent of Sentence Discounting, based on the empirical evidence and research available.

Assessing the empirical extent of Sentence Discounting is complicated by the dearth of research on the topic. There are a variety of reasons for this, but 'the dearth of research is often put down to judicial reluctance to be studied'.[313] This is unfortunate as, the empirical extent of Sentence Discounting can only be discovered through research. Other information (such as Court records) is recorded for a variety of purposes, many of which have little to do with sentencing, let alone Sentence Discounting in particular.[314] This means that much of the data routinely collected will not capture necessary information. For example:

*Recording outcome alone is not very helpful: we need to know, first, the facts of individual cases, the manner in which the crime was committed, as well as the background of the offender, before useful comparisons can be made...Second we need to know sentencers' reasons for their decisions.*[315]

This information cannot be obtained without research. The endless variations in the facts of a case,[316] and the difficulty discovering the true rationale for a decision, mean that it is not practical for standard data collection routines to provide enough information.

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[312] Though Gemmell v HM Advocate does make this uncertain.

[313] Padfield (2013), p.40.

[314] Hutton (2010).

[315] Padfield (2013), pp.40-41.

[316] Padfield (2013), p.41.

However, while research is limited, there are two studies, in particular, that shed some light on the extent of Sentence Discounting: (1) 'The Public Defence Solicitors' Office in Edinburgh: An Independent Evaluation' (hereinafter the 'PDSO Study'); and (2) 'An Evaluation of the High Court Reforms Arising from the Criminal Procedure (Amendment) (Scotland) Act 2004' (hereinafter the Aberdeen Study). While neither study focused specifically on Sentence Discounting, and both occurred before various changes in the law,[317] they provide an intriguing insight into the empirical extent of Sentence Discounting.

## The PDSO Study

The PDSO Study is unique, as it was a 'large-scale quantitative study'.[318] It analysed the operation of the Public Defence Solicitors Office (PDSO). One pertinent feature of the PDSO was that it 'resolved cases at an earlier stage', with more guilty pleas at the intermediate or trial diet.[319] For instance, in Sheriff Court Custody cases 38% of cases were disposed of at the pleading diet, and only 23% before trial.[320] This was a 'marked' difference from non-PDSO cases, where this was reversed: with 39% of cases disposed of before trial, and 27% at the pleading diet.[321]

Thus, all things being equal, it could be expected that PDSO clients, more so than non-PDSO clients, would benefit from Sentence Discounting, and receive lesser sentences in much the same way as offenders south of the border: Sentence Discounting in England and Wales was not 'uniform', but it appeared likely that a

[317] The PDSO Study occurred prior to Du Plooy v HM Advocate (2003), which is significant in this context. The Aberdeen Study is more recent, and while there have been legal developments, Sentence Discounting formally existed at the time of the Aberdeen Study.

[318] Goriely et al (2001), p.54.

[319] Goriely et al (2001), p.3.

[320] Goriely et al (2001), p.85.

[321] Goriely et al (2001), p.85.

discount could be achieved by pleading guilty.[322] Interestingly, the PDSO Study, compared the sentences of PDSO clients to non-PDSO clients. Though no two cases are alike, the large number of cases analysed allowed for probable 'underlying patterns' to be revealed.[323] However, surprisingly:

*Research comparing samples of similar cases in the period found that there did not appear to have been any widespread practice of guilty plea discounting.*[324]

Ironically, the only difference between PDSO and non-PDSO clients was a small, but statistically significant (at the 99% level), increase in likelihood of conviction: 87% of PDSO clients were convicted, compared to 83% of non-PDSO clients.[325] This difference, is largely explained by the later guilty pleas by non-PDSO clients increasing chance of a case collapsing.[326] However, regardless of the reason, it appeared that pleading guilty disadvantaged the accused.

That 'little in the way of Sentence Discounting' appeared to take place is interesting given that section 196 was permissive of Sentence Discounting, and that 'interviews with accused persons suggested that the expectation of a near automatic discounts was widespread'.[327] The potentially limited extent of Sentence Discounting was, partly, attributed to judicial reluctance[328] towards Sentence Discounting.[329] However, it may also be that the potentially limited extend of Sentence Discounting, in Summary Cases, occurs because the small sentences limit the potential size of discounts.[330]

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[322] Tata et al (2004), p.130.

[323] Goriely et al (2001), p.54.

[324] Tata (2007), Footnote 82.

[325] Goriely et al (2001), p.95 and p.105.

[326] Goriely et al (2001), p.96.

[327] Tata (2007), Footnote 82.

[328] Discussed more in the Resistance Chapter.

[329] Goriely et al (2001), p.109.

[330] Goriely et al (2001), p.109.

However, even if the extent of Sentence Discounting was limited before Du Plooy, the Justice System still utilised other 'informal forms of sentence reward for a plea of guilty'.[331] This is interesting as, it should have made a sentence differential noticeable - at least according to the concerns of those, such as Lord Gill, who feel Plea-Bargaining and Sentence Discounting result in excessive sentence reductions. Indeed, while the PDSO did not receive preferential treatment in bargaining with fiscals, they were regarded 'positively', as more 'trustworthy', organised, pro-active, and generally 'better at agreeing pleas'.[332] Thus, the PDSO should have been as good, if not better, at securing discounts through some other form of Plea-Bargaining.

Why the PDSO clients did not receive lesser sentences overall, is uncertain. It may have been that the advantages of delaying a guilty plea, outweighed the disadvantage of a reduced/no discount, or that similar discounts or Plea-Bargains were available for late pleas.[333] Indeed, it may be that a better deal can be obtained on the day of trial, as the prosecutor will be overburdened, making it 'the best time to put on the screws'.[334] Ironically, this would mean that Plea-Bargaining, although designed to resolve cases more efficiently, results in delay.[335]

It may also be that, 'discounting is widespread in Scotland, but in specific kinds of cases and at specific stages'.[336] As the PDSO Study did not focus specifically on Sentence Discounting, it was not able to explore this possibility further. However, it is interesting to consider that today, Sentence Discounting may not operate in the same way in all cases. This means that Sentence Discounting could be influenced by factors such as the nature of the offence, and the seriousness of the offence. From the previous chapters, it can be seen there is little (apparent) basis in law for such distinctions: if the rationale for discounting is efficiency, and there is no ring fencing

[331] Leverick (2004), p.377.

[332] Goriely et al (2001), p.100.

[333] Goriely et al (2001), p.110.

[334] Tata (2007), p.512.

[335] See the discussion in Chapter One, regarding whether Sentence Discounting really is more efficient, or whether it creates a culture of inefficiency.

[336] Goriely et al (2001), p.130.

of public protection elements of a sentence, etc. However, given the uncertainty in the law, and the potential for legal practice to deviate from legal theory, this possibility should not be ignored in any future research.

Alternatively, it may be that Sentence Discounting did not occur during the PDSO Study. This would have been problematic given that, 'accused persons may, therefore, have pled guilty partly in the mistaken expectation of a discount'.[337] This would raise questions of fairness, if the Justice System (even inadvertently) misled accused persons to secure guilty pleas.

While the law has changed since the PDSO Study, the belief in Sentence Discounting has remained. At the time of the PDSO Study, accused persons may have plead guilty, wrongly, believing they would receive a discount.[338] Considering that accused person's beliefs are strongly influenced by their lawyers, there is evidence that (at least some) legal professionals also believed Sentence Discounts were likely before Du Plooy.[339] Thus, if legal actors wrongly believed in Sentence Discounting once, any current beliefs should be questioned. Indeed, today 'there is anecdotal evidence to suggest that some judges may simply start their calculations of sentence from a higher initial tariff to avoid giving the full Sentence Discount'.[340]

## Studies Corroborating The PDSO Findings

Information on the effect of Plea-Bargaining following Du Plooy is limited. There has not been a subsequent empirical study of the same depth as the PDSO Study. However, it may be that, today, Sentence Discounting occurs to a greater extent than

[337] Tata (2007), Footnote 82.

[338] Tata (2007), Footnote 82.

[339] Though the PDSO Study (page 109) highlighted 'several defence agents and procurators fiscal were skeptical that *any* discounts were granted for early pleas'.

[340] Leverick (2006), p.16.

at the time of the PDSO Study. Indeed, this appears to be the case as, since Du Plooy, sentencers often state a discount has been applied. There is also evidence, suggesting that this has resulted in an increased number of guilty pleas.[341] However, the Aberdeen Study provides a basis to question this. The Aberdeen Study is valuable as, being more recent than the PDSO Study, it takes into account significant changes in the law, such as Du Plooy.

In particular, the Study leaves open the possibility that when sentencers state discounts are applied, the headline sentence may be increased to compensate.[342] As with the PDSO Study, the Aberdeen Study did not focus specifically on Sentence Discounting. This means it was not able to carry out empirical research on this issue. Indeed, it was only able to highlight the concern of legal actors, who suspected the headline sentence was being inflated to negate Sentence Discounting. However, this concern adds to the possibility, raised by the PDSO Study, that despite the appearance of Sentence Discounting, the discounts do not materialise.

Additionally, the 'Evaluation of the Reforms to Summary Criminal Legal Assistance and Disclosure' also noted a concern that discounts were not as 'real as they seemed'.[343] In particular, one interviewee was 'far from convinced there is such a thing as a discount'.[344] Again, the suspicion was that the headline sentence was increased to negate any stated discount. Unfortunately, why this happens is not elaborated on.[345] It may be that, in Summary Cases, the penalties are too small for Sentence Discounting to make a noticeable difference. Consequently, it may be that Sentence Discounting is not significant for the 'average criminal'.[346] This is problematic as, it would suggest that most accused are pleading guilty and not getting the expected discount. However, alternatively, it can be questioned whether sentencers might be intentionally using their broad discretion to increase headline

[341] Chalmers et al (2007), para 6.45.

[342] Chalmers et al (2007), para 6.26.

[343] Bradshaw et al (2012), para 6.9 to para 6.11.

[344] Bradshaw et al (2012), para 6.9 to para 6.11

[345] Not being focused on Sentence Discounting means the research could only gather limited information.

[346] Bradshaw et al (2012), para 6.9.

sentences, to negate any discounts: perhaps due to the ‘reluctance’[347] the PDSO Study noted towards Sentence Discounting?[348]

Interestingly, the apparently limited extent of Sentence Discounting, conflicts with the concern, highlighted in the Aberdeen Study, that Plea-Bargaining and Sentence Discounting excessively benefit the accused. For instance, one respondent was concerned that: (1) the prosecution may charge bargain for the plea; (2) the agreed narrative and lack of witnesses testimony may mean the ‘the nasty bits’ tend not to come out’; (3) and the judge will apply a discount to the less serious and ‘cleaned up charges’[349]. Thus, on the one hand, there is concern that Sentence Discounting might not be ‘real’, and does not benefit the accused. On the other hand, there is a concern that Sentence Discounting benefits accused persons too much.

These views appear at odds with each other. However, if both exist, it is possible that sentencers will assume that guilty pleas have been achieved with a Plea-Bargain. Accordingly the sentencer (while possibly unaware of the particular details) could consider this in sentencing. This would mean, paradoxically, that the concern over excessive discounts, leads to the conflicting concerns over the lack of Sentence Discounting.

[347] Goriely et al (2001), p.109 and para 12.11.

[348] C.f. Resistance Chapter.

[349] Chalmers et al (2007), para para 6.26.

# **Explaining The Possible Lack Of A Discount**

*If* Sentence Discounting is not real, one possible reason for this could be that the discount is applied to the hypothetical sentence an accused would have received, if they were convicted at trial. However, what the actual sentence would have been is unknowable: ‘given the extent of sentencing discretion possessed by Scottish judges, there is no real way of telling if the accused actually received a lesser sentence as a result of pleading guilty’.[350] Even the judiciary cannot know what the sentence would have been. Indeed, the difficulty predicting the outcome of a trial is recognised in Du Plooy:

*It cannot be assumed that a judge is in a position to determine reliably whether as a practical matter it is almost inevitable that the accused would have been convicted. The prosecution of an accused may involve novel or complex issues. Its outcome may depend vitally on questions of credibility and admissibility.*[351]

Additionally, there are a myriad of other reasons why a trial may not turn out as predicted. For instance, a witness may not live up to their precognition at a trial, but such a weakness would never be known unless the case goes to trial. This leads to the question of, how the hypothetical headline sentence (predicted by the sentencer after a guilty plea is tendered) compares the sentence that would have been given had the accused gone to trial. In particular, it can be questioned whether the predicted headline sentences are too high.[352]

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[350] Leverick (2006), p.16.

[351] Du Plooy v HM Advocate (2003), para 13.

[352] Indeed, if there is a presumption of guilt among legal actors, a trial may provide an opportunity to dispel this doubt (to an extent that reduces their sentence).

## Explaining The Possible Lack Of A Discount: Can a lesser sentence occur through trial?

In practice, at trial, it may be possible for one of the factors mentioned in Du Plooy[353] (or any other factor) to reduce the sentence an accused receives. For instance, one advantage of the trial may be that it gives an accused person an opportunity to convey their side of the story. While how well trials facilitate this is questionable, the trial may nonetheless be 'an opportunity of sorts' and prevent the accused being marginalised or typified.[354] While it could be argued that Social Enquiry Reports (SER) fulfil this purpose, there are reasons to doubt this. One reason to doubt this is that 'most skip read'[355] the reports, and the narratives of hardship, etc conveyed by the reports are 'so common' they are 'not noteworthy'.[356] Additionally, as SERs are written by professionals, they become routine/standardised, and convey 'encoded evaluative messages about the offender'.[357] This means the message the SER conveys is not, as sentencers 'tended to feel', 'an unmediated insight into the accused's character'.[358] Consequently, the message in the SER may differ from the message the accused would convey: for instance, the accused may have a novel mitigating circumstance, that is lost when it is standardised in SERs.

Thus, despite SERs, accused persons can still be marginalised.[359] Additionally, there are indications that SER writers intentionally 'facilitate the closure of guilty pleas'.[360] For instance, in one case, an accused pleading guilty to possession of a knife, revealed to the report writer that he actually possessed a screwdriver: thereby

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[353] Du Plooy v HM Advocate (2003), para 13.

[354] Leverick (2004), p.374 (referring to witness participation but the point is valid for accused persons as well).

[355] Tata (2010), p.245.

[356] Tata (2010), p.246.

[357] Tata (2010), p.252.

[358] Tata (2010), p.252.

[359] Tata (2010), p.246.

[360] Tata (2010), p.252.

undermining a crucial part of the charge.[361] However, the report writer mediated this by writing that the accused, admitted having an 'offensive weapon'.[362] Thus, it could be questioned whether, if the accused had gone to trial, this fact would have become known and the consequent sentence reduced. Consequently, for reasons such as this, going to trial may be one way that a lesser sentence can be obtained.

However, there are many reasons why a trial may not result in a lower sentence. In particular, the extent to which an accused can convey their side of the story at trial is limited. The process is dominated by legal actors, and the accused's input, as an outsider, will be limited. Additionally, the accused may be stressed and unfamiliar with court procedure, which does not improve their ability to meaningfully contribute. Furthermore, it is possible for trials to go badly: for instance, clients can unexpectedly break down in court, or inadvertently reveal something damning. Thus, the risks of trial need to be balanced against the benefits.

Additionally, any benefits of a trial may be equally obtainable through Plea-Bargaining. For example, an accused may be able to benefit from fact bargaining, and have it noted he possessed a screwdriver, not a knife.[363] However, the effect of Plea-Bargaining on sentences is a complex question, that cannot be easily answered. For instance, it might be assumed that charge bargaining results in a lesser sentence for the accused. However, some commentators have questioned whether, overcharging occurs to give the prosecutor leverage to persuade the accused to plead guilty, by dropping the extra charges.[364] Consequently, if overcharging occurs, this means that Plea-Bargaining will not affect the sentence as much as might be assumed: as any charges bargained over may have been dropped at trial regardless. Indeed, this might partly explain why there was no indication of a reduced sentence for PDSO clients, even though 'the office was better at agreeing pleas'.[365]

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[361] Tata (2010), p.252.

[362] Tata (2010), p.252.

[363] Leverick (2004), p.360.

[364] Kellough and Wortley (2002) p.189.

[365] Goriely et al (2001), p.100

Ultimately, whether the trial benefits an accused will depend on a variety of factors. However, given the surprising lack of a sentence differential detectable in the PDSO Study, it is worth questioning the potential benefits of a trial on an accused's sentence.

## Measuring Sentence Discounts For Guilty Pleas

As discussed above, estimating the extent of Sentence Discounting is difficult. Not only is there broad discretion[366] in setting the headline sentence, but there are other variables, such as other forms of Plea-Bargaining and the effects of a trial on sentences, to consider. If these variables are not accounted for then it will be difficult to produce valid results. For example, an empirical study, not accounting for these variables, might find those who plead guilty receive lesser sentences. However, in such a study it could be that Sentence Discounting has no effect on the sentence, and the lesser sentence is due to some other form of Plea-Bargaining.[367] Thus, there is a challenging 'third variable' problem to be overcome.

Yet, despite the above difficulties, the SC has apparently managed to calculate the extent of Sentence Discounting. For instance, a 2010-2011 bulletin[368] detailed the extent of Sentence Discounting: stating, 69% of those pleading guilty received a 33% discount, 2% no discount, etc.[369] This, in quite a clear manner, suggests the extent of Sentence Discounting in England and Wales.[370] Indeed, if accurate, similar information relating to Scotland would be extremely useful in answering the question in this thesis.

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[366] This discretion creates uncertainty. For instance, there is research suggesting the decision can vary depending on the judge's breakfast. (C.f. Nicola Padfield (2013) p.48; and Shai Danziger et al (2011).

[367] In essence it would be a 'third variable problem'.

[368] Steeples and Bell (2011).

[369] Steeples and Bell (2011), p.2.

[370] While this information is of limited depth, the bulletin acknowledges this and states the survey was not intended to be detailed.

However, 'if accurate' is the key phrase. Unfortunately, the SC estimates the hypothetical headline sentence, that would have been given if the accused was convicted following a trial, by:

*[Making] use of the guilty plea reduction recorded at Part B, Section 7 (Indication of guilt/ guilty plea) of the form to work back from the final sentence outcome.*[371]

Thus, this method merely involves taking the stated discount as correct and performing a simple piece of arithmetic. However, accepting that the stated discount is empirically accurate, and that there has been no compensation in the headline sentence, is (for the reasons above) problematic. Thus, the SC's method of calculating the extent of Sentence Discounting may produce invalid results. To some extent, the Sentencing Guidelines of England and Wales may help reduce this problem: as they constrain discretion regarding headline sentences. However, in practice, there is still enough slack within the guidelines that this cannot be assured.[372]

This makes it notable that the SC, while being transparent in how it arrived at its estimates, fails to mention this potential invalidity: it is likely the SC is aware of the issue, but for some reason has failed to explore or emphasise it.[373] Thus, the estimates used in England and Wales cannot be relied upon as empirically accurate. Furthermore, the same method would be even worse in Scotland owing to the lack of Sentencing Guidelines. This means that, for Scotland (though I would argue, also for England and Wales) a better/valid way to calculate the extent of Sentence Discounting is needed.

[371] C.f. Steeples and Bell (2011), p.32.

[372] C.f. Hutton (2013), especially p.102. This argues that the Sentencing Guidelines enable an account of sentencing, and 'do not prescribe a "correct" sentence'.

[373] It is likely that there are political reasons for the SC not questioning sentencers stated discounts.

# Conclusions On The Extent Of Sentence Discounting

There is a lack of empirical information on Sentence Discounting in Scotland. This lack of information is surprising since Sentence Discounting is not a trivial issue, in normative or practical terms: especially considering the prevalence of guilty pleas. It could be assumed that the empirical extent of Sentence Discounting will correspond to the law. If this were the case, then it would be a *relatively* simple matter to find the extent of Sentence Discounting: for instance, by using information on the number of guilty pleas and the stage they were tendered. Additionally, if the law reflected the reality, empirically accurate information on discounting could be gained from methods, such as those used by the SC, involving taking the stated discount as empirically accurate.

However, this chapter looked at various pieces of research that shed light on Sentence Discounting. The striking finding of this research is that, the discounts that should be expected - based on the law - may not actually materialise. Instead, it may be that headline sentences increase to negate the effect of Sentence Discounting for guilty pleas. However, as noted above, the PDSO Study predates Du Plooy and Spence, which may have altered the situation. Additionally, the PDSO study did not focus specifically on Sentence Discounting, meaning that there is a caveat to its results: Sentence Discounting could have occurred, but have been limited to specific types of offences for pleas at specific stages. This means that it is limited, in providing information on the current extent of Sentence Discounting. Yet, despite this limitation, the research is still useful. In particular, the PDSO study suggests that, despite the belief in Sentence Discounting - a belief that exists today - the discounts may not materialise. Furthermore, later studies provide evidence to bolster the suspicion that - even after Du Plooy and Spence - Sentence Discounting might not be real.

Thus, it appears that Sentence Discounting might not exist, despite appearances to the contrary. Unfortunately, however, there is not enough evidence to be sure of the

empirical reality, one way or the other. The only way to gain this information is through further empirical research. However, as discussed above, any future research must be carefully planned to ensure valid measurements are used, and third variable problems avoided.

# PART 3: Knowledge And Resistance

So far this thesis has explored the nature and extent of Sentence Discounting. In Part One, it was seen that Sentence Discounting poses a number of normative problems, and that there are good reasons to reject the practice. In Part Two, it was seen that the expected extent of Sentence Discounting (based on the law) might not to correspond to the empirical reality.

Part Three, explores why the empirical extent of Sentence Discounting might not be what it should be. Drawing on the issues identified in Part Two, Chapter Five explores how the practice of Sentence Discounting may be affected by limitations in legal actors' knowledge and understanding of the law. Chapter Six - drawing on the normative issues identified in Part One - analyses how legal actors' resistance to Sentence Discounting could explain its potentially limited extent.

# Chapter 5: Knowledge And Understanding

# **Knowledge And Understanding**

For the Rule of Law to operate, legal actors must first know and understand the law: only then can they apply the law. However, in the real world, legal actors are only human. Consequently, they are limited in terms of resources (e.g. time) and cognition. This means it should not be assumed that they know and understand the law in its entirety. Indeed, 'lawyers share with the judge, the prosecutor or other court staff only a portion of the legal knowledge (very likely the legal language and the most general acquaintance of statutes and previous judgments)'.[374] Consequently, gaps in knowledge will be inevitable. This is problematic as any gaps in knowledge or understanding may result in legal practice differing from what the law suggests it should be. Thus, in reality the question should be asked, what exactly do legal actors know and understand?

Consequently, this chapter analyses legal actors' knowledge and understanding of the law on Sentence Discounting. It also seeks to analyse the legal consciousness of legal actors. This type of knowledge, is not based on the letter of the law. Rather, it pertains to the subjective, internal, knowledge a legal actor possesses. This knowledge is important as it will strongly influence all aspects of a legal actors' behaviour, including behaviours related to Sentence Discounting.

## The Dearth Of Research

Considering that knowledge and understanding is necessary for the law to be complied with, it is surprising how little research has been undertaken on legal actors' knowledge and understanding of the law. Not even the Sentencing Council collects information on the knowledge and understanding of legal actors: despite this

[374] Pompeu Casanovas et al, Supporting newly-appointed judges: a legal knowledge management case study, Journal of Knowledge Management VOL. 9 NO. 5 2005, pp. 7-27, p.15

being crucial to the effectiveness of their Guidelines.[375] Part of the reason for the limited research, owes to a tendency to take the knowledge and understanding of legal actors for granted. While clients and lay persons, in particular, may be more likely to 'assume' the competence of legal actors, and 'that someone is making sure standards are being maintained',[376] the same assumptions occur (to some extent) with policy makers, judges, and other legal actors.

As a consequence of the dearth of research, it necessary to draw on knowledge of law studies from several sources. Additionally, it is also necessary to seek proxies indicating the knowledge and understanding of legal actors. For instance, quality legal services require 'up-to-date legal knowledge and skills'.[377] Thus, the quality of judgements, and legal advice, can indicate legal actors' knowledge and understanding. However, even utilising proxies, information is still limited as there is an 'extraordinary paucity of data on actual sentencing decisions'.[378] Additionally, 'there is scant evidence on the technical quality of legal advice'.[379] However, what information there is, 'casts doubts over whether quality standards are as good as is assumed'.[380]

Part of the reason for the lack of information may be that, 'front-line regulatory bodies do little active monitoring of quality, [and rely] mainly on allegations of poor

[375] By contrast, the council does consider the knowledge and understanding of the public: one goal of the SC is to promote public knowledge and understanding of sentencing, to increase public confidence in the Justice System.

[376] Legal Services Consumer Panel (2010), 'Quality in Legal Services' <http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_QualityinLegalServicesReport_Final.pdf>, para 1.2.

[377] Legal Services Consumer Panel (2010), 'Quality in Legal Services' <http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_QualityinLegalServicesReport_Final.pdf>.

[378] Padfield (2013), p.39.

[379] Legal Services Consumer Panel (2010), 'Quality in Legal Services' <http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_QualityinLegalServicesReport_Final.pdf>, para1.3.

[380] Legal Services Consumer Panel (2010), 'Quality in Legal Services' <http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_QualityinLegalServicesReport_Final.pdf>, para1.3.

quality before intervening'.[381] With sentencers, there is a similar issue as decisions are only reviewed on appeal. This means that there are 'few proactive checks to ensure professionals remain competent'.[382] This is a serious failing, given that clients are unlikely to be able to recognise substandard legal competence,[383] meaning complaints may not always arise where knowledge and understanding is inadequate. Additionally, clients may also have more pressing concerns than making formal complaints,[384] or they may not even know how to make a formal complaint.[385] Furthermore, even if a complaint is made, the lack of proactive information gathering means 'it can be difficult to prove poor standards of conduct, particularly to the level necessary in disciplinary proceedings'.[386] Thus, the current system, for ensuring knowledge and understanding, is limited. These limitations may be exacerbated in the future given that, 'the ability of lawyers to maintain quality will come under pressure as...cuts in legal aid...impact on publicly funded work'.[387] Indeed, there is evidence that lawyers spend less time with clients than they once did, and that firms are taking on more clients to maintain profitability.[388]

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381 Legal Services Consumer Panel (2010), 'Quality in Legal Services' <http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_QualityinLegalServicesReport_Final.pdf>, para2.6.

382 Legal Services Consumer Panel (2010), 'Quality in Legal Services' <http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_QualityinLegalServicesReport_Final.pdf>, para2.6.

383 Clients tend to presume competence and assess lawyers on service issues.

384 Especially if the inadequate advice results in a custodial sentence.

385 The complaints process requires time as there are several steps, such as first contacting the clients relations partner. The complaints processes is also geared towards written submissions, which will be problematic for some complainants <https://www.lawscot.org.uk/forthepublic/what-the-society-can-do-for-you/making-a-complaint>.

386 Haller (2010) pp.100-101.

387 Legal Services Consumer Panel (2010), 'Quality in Legal Services' <http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_QualityinLegalServicesReport_Final.pdf>, para 2.8.

388 Tata (2006).

# Knowledge Of Accused Persons

The terminology of the criminal process can be confusing to lay persons. This will limit their ability to know and understand what is going on. This lack of knowledge and understanding limits the agency of accused persons, forcing them to rely on the knowledge and understanding of their lawyer. Indeed, most accused persons have 'only a hazy understanding of what they have been charged with, and indeed, what they have pled guilty to'.[389]

Consequently, the lawyer can efficiently control decisions that would appear to rest with the client. Some clients have even claimed that their lawyer pressured them into pleading guilty: for instance, in one study, a third of those who pled guilty claimed they were innocent, and only pled guilty on their lawyer's advice.[390] Indeed, 'the most common reason' accused persons give for pleading guilty is 'their own lawyer's advice'.[391] Blumberg even noted that, it is defendants' own lawyers who are the most effective inducers of guilty pleas.[392] Thus, the way an accused pleads may indicate the advice they received, which will depend on their lawyer's knowledge and understanding of Sentence Discounting.

However, estimating the knowledge and understanding of legal actors, using accused persons as a proxy, is problematic. Lawyers do not provide the accused with an accurate approximation of their knowledge and understanding. Instead, 'literature on lawyer–client relations has shown that, to a greater or lesser extent, lawyers manage client expectations'.[393] Thus, what lawyers convey, may not exactly reflect what lawyers actually know and understand: for instance, expectations may be managed by omitting details that would prompt a client to go to trial.

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[389] Tata (2010), p.255.

[390] Bottoms and McClean (1976), p.231.

[391] Darbyshire (2000), p.903.

[392] Blumberg (1967), p.724.

[393] Tata (2010), p.247.

Indeed, in Scotland, changes to remuneration, and other aspects of the legal process, altered case trajectories in a way that maximised remuneration for lawyers.[394] However, this was not necessarily detrimental to clients. For instance, although lawyers became less likely to carry out precognitions, once it was financially detrimental, changes to disclosure meant precognitions were less important. Additionally, once spending greater time with clients was financially detrimental, client contact time reduced. However, legal actors felt that the changes to disclosure meant the time spent with clients was more productive.[395]

Thus, while case trajectories changed, to maximise remuneration, clients were not disadvantaged, as much as might be expected. The reason for this is that, while remuneration is important, legal actors have other forms of 'capital': such as professional ethics, reputation, etc. This means legal actors predominately manage clients to their advantage, only in cases of 'ethical indeterminacy'.[396] For example, a guilty plea at the pleading diet, may be beneficial for the lawyer. However, the client will only be encouraged to plead if it is not disadvantageous.[397] Thus, 'managing' the accused to maximise remuneration, only occurs where it does not damage the lawyer's (social) capital.

Additionally, in terms of remuneration, it is worth pointing out that per case remuneration for lawyers has not decreased.[398] However, there is a *perception* of less remuneration, and there is perhaps less work available.[399] An unfortunate side effect of this perception is that, the quality of advice available for criminal matters may decline as lawyers, or the best lawyers, stop undertaking criminal defence work. Indeed, there is already evidence that lawyers are becoming more 'conscious' about the work they undertake.[400] Ultimately, this could lead to a similar decline as was

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[394] Tata (2007).

[395] Bradshaw et al (2012), para 5.4.

[396] Tata (2007).

[397] Tata (2007), p.511.

[398] When fixed payments were introduced law firms adapted by taking on more clients to return to pre-fixed payment levels of profitability

[399] Bradshaw et al (2012).

[400] Bradshaw et al (2012), pp.9-10.

experienced in the legal services for housing matters.[401] This would reduce the knowledge and understanding of criminal matters in the long term.

## Legal Consciousness

Legal actors advise clients to plead for a discount, but also indicate they do not believe the discount exists when speaking to researchers. One explanation of this is that, since the guilty plea works to the lawyer's advantage, lawyers induce clients to plead guilty. However, as discussed above, self serving motives are most influential when the issue is 'ethically indeterminate'.[402] Thus, the question is how to reconcile the two views of legal actors: that allow them to advise clients to plead guilty for a potential discount, and tell researchers discounts are not real.

The different accounts could be related to the role legal actors have in the Justice System, and their legal consciousness. When dealing with consumers of law, legal actors have a formalistic view of their role. In this formalistic role, it is the client who decides how to plead, and the lawyer merely advises them of the law.[403] However, legal actors' consciousness of law is more complex than this. Legal consciousness[404] is about more than just looking at rules, or what the law is in a black letter sense. It is about legal actors' own ideas of how the law works. This is because, in addition to their knowledge of legal doctrine, legal actors also have a more tacit knowledge of the legal system, and how it operates, based on their own institutional and personal 'stock of knowledge':[405]

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[401] E.g. Arden (2006).

[402] Tata (2007).

[403] This formalistic view ignores the fact that, often the lawyer has a significant ability to induce guilty pleas.

[404] There is debate about what the term 'legal consciousness' means, and many articles develop their own meanings. What legal consciousness is cannot be explored in detail here, but it suffices to say a broad meaning is attached to the term.

[405] MacCrimmon (1998).

*The one having to do with personal behaviour, practical rules, corporate beliefs, effect reckoning and perspective on similar cases, which remain implicit and tacit within the relations among judges, prosecutors, attorneys and lawyers.*[406]

For instance, Sheriff shopping[407] is not based on legal doctrine (this would hold all Sheriffs equal), but rather the lawyer's own stock of knowledge about the current Sheriff and the alternatives. Thus, when advising clients to plead guilty, legal actors inform them about the law, as their role requires: since this is their duty it creates no ethical issues. However, when speaking to researchers, legal actors may share something of their legal consciousness: their own private/deeper understanding of law. This understanding is not one the lawyer is duty bound to convey to a client: their role is to operate based on the formal law. Indeed, it may be inappropriate to advise a client based on their own beliefs of law.[408] Additionally, it may be that when guilt is perceived to be assured,[409] the plea is not thought to affect the client's sentence: making the issue of how to plead ethically indeterminate.

[406] Casanovas et al (2005), pp.7-27.

[407] The practice of delaying, or otherwise manipulating proceedings, with the hope that this will result in a different Sheriff, who will be more favourable.

[408] A legal actor advising a client based on their own personal beliefs of law would find it difficult to account for the advice, if needed. By contrast, advising based on the formal law makes it easier to account. For instance, the legal actor need only make reference to section 196 to justify advising a client of a potential discount. In terms of ethics, if there is a gap between the law and practice, this is not the legal actor's fault.

[409] There is a presumption among legal actors, that most clients are guilty of something. C.f. Leverick (2004), pp.380-382, and Darbyshire (2000), p.904.

# A Guilty Plea At The First Opportunity

The law suggests that an accused should plead guilty at the first opportunity to maximise the discount.[410] This can mean accused persons pleading guilty before their lawyer can examine the case.[411] It can also mean pleading guilty, without knowing what evidence the prosecution has. The basis for such early pleas is the belief that, an accused will know if they are guilty, and consequently do not need to wait to plead. Indeed, in an ideal world only the culpable would plead guilty. However, in reality, while a lay person may know facts, it can hardly be expected they know whether they are guilty of the crime charged: often legal actors cannot agree upon the law.

Failure to recognise the limitations to an accused person's (and legal actors, who may need time to undertake research) knowledge and understanding may result in wrongful convictions. For instance, in Petto v HMA,[412] the accused appealed his conviction for murder, after pleading guilty. The appeal was ultimately rejected, however, the court went to great lengths to uphold the conviction.[413] Indeed, in this case, it is arguable the accused was guilty of culpable homicide, not murder. However, a lay person is unlikely to make the distinction between murder and culpable homicide. Indeed, in allowing the plea, even the legal actors demonstrate some weakness in their knowledge and understanding.[414] Thus, Sentence Discounting appears problematic, as the time scales involved may prompt a guilty plea, despite the weaknesses in the knowledge and understanding of the relevant (legal and lay) actors: indeed 'if the defence solicitor and accused do not have

[410] Gemmell v HM Advocate (2011), para 42. Also see: Murray v HM Advocate (2013), McKinlay v HM Advocate (2009), and HM Advocate v Thomson (2006).

[411] Though allowances may be made for reports on the mental health of an accused.

[412] Petto v HMA (2009).

[413] A cynic might suspect there was a desire not to acknowledge an accused was able to plead guilty to a crime they did not commit. This would bring multiple areas under unwanted scrutiny, not the least of which being how little sentencers question guilty pleas.

[414] More details surrounding this plea are not known. However, it is possible that if the legal actors had more time to asses the case, then a more appropriate result could have been achieved. Indeed, if the defence lawyer does not have time to evaluate the case, there is little point in legal representation.

enough information about the strength of the case...the only sensible option is to plead not guilty'.[415]

## Conclusions On Knowledge And Understanding

Legal actors' knowledge and understanding is taken for granted. However, there are a number of reasons to criticise this assumption. In particular, criticisms can be made as legal actors do not know as much of the law as the legal theory would suggest. There are various reasons for this. One is that, in many ways, the law is unknowable: it is subjective and open to interpretation - even the High Court could not agree on fundamental aspects of Sentence Discounting. Additionally, legal actors are limited in terms of cognition and time. This means they cannot scrutinise every case, and every precedent. Instead, they must gain, at least some, knowledge from secondary sources (such as the Scots Law Times), which increases the risk of error.

Unfortunately, while it is clear knowledge and understanding is limited, research on these limitations does not exist. The sensitivity of the question, and legal actors' reluctance to be researched is largely responsible for this. Additionally, it also seems that assumptions regarding legal actors' knowledge and understanding has played some role in preventing research. Indeed, it may be assumed that the regulation of the legal profession results in standards of knowledge and understanding being maintained: meaning research seems unnecessary. However, the system of self regulation is largely reactive, not proactive: it responds to complaints, rather than attempting to actively monitor knowledge and understanding. This reactive nature is flawed, given that it most often relies on complaints from clients. However, the knowledge of clients is generally limited, and there is no guarantee that a client will recognise a basis to complain, or be motivated to do so: especially if the failure results in a custodial sentence, where the client may have more pressing concerns.

[415] Bradshaw et al (2012), para 5.27.

Thus, if there are limitations to legal actors' knowledge and understanding of Sentence Discounting, these may not be identified. This could be detrimental to Sentence Discounting as, while the judge applies the discount, the lawyer can influence the accused and if/when he or she pleads guilty:[416] thus, a lack of knowledge on the part of the lawyer may affect the sentence discount the accused receives.

The chapter also questioned the tacit knowledge legal actors: for instance, their understanding of how the Justice System operates in practice. This knowledge is part of their legal consciousness, and will have a profound effect on the way legal actors operate and respond to Sentence Discounting: 'legal consciousness research seeks to understand...people's routine experiences and perceptions of law'.[417] While legal actors tend to describe the law in a relatively simple manner (such as a body of rules), it is not unusual for legal actors to describe their role in a way that suggests they have a more profound conception of what law is: for instance, sentencers may describe their role as dispensing justice, rather than just applying rules. The effect of this type of knowledge is varied, but it can be significant. For example, delaying a guilty plea (to put pressure on the prosecution) is not based on black letter law, but originates due to a different knowledge about how the system operates and how advantages can be achieved. Thus, it seems likely that the views of legal actors may influence Sentence Discounting[418] - indeed strong negative views of Sentence Discounting, and a deep understanding of the system, would provide both motive and means to subvert and resist Sentence Discounting.

[416] This is discussed above under 'Knowledge Of Accused Persons'.

[417] Cowan (2004), pp.929.

[418] As mentioned above, the defence lawyer can do this by influencing the accused.

# Chapter 6: Resistance To Sentence Discounting

# Resistance

In Part One, it was seen that there are good reasons for legal actors to object to Sentence Discounting. These reasons include the concern that Sentence Discounts, combined with other forms of Plea-Bargaining, result in excessive, and unjust, sentence reductions. In Part Two, it was seen that the empirical evidence available suggests the possibility that Sentence Discounting might not be real, and that headline sentences might be increased to negate any discounts: despite the law suggesting discounts should be up to one-third.

This chapter explores the possibility that, if headline sentences are inflated to negate discounts, this behaviour could be explained by resistance to Sentence Discounting. In doing so, it explores the methods of resistance that could occur, and the potential precedent for resistance in Scotland. Indeed, legal actors resisting the law is not unheard of. There is scholarship on this from the USA,[419] Argentina,[420] England and Wales, etc. For instance, it has been noted that in the 'conflicts in...the politics of sentencing', the judiciary of England and Wales resisted in Whitehall and in the media.[421] Resistance from other legal actors can be seen in protests over legal reforms.[422] Yet, beyond this overt resistance to upcoming laws, Ashworth suggests that legal actors 'will carry out the wishes of Parliament rather than attempt to undermine the legislation'.[423] However, if 'the preservation of maximum discretion' is the 'strongest motivating factor' for resistance,[424] it is prudent to question, to what extent legal actors accept the law.

[419] E.g. Provine (1998); and McBarnett (1988).

[420] Osiel (1995).

[421] Ashworth (2013), p.15.

[422] Baksi (2013).

[423] Ashworth (2013), p.15.

[424] Ashworth (2013), p.15.

# The Nuance Of Change

The law on Sentence Discounting requires legal actors[425] to change to accommodate it. However, compliance is more nuanced than a simple binary dichotomy of, whether or not the change has occurred.[426] Kelman suggests that 'change...may occur at different levels',[427] and that the 'level' at which a change occurs indicates how the change will be implemented. The three such levels of change identified are: 'compliance', 'identification', and 'internalization'.

The 'Compliance Level'[428] relies on '(dis)incentives'[429] to secure compliance, and accordingly is only likely to be effective as long as the (dis)incentives are applicable. This means that, for Sentence Discounting, where transparency and accountability are limited, Compliance Level change is unlikely to be effective. Indeed, change at the Compliance Level could result in legal actors appearing to comply with Sentence Discounting, while not actually doing so.[430] In this way, 'Compliance Level' change increases the possibility for resistance.

Compliance Level change can be contrasted with the 'Internalization Level'. At this level, legal actors comply because they believe in the change. Consequently, if legal actors were to internalize Sentence Discounting, they would not resist it: even in the many areas where transparency and accountability are lacking. However, achieving internalisation with Sentence Discounting is difficult. Internalization tends to occur when the change fits within the actors' existing values. Unfortunately, the objectionable nature of Sentence Discounting, means it is likely to conflict with legal actors' values.

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[425] Both the judges (who apply discounts), and the lawyers who persuade accused persons to plead guilty.

[426] C.f. Jones (2006).

[427] Kelman (1958), p.52.

[428] Kelman (1958), p.53.

[429] Jones (2006), p.190.

[430] Indeed, if headline sentences are inflated to negate stated sentence discounts, this could explain why.

Of course, Kemlan's theory is one of several[431]. However, the main point is that Sentence Discounting may be *accepted* in one of several ways. In particular, it may be that legal actors do not entirely comply with Sentence Discounting, and resist it in certain ways.

## Furtive Resistance

If Sentence Discounting is resisted, it is likely the resistance is furtive. Being furtive allows resistors to operate without repercussions. For example, if sentencers openly resisted Sentence Discounting, Parliament may respond with '(dis)incentives' such as guidelines that restrict judicial discretion. Additionally, legal actors can be called to account for overt resistance.[432] Thus, overt resistance can be costly: this makes furtive resistance more likely.

It has been noted that in order to explore questions regarding the Justice System, it is necessary to 'take account of both the formal law...and the organisational practices of officials operating within that legal framework'.[433] It may be that these organisational practices can be furtively utilised to resist Sentence Discounting. For example, although Ashworth suggests legal actors will not undermine legislation, he notes that a provision preventing the Court laying down Guideline Judgements, was 'applied with a degree of elasticity'.[434] This involved, 'couching' the judgement as 'not laying down guidelines, but...simply summarising the effect of existing judgements'.[435] However, Ashworth was unconvinced by this, and argued that 'on

[431] C.f. Jones (2006).

[432] Lord Gill was called to account before a Holyrood Committee for his resistance to a measure intended to promote judicial accountability and transparency (Daily Record, 'Scotland's top judge summoned to appear before MSPs after trying to block register of judicial interests. 10 March 2013 <http://www.dailyrecord.co.uk/news/scottish-news/scotlands-top-judge-summoned-appear-1753545>).

[433] Henham (1998), citing Sanders and Young (1994), p.20.

[434] Ashworth (2013), p.19.

[435] Ashworth (2013), p.15.

reading the judgement it goes further than that, and contains a prescriptive element'.[436] One possible explanation of this oddity is that the courts furtively used an everyday practice (in this case a judgement) to resist the legislation and undermine its effectiveness, when they desired.

## Identifying Resistance

Due its furtiveness, identifying 'resistance' is fraught with subjectivity. Indeed, the concept of resistance in this thesis is more 'liquid'[437] than may be used elsewhere.[438] Part of the issue is that while events may be documented, 'the interpretations of the politics surrounding those events are matters for conjecture, or at least for piecing together an incomplete set of clues'.[439] Deciding whether legal actors are resisting is even more difficult as there are often multiple interpretations for their behaviour. This means it is often uncertain whether a legal actor is resisting the 'spirit' of a law, or merely applying the letter of the law as they believe they should.[440] For instance, in 2010 the Supreme Court ruled asset freezing orders for terrorist suspects illegal.[441] It may be that this decision was simply because the Court believed this was illegal. However, some interpreted this as an act of judicial resistance to anti-terrorism laws.[442]

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[436] See 'Rule Manipulation' below. Also see the criticism made of the distinction between Guideline Judgments and non-Guideline Judgements, above, which may fulfil a similar role via precedent.

[437] 'Liquid' in a similar sense to how it is used in the context of 'liquid racism' (c.f. Weaver (2010) pp. 678-680). In particular, being 'liquid' means the resistance is difficult to identify without context (or a 'container') to give it shape.

[438] For instance, I used the example from Ashworth as a possible instance of resistance. However, it may be that others would not recognise the behaviour as 'resistance' due to a different understanding of the term.

[439] Ashworth (2013), p.15.

[440] C.f. McBarnet (1988).

[441] HM Treasury v Ahmed (2010).

[442] Human Rights In Ireland, 'Remembering 2001: 'Judicial Resistance to EU & UK Law'. 16 September 2010 (http://humanrights.ie/criminal-justice/remembering-2001-judicial-resistance-to-eu-uk-law/).

These issues, over identifying resistance, are not helped by the lack of transparency in the criminal process, as this makes it difficult to assess the true rationales underlying legal actors' behaviour. However, ultimately, given its controversial nature, if resistance occurs in Scotland, Sentence Discounting is a likely locale.

## Methods Of Resistance

Ewick and Silbey argue resistant practices 'appropriate' elements of the system they are resisting.[443] This means there will be common 'methods' of methods of resistance in the legal system. These methods could include: (1) *Rule Manipulation,*[444] *(2) Perceptual Manipulation,*[445] (3) *Hierarchical Manipulation,*[446] and (4) *Resource Manipulation.*[447] These methods provide a good framework for analysing resistance to Sentence Discounting. However, they are not definitive. Even Ewick and Silbey concede, there can be arguments for additional or different methods.[448] Additionally, in practice several 'methods' of resistance can be used simultaneously, or a particular act of resistance could fall into multiple categories[449]. Furthermore, these methods have not, to date, been used to assess legal actors. However, as seen below, it would be useful if they were.

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[443] Ewick and Silbey (2003), p.1363.

[444] Ewick and Silbey (2003), pp.1353-1355.

[445] Ewick and Silbey (2003), pp.1350-1353.

[446] Ewick and Silbey (2003), pp.1355-1359.

[447] Ewick and Silbey (2003), pp.1360-1363.

[448] Ewick and Silbey (2003), p.1350.

[449] Ewick and Silbey (2003), p.1350.

# Method 1: Rule Manipulation

The ability to work with rules is the archetypal skill of the legal profession. Many facets of legal work require working with rules, to achieve specific goals. This means legal actors will gain experience and skill working with rules in their daily life. Even the entry requirements to the legal profession (from entry to Law School, to the 'competitive market')[450] foster and filter the skills and propensities required to utilise rules. Thus, while all actors may manipulate rules, legal actors may do so to a degree that may not be equalled in areas such as, for example, medicine: where the emphasis may be on clinical ability. This is significant as one method of 'resistance' is Rule Manipulation.

## What Is Rule Manipulation?

Rule Manipulation involves breaking the spirit of law, without breaking the letter of the law.[451] An illustration of Rule Manipulation comes from the MoD use of Depleted Uranium (DU) shells in Scotland. The rule, in this instance, originates from the OSPAR Convention,[452] and prohibits radioactive shells being '*dumped*' in the sea. The rationale for this rule is simple. The OSPAR convention concerns environmental issues, and radioactive DU shells are detrimental to the environment: thus, the rule aims to protect the environment by preventing radioactive shells being discarded into sea. However, despite this rule DU shells have continued to be deposited into the sea. Interestingly, information *leaked* from an *internal* MoD committee, suggests that the MoD has taken the approach that '*placing*', rather than

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[450] The Law Society of Scotland (2013), 'Information about traineeships' <http://www.lawscot.org.uk/education-and-careers/studying-law/currently-studying-the-llb-/information-about-traineeships->.

[451] McBarnet (1988).

[452] OSPAR Convention, Annex II Article 3 Section 3(a).

'*dumping*' the shells is legally permissible: despite no practical difference between the two terms.[453]

This is an example of Rule Manipulation/Literalness shows how the spirit of a rule can be subverted, as through 'creative compliance' the rules designed to prohibit a practice can be manipulated to enable it.[454] It also demonstrates that, Rule Manipulation can be motivated by the goals of agencies/actors.

## How Likely Is Rule Manipulation?

Rule Manipulation is a method of resistance the legal profession is well suited for.[455] Indeed, Hutton has noted that part of the issue with judicial reason giving is judges spend their early career (usually as an advocate) developing legal arguments to achieve specific goals. Consequently, when providing reasons as judges, they use these same skills to produce legal arguments for a decision, and do not produce judgements reflecting the actual reasons for the decision.[456] Thus, judges, along with other legal actors, routinely manipulate rules to achieve specific goals.

In relation to Sentence Discounting, resistance is likely as its statutory nature may be perceived to limit the discretion of sentencers. This may promote resistance as:

*Regulatory literature suggests that any regulatory agency might resist legislative change and regulators of the legal profession and the legal profession itself when self-regulating, might be particularly resistant to changes of this type.*[457]

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[453] MoD Committee meeting minutes, as cited by BBC News, 'Dundrennan weapon test legality questioned'. 12 March 2013 <http://www.bbc.co.uk/news/uk-scotland-south-scotland-21754241>.

[454] McBarnet (1988) pp.118-119.

[455] Hutton (2006), explores how the judiciary may resist outside interference.

[456] Hutton (2013), pp.88-89.

[457] Haller (2010), p.84

Furthermore, there are a range of normative objections to Sentence Discounting, that could motivate resistance. Thus, if for this, or any other reason, a judge were to oppose Sentence Discounting, they could use Rule Manipulation. Indeed, this would be simple as it uses the same skills of reason giving as described above. The only difference is the 'goal' the legal actor seeks to achieve is resistance to Sentence Discounting.

## Effectiveness Of Rule Manipulation

Rule Manipulation can be very effective. Even the rigid American Sentencing Guidelines of the 1980s could be overcome in this way.[458] These guidelines were far more restrictive than anything in Scotland. Thus, if they could be resisted, then so can Sentence Discounting. Part of the reason, even the most rigid rules can be thwarted, is that legal actors 'work' hard to avoid the 'spirit' of the law, without violating the letter of the law.[459] This 'creative compliance' can have the consequence of rendering the law ineffectual in fulfilling its intended purpose.[460] One solution law makers tried, in parts of America, was creating more complex rules. However, this failed as the more detailed rules created more 'loopholes' to exploit. Indeed, it may be that a rule can never remove discretion entirely as, so called, 'loopholes' may be inherent in the law. Thus, law and discretion may not be a binary dichotomy.[461]

[458] Provine (1998).

[459] McBarnet (1988), pp.118-119.

[460] McBarnet (1988), pp.118-119.

[461] Baldwin and Hawkins (1984), p.594. This argues that law and discretion are inextricably bound.

# Explaining Gemmell

Given that Sentence Discounting may damage legal actors' capital, and conflict with normative ideals, there is further reason to suspect legal 'actors [will] try to use the rules...to their advantage' by resisting Sentence Discounting.[462] Indeed, a disapproval of Sentence Discounting appears to have been at the heart of Lord Gill's judgement in Gemmell: when he argues Sentence Discounting should only be used 'sparingly' and 'only for convincing reasons',[463] etc.

While judges are expected to interpret the law, it seems more than coincidence that this argument originated from a judge who opposes Sentence Discounting. Indeed, Lord Eassie implied an interpretation such as Lord Gill's would undermine the espoused rationale of Sentence Discounting: by reducing confidence in discounting, guilty pleas will decline, and efficiency gains will be lost.[464]

Unfortunately, defining an action as resistance is subjective where the legal profession is concerned. While it is argued here Lord Gill's decision is resistance to Sentence Discounting, some may disagree. Indeed, this type of resistance within the legal profession is particularly hard to identify as Rule Manipulation is normalised. Some methods of Rule Manipulation have become so well ingrained and standardised that they themselves become a '*rule* of interpretation': thus they are seldom questioned.[465] However, the arbitrary way rules are interpreted, means it is necessary to ask, why a rule was interpreted in a particular way. In regard to Lord Gill's judgement in Gemmell, it appears this interpretation was chosen, as it is a means to argue against Sentence Discounting.

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[462] Hutton (2006), p.162-163.

[463] Gemmell v HM Advocate (2011), para 75.

[464] Gemmell v HM Advocate (2011), para.145.

[465] 'Expressio unius est exclusio alterius' arguably encompasses the MoD's rationale in the above illustration: that since 'dumping' was included in the rule 'placing' was not.

## Manipulating The Aims Of Sentencing

Within the legal system each actor has a role to play. However, the exact nature of this role (practically and normatively) is flexible. This provides legal actors with the ability to manipulate their role, in order to achieve their aims. For instance, the judiciary could manipulate their role to something akin to an 'umpire', or take a more active role to secure 'justice'.[466] Both roles are plausible, and the judge may adopt whichever best achieves his goal: Lord Denning, for example, adopted a more active role to achieve 'justice', than many of his contemporaries. Thus, as the decision regarding what role to perform is discretionary, and given that this can significantly affect various matters, such manipulations can be a powerful method of resistance.

Furthermore, the aims of sentencing are equally flexible, creating opportunities for resistant manipulations. Even in England and Wales - where the Criminal Justice Act 2003[467] attempted to clarify the 'purposes of sentencing' - the aims remain poorly defined. This is because attempts to set out aims, produces a range of options that sentencers can cherry pick from. Additionally, many of these options can be contradictory in practice: for instance, it may not be possible to aim for both punishment and rehabilitation. Yet, as all are considered legitimate, legal actors have broad discretion over which they proclaim to achieve. Indeed, one explanation for inconsistency in decision making, is that different legal decisions are reached using different (but valid) principles. However, in reality, these principles may be too abstract to govern decisions. Consequently, they may actually operate as rationales to justify a decision, based on other goals: such as resistance.

Thus, while there is danger in reading too much into decisions, it is possible that legal actors can masquerade as fulfilling different roles to achieve resistance. This opens up a new avenue for analysing legal decision making. Importantly, for

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[466] It is plausible for a judge to fulfil either role.

[467] Criminal Justice Act 2003, section 142.

Sentence Discounting, it brings focus to the underlying rationale of Gemmell. This means that, while valid in its own terms, (Gemmell rejects discounting due to issues such as justice and confidence in the legal system) questions can be asked about why these particular principles were chosen to be relevant (rather than, for example, promoting an efficient Justice System, reducing delay, etc).

If such manipulations occur, it means that while decisions appear normatively, and procedurally unproblematic, in reality illegitimate (non-legal) factors are directing the outcomes of cases. This opens up the possibility for unacceptable bias in a range of ways: such as the racial bias identified by Roger Hood.[468] What is also problematic is that, such biases would not be apparent from looking at individual cases, as each case would employ a manipulation that ostensibly legitimises the decision.

## Liberal Rule Of Law Implications

Given the Scottish Justice System's Liberal Rule of Law values, Rule Manipulation raises some fundamental questions regarding the supremacy of law. Given this ideal, in theory, applying rules should not be problematic as, this is what *ought* to happen. However, if there are systemic issues where actors are able to creatively comply with rules, in ways that undermine their intention, then this view is complicated.

Interestingly, such practices may not only occur, but may be the norm in the legal system. Indeed, in the legal system 'most transactions can run...only if rules are systematically overlooked, bent, stretched, and otherwise ignored'.[469] This can be seen in areas from sentencing, to interpreting wills.[470]

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[468] Hood (1992).

[469] Ewick and Silbey (2003), pp.1352.

[470] C.f. Miller (1987). For instance, substantial compliance with a will may necessitate that it is not literally complied with. For example, a person fond of the SSPCA may bequeath money to the RSPCA, not knowing the difference: http://news.bbc.co.uk/1/hi/scotland/7865965.stm.

These issues stem from the Rule of Law's failure to grasp that, in the empirical reality 'rules' are not a simple matter.[471] Rules are always (to some degree) *indeterminate*, *contradictory*, and *finite*. This means that, discretion is needed to interpret and apply the rules, and that the distinction between rules and discretion is blurred.[472] Indeed, 'sentencing is a social process, as well as a matter of political contest and individual judgement'.[473] Consequently, relying on rules, as the Rule of Law would suggest, is not only impractical, it is impossible. Rules by their very nature require some degree of subjectivity in their application. Thus, it may ultimately be that law is not as supreme as the Rule of Law presumes. Rather law may, merely, be one of the factors influencing decision making, rather than *the* factor.

## Method 2: Perceptual Manipulation

It has been said that possession is nine tenths of the law, but perhaps here it would be better to say perception is what matters. Indeed, there are many subjective issues regarding Sentence Discounting. This subjectivity means that a lot depends on how issues are perceived: for instance, to an accused the difference between a harsh and light sentence may depended on what he or she expected.[474] Through matters such as this it can be seen how perceptions can play an important role in the Criminal System.[475] However, given that perceptions are subjective this creates opportunity for legal actors to manipulate them, as a method of resistance: here this method of resistance is termed 'perceptual manipulation'.

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[471] Hutton (2013), pp.89-90.

[472] Hutton (2013), pp.90.

[473] Hutton (2013), pp.90.

[474] As discussed above an accused's expectations can be influenced by (among other things) their lawyer.

[475] Indeed, 'Procedural Justice' (a topical subject at the moment) is largely concerned with perceptions: e.g. how people feel they were treated.

In theory, perceptual manipulations could be entirely false and 'deceptive'.[476] However, to remain furtive, it will be more common for Perceptual Manipulations to present a scenario that the actor has a defendable claim to.[477] Such Perceptual Manipulations will provide a way for legal actors to resist Sentence Discounting. In particular, the perceptions of Sentence Discounting could be manipulated.

There is a pervasive belief among accused persons, that a guilty plea will benefit from a near automatic Sentence Discount.[478] However, the limited empirical evidence available leaves room for the possibility that this expected discount might not materialise. Additionally, legal actors give contradictory accounts of the efficacy of Sentence Discounting: they advise clients to plead guilty for a discount, but a few tell researchers they do not think the discounts are real due to headline sentence inflation. Thus, the question arises, could legal actors be manipulating the perceptions of accused persons to facilitate guilty pleas?

It can be seen above that the accused's lawyer is best placed to influence their beliefs on Sentence Discounting. However, sentencers play a key role, as they explicitly state discounts are being given. This means that, if the perceptions of Sentence Discounting are being manipulated, legal actors are collaborating. That legal actors may collaborate is interesting, given the adversarial nature of the Justice System. However, it may be that collaboration should be expected, given that legal actors are part of 'Court Work Groups'.[479]

In the long term, a legal actor will have more contact with their peers, who like them, are 'repeat players'.[480] Thus, their relationship with other legal actors, will be more important than their relationship with 'one shooter' clients. Additionally, legal actors will have more personal traits in common with other legal actors, such as having

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[476] Ewick and Silbey (2003), p.1351.

[477] Ewick and Silbey (2003), p.1351.

[478] Tata (2007), footnote 82.

[479] C.f. Schulhofer (1984); and Provine (1998).

[480] Galanter (1974).

attended Law School. By contrast, the ‘very obvious demographic chasm’[481] between accused persons and legal actors, means that working with accused persons will be more difficult. Consequently, a legal actor will be inclined to work with other legal actors. Given that adversarial proceedings hinder cooperation, guilty pleas may be desirable.

Furthermore, there are other reasons it is in legal actors’ best interests for accused persons to plead guilty. For instance, judges and prosecutors have case loads that must be disposed of. Private firm defence lawyers, undertaking Legal Aid work, need a higher volume of clients, to maintain the level of profitability they had before fixed payments: necessitating the time spent per client is limited. Additionally, private firm defence lawyers can lose money where a case goes to trial, creating more incentive to have clients plead guilty.[482]

Sentence Discounting facilitates these goals, by persuading accused persons to plead guilty. However, and perhaps more importantly, Sentence Discounting allows legal actors to justify advising, and accepting guilty pleas. Indeed, if there was no Sentence Discounting, a legal actor may find it more difficult to reconcile the abrupt guilty pleas they encourage, with their conscience. However, fortunately, a presumption of guilt exists,[483] which regardless of its veracity, ‘is clearly a functional attitude’[484] for Sentence Discounting: it ‘eases the psychic conflict’[485] of legal actors, who do not wish to operate in ‘bad conscience’[486]. Indeed, it is notable that, ‘even in a system where ‘admitting’ guilt is made to seem highly advantageous’, legal actors believe guilty pleas, ‘although they believe little else the defendants say’.[487]

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[481] Tata (2008) p.31.

[482] Tata (2006).

[483] Darbyshire (2000), p.904.

[484] Haney et al (1979), p.642.

[485] Haney et al (1979), p.642.

[486] C.f. Tata (2010), and Tata (2007).

[487] Haney et al (1979), p.641.

Thus, Sentence Discounting may exist to allow legal actors to rationalise guilty pleas. Indeed, Heumann[488] has argued Sentence Discounting does not just exist for efficiency and resource reasons, but because of factors such as 'Work Groups'.[489] Consequently, Sentence Discounting may be more important for legal actors, than for accused persons. If this is correct, then it means the actual rationale for Sentence Discounting, and the nature of Sentence Discounting - in the real world of 'the living law' - may be different to the theoretical rationales discussed in Part One.

Thus, legal actors benefit from guilty pleas. They may have normative objections to Sentence Discounting, but it is necessary in that it facilitates the guilty pleas they desire. Consequently, it is in all legal actors' interests to ensure that there is a perception guilty pleas are rewarded. However, 'there is a strand of judicial thinking that discounts have become too generous and too readily given'.[490] One way to overcome this problem, is to not discount sentences, but maintain the perception that guilty pleas result in Sentence Discounts. Indeed, *if* headline sentences are inflated, this could explain why this occurs: instead of legal actors simply stating no discounts are being given.

## Methods 3 And 4: Protests And Lobbying

Protests and lobbying use resources including space, time, and money. They also involve subverting the typical hierarchies of the Justice System. A recent example of this form of resistance is the protests regarding legal aid. During these protests several legal actors occupied space outside Holyrood.[491] In doing so they sought to gain publicity for their point of view, and subvert the typical processes for voicing

[488] Heumann (1981).

[489] Thus, it may be that the legal rationales discussed in Chapter One are merely accounts for Sentence Discounting, and not the reason for the practice. Other reasons may include, Work Groups, the presumption among legal actors that most accused are guilty (meaning there is no point to a trial), etc.

[490] Shead (2013).

[491] Whitaker (2013).

(and managing/mollifying concerns). Additionally, they also sought to threaten the social capital of those implementing the reform: by arguing that they were doing something unethical. While actions such as this are notable, instances of legal actors protesting in this fashion are rare. Indeed, it is to be expected that this kind of resistance is rare, given that it is not covert. Thus, it is necessary to look for more subtle ways that legal actors can resist Sentence Discounting.

It is likely that forms of lobbying, by legal actors, occur more frequently than protests. Strong lobbying can be effective, and has been noted to result in a willingness 'to contravene traditional understandings of law and to jeopardise the traditional factions of law making'.[492] A potential instance of lobbying by the judiciary can be seen in England and Wales. Ashworth notes that the statutory guidelines for murder were watered down, compared to what the Home Secretary had suggested. Consequently, he speculates 'perhaps this is an example of behind-the-scenes influence exerted by the senior judiciary'.[493] Thus, it is probable that legal actors engage in effective lobbying. Unfortunately, instances of lobbying, specific to Sentence Discounting, are hard to identify: lobbying need not occur in the public domain, but can occur behind-the-scenes. However, the delay to the establishment of a Scottish Sentencing Council, suggests something is occurring 'behind the scenes'.[494] Thus, it is likely that lobbying occurs in Scotland, and that Sentence Discounting is resisted in this way.

## Subverting The Hierarchy: The Media

Another way legal actors can resist Sentence Discounting, is by voicing concerns about discounting to the press. This ignores the typical hierarchy (involving consultations, etc), which can mollify the effects of contrary opinions: if only

[492] Komaitis (2011).

[493] Ashworth (2013), p.15.

[494] Indeed, it appears there are concerns that pressing this will ignite a constitutional crisis with the Judiciary: undesirable in the run up to the 2014 Referendum on Independence.

because the public are unlikely to read them. Certainly, the Judiciary in England and Wales have resisted in this way: Ashworth noted that, 'if their discreet opposition to new measures fails to win the day in the corridors of Whitehall, [the judiciary] are perfectly willing to use the national media in their efforts to oppose a particular measure'.[495] This method of resistance has proved effective, as it was largely due to a media backlash that proposals to extend Sentence Discounts to 50% failed.[496]

However, this method of resistance may be less common in Scotland, given the judiciary are 'less vocal' in the press.[497] On the other hand, even the potential to use the press may be enough. For instance, it has been speculated that, in Scotland concerns over precipitating a public constitutional crisis, in the run up to the Referendum on Independence, have delayed the creation of a Scottish Sentencing Council.[498] Thus, the delay to the Scottish Sentencing Council may be due to more than just lobbying: 'going public' is an escalation of lobbing.

Another, less direct, way to communicate to the media is through legal judgements. Legal judgements are not merely factual indicators of why a decision was reached.[499] Instead, they are designed to provide an account for decisions. This means that, 'reasons may be defensible rather than true'.[500] Additionally, it is well known that judgements often include irrelevant material (obiter dicta). However, given that judgements are purposeful, it may be remarks seemingly irrelevant to the case are relevant towards another end, such as resistance. For example, in Gemmell Lord Gill states:

*We already have a penal policy in Scotland in which the protection of the public from dangerous offenders is expressly compromised by statute.*[501]

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[495] Ashworth (2013), p.15.

[496] Discussed Above.

[497] Millie et al (2007), p.263.

[498] Tata (2013).

[499] Tata (2007b).

[500] Tata (2007b), esp pp.428-430.

[501] Gemmell v HM Advocate (2011), para 494.

This statement is very critical of the Scottish penal policy, and Sentence Discounting. However, this criticism is unnecessary for the judgement. Thus, considering the statement in context, this may be a form of resistance. In particular, the 'penal policy' appears to refer to backdoor sentencing reforms:[502] something the judiciary have been critical of for various reasons (undermining judicial discretion, etc). Thus, judgments could be a way for legal actors to resist Sentence Discounting.

## Is Resistance Beneficial To Sentence Discounting?

Resistance creates complications for Sentence Discounting. However, preventing resistance is difficult. Perhaps, resistance could be overcome if the legal actors internalized Sentence Discounting. However, this is unlikely to happen.[503] Thus, some level of resistance will be inevitable. However, it is possible that resistance can benefit the Justice System:

*By providing temporary relief from the burdens that power imposes...resistance may make insufferable conditions tolerable. In doing so, [resistance may] inoculate power from more sustained and powerful [challenge].*[504]

Thus, resistance may be a release valve for legal actors. In the context of Sentence Discounting, acts of resistance may allow the senior judiciary to live with the practice. This prevents more concerted resistance from occurring. For instance, Human Rights confer considerable power on the Courts. This power could be used to

[502] 'Statute' could refer to section 196 or the recent presumption against sentences under 3 months which was also controversial: c.f. The Herald, 'The Jury is out on Community Sentences'. 16 July 2012 <http://www.heraldscotland.com/comment/herald-view/the-jury-is-out-on-community-sentences.18086529>.

[503] Internalisation tends to occur when the change fits in with actors' existing values. Sentence Discounting, as seen in part 1, contradicts these values and is consequently unlikely to be internalised (c.f. Kelman (1958)).

[504] Ewick and Silbey (2003), p.1330.

challenge Sentence Discounting, as violating the right to a fair trial.[505] Consequently, it may be that the lesser (furtive) forms of resistance help prevent this, and in doing so allow Sentence Discounting to operate without more serious forms of resistance, such as protests. However, whether this would be good is a complicated question: especially if it would prevent problems with Sentence Discounting being addressed.

## Is Resistance Performative In Bringing About Change?

Du Plooy can be thought of as an attempt to improve transparency regarding Sentence Discounting. However, Du Plooy merely pre-empted legislation that would have had similar effects.[506] Additionally, it appears Du Plooy was triggered by the possibility of Government interference in sentencing.[507] Thus, given the desire to maintain sentencing discretion, it appears that Du Plooy was an attempt to protect sentencing discretion.

Indeed, there appears to be a propensity for the Scottish Judiciary to outmanoeuvre, and resist Government interference with their discretion.[508] The suspicion that Du Plooy was such a manoeuvre, is bolstered by the fact that the Court in Du Plooy made it clear the imminent legislation would have a negligible effect on their behaviour.[509] Thus, it appears that Du Plooy was a preemptive strike, designed to protect sentencing discretion. In particular, Du Plooy means that, when sentencers

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[505] In Melbourne, a double murder trial was halted due to legal aid cuts being held to infringe the right to a fair trial: demonstrating the power of Human Rights decisions by the Courts to resist practices. There has been speculation Human Rights could result in similar issues in Scotland (c.f. The Firm, 'Scots Law Warning as double murder trial halted due to 'unfairness of legal aid cuts' <http://www.firmmagazine.com/exclusive-scots-law-warning-as-double-murder-trial-halted-due-to-unfairness-of-legal-aid-cuts/>; and Edwards (2013).

[506] The Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5) s.20(2), substituted the word 'may' in section 196 of the 1995 Act for 'shall'.

[507] The Government interest in reform at this time can be seen in the Scottish Executive's proposals for High Court reform and Lord Bonomy's report on the Justice System (this argued for a more 'predictable' system of Sentence Discounting).

[508] C.f. Tata (2013); and Tata and Hutton (2003).

[509] This is discussed in Chapter 3.

must take a guilty plea into account, they must do so because of judicial precedent, not statute.[510]

Thus, it can be questioned whether, without 'the threat' of outside interference, these changes would have occurred.[511] Indeed, if the threat of interference can be performative, then this has useful applications for policy makers. In particular, it may be possible to utilise the resistance of legal actors to bring about change. Change brought about in this way, may be less prone to resistance: if the change is not viewed as an unwanted external interference with judicial discretion.[512] This is beneficial as, it increases the chance of the change being internalised. In the context of sentencing, where transparency is limited, an internalised change is more likely to be successful.

## Acknowledging Resistance

Policy makers must be aware of resistance. However, they do not discuss resistance publicly. For instance, the Sentencing Council stresses the need to get 'legal advisors 'on board''.[513] This suggests an awareness that a level of internalisation is required for a change to be successfully implemented. However, given the significance of resistance, the point is not recognised as clearly as it should be: the issue is merely remarked upon as something interviewees stated as necessary.

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[510] The Court appears to prefer avoiding reliance on statute. For instance, in the discussion of Guideline Judgements (Chapter 3) it was noted that the High Court was giving guidance of the kind envisioned by section 118(7), but was doing so without utilising the Act.

[511] Tata (2013).

[512] It could be argued that a reform by the Senior Judiciary is nonetheless imposed on the lower courts. However, this point while worth noting cannot be explored here. However, the Senior Judiciary may be more 'in touch' with the values of judges than the Government. Thus any reform they implement may be more consistent with these values: important since internalisation is most likely to occur when a change conforms to an actor's pre-existing values.

[513] Sentencing Council, 'Research into allocation process and decision making'. March 2012 (http://sentencingcouncil.judiciary.gov.uk/docs/Analysis_and_Research_report_allocation_web.pdf), p.13.

This lack of emphasis could be an indication that the interviewees alone recognise the significance of resistance. However, this is unlikely given the knowledge and experience present within the Sentencing Council. Thus, it is appears that the politically sensitive nature of resistance is the reason why it is not discussed more openly.[514] This is unfortunate as it means the publications are more useful for the information they provide, rather than for the analysis offered: as this is intentionally limited.[515] Ultimately, the result is, that while the Sentencing Council has captured interesting information on the way legal actors operate in relation to guidelines, it fails to explore the intricacies of this operation (such as resistant practices): this is unfortunate, as if it did, the information could be used to speculate on the situation in Scotland.[516]

## Resistance And Reform In Scotland

In Scotland, it would be strange if policy makers were not aware of similar issues. Unfortunately, without a Sentencing Council, information is harder to source. However, it is notable that until the presumption against sentences of three months, there has been limited 'front-door sentencing reform' in Scotland.[517] This lack of front-door sentencing reform contrasts with England and Wales: where reforms have been implemented. This lack of front-door sentencing reform may suggest that reform is particularly difficult in Scotland, and that policy makers have adapted to this by avoiding front-door reforms.[518]

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[514] Policy makers need the cooperation of legal actors and suggesting they resist would damage their relationship with legal actors.

[515] The Sentencing Council cannot be criticised too harshly for this. Diplomacy is often necessary in certain matters. However, it is still unfortunate.

[516] Its almost like, the pieces are there, but they are not being put together.

[517] Tata (2013).

[518] Hutton and Tata (2010), p.274.

There are, many reasons why sentencing reform can be difficult. For instance, in both England and Scotland, there are political issues with Sentence Discounting: such as the desire to appear tough on crime (penal populism). However, it is also possible that the reason change in Scotland could be more difficult, is that the judiciary in Scotland may be more resistant to change. For example, the SIS project initiated by the judiciary, 'was partly a way for them to head off political pressure' for change.[519] Alternatively, a factor limiting reform in Scotland could be that Scottish Policy makers prefer a soft approach. While it could be expected that a soft touch will minimise resistance, it comes with the danger of hindering reform. Thus, while a soft approach has benefits, it may be that the threat of front-door reform is also needed: without which there is the danger of stagnation.

## Conclusions On Resistance

There are a variety of ways legal actors can resist Sentence Discounting. The methods, described above, provide some indication of how this resistance can operate. In particular, the indication is that while these methods of resistance can be overt, most resistance will be furtive. This has significant implications for research as it means that identifying resistance will be challenging. The resistor will couch their practices so that they can be explained, in a way that belies their resistance nature. Thus, while legal actors likely engage in resistance, the extent of resistance is unknown. It could be that legal actors only resist in exceptional circumstances. Alternatively, it could also be that resistance is systematic, and is an everyday occurrence. However, regardless, the controversy surrounding Sentence Discounting means it is a prime locale for resistance.

From the above, it can also be seen that there are questions, over which legal actors are resisting Sentence Discounting, and why. For instance, members of the Senior

[519] Hutton and Tata (2010), p.275.

Judiciary clearly object on principled grounds. This can be understood based on sociological factors: such as their social capital being dependent on dispensing justice, etc. However, the motivations of others are less clear. Certainly, there is uneasiness, at the gap between the ideals of justice, and the actual practice among legal actors.[520] This would explain why these legal actors may resist Sentence Discounting. However, there are also reasons these legal actors would welcome Sentence Discounting: such as the presumption of guilt,[521] Work Groups, and caseload pressures. Thus, more research is needed to understand the details of resistance and how it affects Sentence Discounting[522].

These questions are significant, given that the potential for resistance to affect Sentence Discounting is significant[523]. Indeed, resistance may be inevitable as attempts to reduce resistant practices have failed: previous attempts to impose stricter rules have been bypassed with creative compliance, or resulted in the resistance being 'displaced',[524] rather than quelled. Furthermore, resistance also raises questions regarding the feasibility of the Rule of Law in practice. For instance, the Rule of Law would suggest that applying rules should not be problematic. However, if rules can be manipulated to resist the spirit of the law, it can be asked how effective the Rule of Law can be.

[520] Tata (2010).

[521] Darbyshire (2000), p.904.

[522] It could be that the perception of a discount is maintained to facilitate guilty pleas, however, the headline sentence is inflated so the accused does not 'get off easy'.

[523] Cheliotis (2006).

[524] Baldwin and Hawkins (1984), p.582.

# Conclusion

## Summary

The question explored here is the nature and extent of Sentence Discounting. The nature of Sentence Discounting is illuminated by the rationales used to justify the practice. The Efficiency Rationale was found to be dominant in Scotland, however, rationales based on remorse and sparing victims were found to still be relevant. The persistence of multiple rationales suggests there is controversy, and difficulty accepting the Efficiency Rationale. Additionally, all the rationales were found to be limited in their ability to justify Sentence Discounting. These limitations were exacerbated by the objections to Sentence Discounting. This led to the question of whether Sentence Discounting was unjust.

Whether Sentence Discounting is unjust was explored in Chapter Two, by analysing the principled objections to Sentence Discounting: that it penalises accused exercising their right to trial, that it may induce the innocent to plead guilty. These objections were balanced against the possibility that Sentence Discounts may allow accused to be spared unjust process costs, and may aid penal parsimony. However, on balance, given the weakness of the rationales and the strength of the objections, the thesis concludes that Sentence Discounting is not just. Indeed, if efficiency is the rationale for Sentence Discounting, then it is unsurprising that by nature it has less appeal to some ‘high moral principle’ than might be desired.

Next, the extent of Sentence Discounting was explored in Part Two. This began with a legal analysis of the extent of Sentence Discounting. Surprisingly, given the number of guilty pleas, the law regarding Sentence Discounting is unclear: especially following Lord Gill’s comments in Gemmell. This uncertainty was linked to the

normative issues and controversy identified in Part One, which create difficulties accepting the Efficiency Rationale. However, despite these difficulties, the conclusion was that, based on the law, it appears that Sentence Discounts could be expected in most cases: the law posits efficiency as the basis for Sentence Discounting, and provides few limitations to when discounts are applicable. Next, having regard to the uncertainty in the law - and that law cannot guarantee the empirical reality - it was prudent to explore empirical research on the extent of Sentence Discounting in Scotland. The research available was limited, as it did not focus specifically on Sentence Discounting, and predated a number of changes in the law that may (or may not) have altered the empirical situation. However, the research did provide a basis for hypothesising that the empirical extent of Sentence Discounting, despite appearances, might be less than the law suggests it should be. Furthermore, it left room for the possibility that headline sentences might be increased to negate Sentence Discounting: if this occurred, it would be a result that could invalidate the Sentencing Council's measurements regarding the extent of Sentence Discounting. Thus, Part Two identified, what could possibly be, a puzzling oddity in the extent of Sentence Discounting.

Finally, the thesis analyses why the extent of Sentence Discounting may not be what it should be. In particular, the issues identified in Part Two (concerning the uncertainty in the law) are drawn upon to explore how the practice of Sentence Discounting may be affected by limitations in legal actors' knowledge and understanding of the law. The basis for this was that to apply the law, legal actors must first know and understand it. However, the level of uncertainty in the law means knowledge and understanding cannot be absolute. Despite this, it was found that legal actors' knowledge and understanding is generally (and sometimes wrongly) assumed. Additionally, Part Three draws on the normative issues identified in Part One (and the history of Sentence Discounting)[525] to how Sentence Discounting may be resisted by legal actors. This was done through identifying methods of resistance, and analysing possible instances of resistance in Scotland. It was noted that

[525] Suggesting Sentence Discounts occurred despite being officially objectionable, according to Strawhorn v McLeod (1987).

resistance is likely to be furtive. This means identifying resistance will often be a subjective matter of interpretation. However, ultimately it was hypothesised that resistance from legal actors is probable, and that the controversy surrounding Sentence Discounting increases the likelihood of legal actors resisting it.

## The Need For Research

In Chapter 4 it was noted that the empirical research to-date only partially illuminates Sentence Discounting. Ultimately, the only way to address these limitations and the questions raised by this thesis is through further research. While this thesis does not set out a methodology for a future study, it does highlight issues (particularly regarding knowledge and resistance) that future research will have to contend with. Exactly how these issues are dealt with will vary depending on the circumstances of the study (what data is available, who can be interviewed, etc). However, regardless of the particularities, a difficult issue to overcome will be the sensitive nature of the questions identified here. For instance, questioning the limitations of a legal actor's knowledge could be offensive.

Any future study should employ a mixed method approach.[526] A mixed methods approach, considering the lack of guidelines[527] in Scotland, is the most likely to gain an insight into Sentence Discounting: particularly, what happens, how it happens, and why it happens. It would also be prudent for a future study to utilise existing information. For instance, a literature review of relevant materials, and an analysis of the methodologies of previous studies, would be beneficial. Additionally, court records have proved useful in previous research. However, existing information (such as court records) note limited information on Sentence Discounting, as they are created for a

[526] Necessary as the question has qualitative (i.e. 'nature' implies sense making) and quantitative (i.e. 'extent' implies measurement) elements.

[527] Scotland has Guideline Judgments, but not Sentencing Guidelines like England and Wales.

variety of purposes, many of which have little to do with sentencing.[528] Thus, additional data must be collected.

## Simulated Sentencing Exercise

One useful method of gathering data, could be simulated sentencing exercises.[529] In particular, research could involve questionnaires asking for a sentence to be applied to a hypothetical case for a plea of not guilty. Another questionnaire could ask others to assign a sentence to the same case, but where a guilty plea is tendered at some stage. The advantage of the questionnaire, compared to an interview, is that it may allow for thought out answers, as sentencers can read and think on the answer, rather than being put on the spot.[530] The questionnaire also allows more flexibility for the participant as they can answer whenever they can: rather than having to dedicate a particular time to speaking to the researcher. Additionally, the questionnaire reduces the risk of unwanted variables: for instance, the questionnaire might say sentencing is the topic of research (not prejudicing the study by specifically mentioning Sentence Discounting), but in conversation a legal actor may seek more information on the variable being researched.

There are also limitations to the questionnaire method described above. One is that a balance will need to be struck between length and detail. There needs to be enough information to allow the decision to be made without the need to assume facts,[531] but the questionnaire cannot be so long that the participant does not complete it or hastily completes it. Additionally, there is a possibility of participants comparing notes to derive an answer. This would skew the results from simulating a real case. How likely this is cannot be predicted, but it will probably depend on the importance the participant attaches to the study: if it is seen as low priority then the odds of it being

[528] Hutton (2010).

[529] Padfield (2013), p.41.

[530] However, it may be this is less natural: in normal day-to-day practice the judge may have to provide a decision quickly.

[531] However, again, it may be that sentencers regularly assume facts. Thus, too much information could also skew the results from reflecting the normal practice of sentencing.

discussed are less. Furthermore, while the questionnaires ideally seek to change only the plea variable, the fact different judges are answering the questions may result in differences. This in itself would be interesting, but of limited relevance to Sentence Discounting.[532]

To overcome this, a greater amount of data[533] may be needed to identify general patterns. However, if using multiple factual scenarios, an issue may occur since (as suggested by the PDSO Study) Sentence Discounting may vary for particular types of offences with pleas at particular stages. This would create another variable that research would have to control for.

## Interviews

Empirical research alone would not provide much context, or help research to understand Sentence Discounting: due to the subjective nature of sentencing; the paucity of guidance in Scotland; and the number of variables affecting Sentence Discounting. Thus, qualitative research is also required. Notably, interviews with sentencers (most likely semi-structured) would be useful. This is important as, 'we need to know sentencers' reasons for their decisions'.[534] However, this will take some work as these reasons 'have proved elusive to harvest'.[535] To overcome this difficulty interviews with experienced practitioners (such as defence lawyers and fiscals) would be informative. As well as providing a different point of view from that of sentencers, it is likely practitioners will have an understanding of the reasons behind particular decisions: this may help to fill in any gaps that, for whatever reason, remain after speaking to sentencers.

[532] Regression analysis may be able to account for the variation between sentencers to some extent.

[533] How much data and whether collecting this is feasible would need to be determined.

[534] Padfield (2013), p.40

[535] C.f. Padfield (2013), pp.42-45

While arranging interviews with busy practitioners can take time, previous research demonstrates this can be done.[536] Such interviews could hopefully shed light on how legal actors interpret Sentence Discounting, and explain how and why it operates the way it does. Additionally, interviews with offenders can be used to determine what expectations they have about Sentence Discounting and where these originate.

Thus, it can be seen there are a variety of ways to conduct research on Sentence Discounting, although these cannot be discussed in detail here. However, while the details of a future empirical study will need to be considered carefully, the suggestions here could hopefully provide food for thought for such a project.

# Final Words

The nature and extent of Sentence Discounting is a more complex question than it initially appears. The deeper it is analysed the more latent complications emerge. While not all of these complications could be explored here, the thesis has shown Sentence Discounting has significant normative and practical implications for law, justice, and policy: as it may punish those who exercise their right to trial, and induce the innocent to plead guilty. These issues are severe in a system that relies on due process, and the Liberal Rule of Law for its claim to legitimacy. Indeed, it may be that Sentence Discounting is one way that the processes used to claim legitimacy (the right to a fair trial, the presumption of innocence, etc) are bypassed in practice without damaging the perception of legitimacy.[537] Thus, given the significance of these objections, Sentence Discounting is difficult to justify.

The Efficiency Rationale is the officially accepted rationale, and thus purported to justify the practice, in the face of the above objections. However, continued

[536] E.g. Chalmers et al (2007); Bradshaw et al (2012); Goriely et al (2001).

[537] As stated in the introduction, the jury trial is the stereotypical image people have of the Criminal Justice System, but is rare in practice.

discussions of other rationales suggest it has not been completely accepted in practice. The advantage of the other rationales is that they (attempt to) appeal towards some 'high moral principle'. The Efficiency Rationale, however, has little relationship with justice. If efficiency were the rationale, it would not be surprising if Sentence Discounting were unjust. However, given the objections that can be made against Sentence Discounting, it is doubtful whether any of the rationales are sufficient to justify Sentence Discounting.

The extent of Sentence Discounting is uncertain as there is limited research. This is surprising as Sentence Discounting is important for law, justice and policy. It is also not an obscure area: considering the high number of guilty pleas. Consequently, the lack of research is detrimental, as important decisions in this area must be made based on informed speculation. The problem with this is exemplified by SC research on Sentence Discounts. This research makes use of informed speculation, and operates on the basis that legal theory corresponds to legal reality. As a result, it does not consider many of the issues discussed in this thesis, and its apparently clear cut conclusions are likely incorrect: meaning decisions based on this information will be problematic.

In conclusion, the thesis finds that on the basis of the principled arguments Sentence Discounting is unjust. It also als whether it is possible that sentencing judges are not awarding discounts, or whether they might be inflating headline sentences to negate discounts. If this were the case then it would be doubly unjust: it would mean that accused persons are foregoing their right to trial for a benefit that does not materialise. Unfortunately, while there is a basis to query the extent of Sentence discounting, more research is needed to be sure.

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