The Nature and Extent of Sentence Discounting for Guilty Pleas

In Scottish Sheriff Court Summary Cases

Signed: 

Date: 23 November 2018

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Acknowledgements

I would like to thank my supervisors Professor Cyrus Tata and Professor Neil Hutton for their guidance and support. Cyrus's wise counsel and critical insight have been incredibly helpful throughout this research. Neil's perspective and guidance at critical junctures has also been of significant benefit. I would also like to thank Professor Nicole Busby, Dr Rhonda Wheate, Dr Monica Barry, and Dr Saskia Vermeylen who generously provided valuable feedback on various aspects of this research. I am indebted to them all for their support.

I owe a huge debt of gratitude to those who supported this research and the interviewees who generously devoted their valuable time. Without the interviewees' profound insights this thesis would not have been possible. Their participation has enabled the thesis to draw on lifetimes of engagement with the justice system. Legal practitioners' (judges, prosecutors, and defence lawyers) dedication to law and justice is inspiring. Accused persons' lived experience is enlightening.

I gratefully acknowledge financial support for this PhD from the University of Strathclyde.

Finally, I thank my family for their love and forbearance. I would especially like to thank Alicia, James, and Helena Smith for their unwavering support. I would also like to thank Helena for the very laptop on which this thesis was written.

Abstract

The thesis starts from a position whereby almost nothing is known about Sentence Discounting in practice. This research addresses this knowledge gap by observing two courts and conducting interviews with seven sheriffs, eight defence lawyers, two prosecutors, and twelve accused persons.

Firstly, the thesis argues that while practitioners believe the formal law is authoritative, in both statute and case-law the position is ambivalent and occasionally somewhat contradictory. The thesis shows that the formal law is radically indeterminate with regard to Sentence Discounting.

Secondly, the thesis shows that case disposal via Guilty Pleas depends upon social relationships between legal practitioners (judges, prosecutors, and defence lawyers). These social relationships result in an element of predictability regarding the stated Sentence Discount. The importance of social relationships also means that formalistic innovations intended to yield greater efficiency may have been counter-productive.

Thirdly, the thesis documents how individual courts generate unique norms. The thesis demonstrates this by analysing differences between two neighbouring courts of comparable size. Court 1 took significantly longer than the national average to reach a Guilty Plea while Court 2 was considerably faster. The research shows that different intra-court cultures partly explain the differences between the two courts.

Fourthly, the thesis reveals that Sentence Discounting contributes to accused persons' feelings of disconnection with the criminal process. While accused persons believed in some idea of the majesty of the law, they lamented that this did not materialise in their cases. Accused persons felt Sentence Discounting trivialised their experiences and introduced inappropriate elements of gamesmanship.

Finally, the thesis provides an empirical conceptualisation of how practitioners perceive Sentence Discounting. To explain decisions, legal practitioners shuttle between two narratives. The first narrative is based on the formal law/law-texts. The second narrative is based on culturally-embedded understandings of context.

Chapter 1 – Thesis Introduction

1 - Research Question

This thesis critically scrutinises the nature and extent of Sentence Discounting for Guilty Pleas in Scotland. The focus of the thesis is on Sheriff Court summary cases. The thesis raises fundamental questions of justice, legitimacy, fairness, and due process. Indeed, the thesis shows that Sentence Discounting is among the most controversial features of Scottish criminal justice.

However, in providing a critical analysis, the thesis does not deny the many laudable aspects of the criminal system in Scotland. No one interviewed in this researched believed the justice system to be perfect. Indeed, interviewees pointed out serious flaws. Yet, these flaws did not mean that interviewees did not take pride in the criminal justice system. Even accused persons (some who had spent most of their lives in prison) felt there was much to be proud of with regard to the justice system. As the thesis engages in its critical analysis, readers should keep this pride in mind.

In Scotland, Sentence Discounting is unique in being the only form of Plea Bargaining with a statutory basis. Policymakers assume Sentence Discounting is a key method to encourage earlier Guilty Pleas and to promote the expedient disposal of cases. Policymakers' beliefs make Sentence Discounting a vital part of attempts to secure the largely non-trial operation of the criminal justice system. This non-trial operation means that Scotland (like other Anglo-American criminal justice systems) seeks to dispose of the vast majority of criminal cases with an early Guilty Plea.

However, Sentence Discounting's role in the non-trial operation of the justice system has never been evaluated. There has not been research dedicated to exploring whether Sentence Discounting encourages Guilty Pleas in Sheriff Court summary

cases. Moreover, there has not been an evaluation specifically focusing on how legal practitioners (judges, prosecutors, and defence lawyers) and accused persons perceive Sentence Discounting.

To investigate the nature and extent of Sentence Discounting, I undertook empirical research to complement my analysis of the formal law (case law and statute). While the methods are set out more fully in Chapter 4, it is worth summarising these here as the thesis draws on the empirical data and provides limited interview quotations from the outset.[1]

The empirical research involved court observations over twelve months in two sheriff summary courts and in-depth interviews with seven sheriffs (judges), eight solicitors (defence lawyers), two fiscals (prosecutors), and twelve persons accused of a criminal offence. Sheriffs, solicitors, fiscals, and accused persons were chosen as it is these groups that are most directly concerned with Guilty Pleas, sentencing, and Sentence Discounting. The two courts interrogated were similar in most regards. The two courts were similar sizes, processed a similar number of cases, heard a similar mix of offences, and both courts were in the same Sheriffdom.[2] However, despite these similarities, one court was, on average, much faster at disposing of cases through Guilty Pleas. Given the assumed (but unresearched) relationship between Sentence Discounting and Guilty Pleas, this difference between the two courts made them uniquely worthy of scrutiny.[3]

[1] Interviewees are referred to by their role and a number (e.g. Sheriff 1).
[2] A Sheriffdom is a grouping of nearby courts for management purposes. Courts within the same Sheriffdom will be managed by the same Sheriff Principal.
[3] Chapter 4 more fully explains the methods chosen, the reasons for not doing mixed methods research (e.g. practical limitations), etc.

A – The Complexity of the Nature and Extent of Sentence Discounting

The nature and extent of Sentence Discounting initially appears to be a simple question. Policymakers assume that Sentence Discounting is straight-forward. There is also a compelling argument in formal theory that Sentence Discounting is independent of the complexities of determining the headline sentence. Policymakers may think that these features simplify Sentence Discounting by averting the need to consider "all the facts and circumstances" of a case.

However, contrary to what formal conceptions would suggest, this research found that Sentence Discounting does not exist in isolation. An understanding of Sentence Discounting requires an understanding of judicial practice, defence lawyer cultures, individual court cultures, perceptions of practical and ethical limitations, etc. As one sheriff noted:

> If you are only looking at one aspect of sentencing, I think the important point to bring out in your paper, which I am sure you will, is that it is just one aspect. And it is a very important aspect, and it is an aspect that we have to have cognisance to and look at how it is applied. But it is only one part of a situation. (Sheriff 2)[4]

Consequently, Sentence Discounting is not isolated. For example, the 'extent' of Sentence Discounting directs attention to questions such as:

- How often are Sentence Discounts given?
- How significant are Sentence Discounts?
- What types of cases receive Sentence Discounts?
- Can a Sentence Discount change a custodial sentence to a non-custodial sentence and, if so, in what circumstances?

[4] Limited interview quotations are provided in the thesis. Interviewees are referred to by their role and a number. The methodology is explained in Chapter 4.

The 'nature' of Sentence Discounting directs attention to questions such as:

- How is the formal law operationalised in practice?
- Is a Sentence Discount a form of Plea Bargaining, a recognition of remorse, or both?
- Why are Sentence Discounts given (in theory and practice)?
- How do practitioners perceive Sentence Discounting?
- Does Sentence Discounting challenge the presumption of innocence?

A key sub-question is the effect of Sentence Discounting in encouraging early Guilty Pleas. Early Guilty Pleas are at the heart of what policymakers intended Sentence Discounting to accomplish. As such, the success or failure of Sentence Discounting in encouraging early Guilty Pleas (what is often called 'efficiency'), is a crucial question. This thesis will show that Sentence Discounting's limited ability to encourage Guilty Pleas is inextricable from:

- The social nature of case disposal;
- The holistic nature of sentencing, which can negate Sentencing Discounting's effect;
- The prevalence of Charge Bargaining and Fact Bargaining, which require time and mean that early Guilty Pleas cannot be encouraged as effectively by Sentence Discounting;
- The way defence lawyers manage their duties to clients and the courts in terms of facilitating a Guilty Plea;
- The problems posed by Legal Aid and its effect on Guilty Pleas and their timing;
- Accused persons' desire to mirror legal practitioners and game the system.

Thus, the central questions of this thesis are inexorable from wider considerations. This lack of isolation means that Sentence Discounting raises fundamental questions about sentencing and the origin of the law more generally. I will now provide a brief

overview of the thesis's structure and how it addresses these questions in light of broader considerations.

2 - Situating the Thesis

A – The Scottish Context

There are 49 Sheriff Courts in Scotland which are divided into six 'Sheriffdoms' for managerial purposes. While courts within a Sheriffdom can differ significantly, all courts within a Sheriffdom fall under the purview of a single Sheriff Principal whose duties include securing "the efficient disposal of business in the sheriff courts of that Sheriffdom."[5] This research took place in two Sheriff Summary Courts within a single Sheriffdom.

While it is legally possible for private prosecutions in Scotland, these are exceptionally rare.[6] In practice, criminal cases are brought by a public prosecution service. The Scottish prosecution service is known as the 'Crown Office and Procurator Fiscal Service' (COPFS) or 'the Crown.' The Lord Advocate heads COPFS and provides guidance to Procurator Fiscals who prosecute cases on his/her behalf. Procurator Fiscals are often known as 'PFs' or 'Fiscals.' Fiscals are responsible for evaluating police reports and deciding what charges to bring against a person. At summary level the official list of charges is known as a 'complaint.'[7]

The process of deciding what charges to libel against a person is known as 'marking' the case. At summary level cases are marked centrally in one of two offices in Stirling or Paisley (known as 'National Initial Case Processing Units' or 'Marking Hubs'). In marking a case, COPFS has wide discretionary powers to decide whether to prosecute

[5] Courts Reform (Scotland) Act 2014, section 27.
[6] Macaulay (2017).
[7] Criminal Procedural (Scotland) Act 1995, section 138.

at all; whether to use an alternative to prosecution in the courts such as a fiscal fine (known as a 'direct measure');[8] and (if proceeding to court) the level at which to prosecute a case. Even when the decision is made to prosecute a case in the courts, COPFS may later decide to drop the case or alter the charges. Where a prosecutor uses their discretion to lower a charge, uses a direct measure, or elects not to prosecute, they are said to have 'taken a view.' Fiscals may 'take a view' on a case following Plea Bargaining with defence lawyers.

Defence lawyers in Scotland are known as solicitors, and they work alone or in groups called firms. While there are public defence lawyers in Scotland, most accused persons are represented by private solicitors who are paid by the Scottish Legal Aid Board (SLAB). Legal aid in Scotland is a contentious issue that the thesis cannot explore fully. However, the thesis can note that in 1999 the system of legal aid in Scotland moved to 'fixed payments.' Fixed payments can discourage client contact and the amount of time solicitors spend per case. More recently, in part due to the use of direct measures, there has been less expenditure on legal aid which may create additional pressure those who derive incomes from legally aided criminal law work.[9]

Within the Sheriff Court, judges known as 'Sheriffs' hear cases at two levels: summary (non-jury triable cases) and solemn (jury triable cases). Sheriffs[10] are legally qualified persons who have previously been solicitors or advocates (new sheriffs must have at

[8] An increase in the use of direct measures by both the police and COPFS has contributed to a 13% decrease in legal aid expenditure in the year ending March 2018. This decrease follows several years of falling incomes for criminal defence firms and may contribute to the low morale among these practitioners See SLAB (2018) and Evans (2018).

[9] See Evans (2018) for more detail.

[10] Summary Sheriffs are a new level of judge below (regular) Sheriffs but above Justices of the Peace. The term 'Summary Sheriff' reflects their role in only summary cases.

least ten years of experience).[11] Sheriff Summary cases account for about 60 percent of the 100,000 criminal cases that proceed to court each year.[12] The Sheriff Summary Court's maximum sentencing powers are 12 months' imprisonment (where there is a bail aggravation the maximum period of imprisonment is 18 months) and a £10,000 fine (unless statute allows for a higher amount). Within the maximum bounds, Sheriffs have broad discretion.

While, in legal theory, each of these legal practitioners (judges/sheriffs, prosecutors/fiscals/ and defence lawyers/solicitors) carries out their role in relative isolation, in practice this is not the case. Those in court will work together and Lipskey's work on Street Level Bureaucrats (SLBs)[13] is beneficial to our understanding of this collegiality. The valuable aspect of the SLB in analytical terms is that it draws attention to how those who implement the law exercise discretion. Understanding legal practitioners as SLBs (their discretion, their imperatives, etc) highlights how those in the Summary Courts effectively determine what the law is:

> We should not assume that a linear or even hierarchic flow exists between political command, practical implementation and the longer term impact on those who come within the purview of the criminal justice system. Time and again the history of the Scottish criminal justice developments have highlighted the ways in which practitioner groups have subverted the policy imperatives of government, through outright challenge or by ignoring or quietly dropping key demands; and how their day-to-day performance is shaped more by the exercise of discretion and cultural working practices.[14]

[11] Courts Reform (Scotland) Act 2014, section 14.
[12] Scottish Government (2019).
[13] Lipskey (1980).
[14] McAra (2017), p.783.

Within the Summary Court Process, there are various court stages ('diets'), and a Guilty Plea is possible at any time. The 'Pleading Diet' is where the accused is initially asked to tender a plea. However, an intention to plead guilty may be intimated earlier by what is known as a 'Section 76 Letter.' A Section 76 Letter is more likely to attract what legal practitioners commonly regard as the maximum 'Sentence Discount' of one-third.[15] If an accused pleads Not Guilty at the Pleading Diet, then the court will set both an 'Intermediate Diet' and a 'Trial Diet.' Intermediate Diets were intended to check the preparation of a case for trial and to assess whether the accused might plead Guilty. Part of the motivation behind Intermediate Diets was to reduce the number of instances where an accused pleads guilty at a Trial Diet (known derisively as a 'cracked trial').[16] In some cases, there may be repetition of a diet, and this is known pejoratively as 'churn.' Trial Diets are where the trial takes place though relatively few cases are 'disposed' of following a trial verdict.

C – The Wider Literature

Below I will set out some of the key works relevant to this research. The aim is not to provide a full account of these works, but instead to signal to the reader how this thesis fits into the literature that empirically scrutinises the operation of criminal courts. In identifying relevant literature, I will also highlight what I believe are the most significant points relevant to this thesis.

i - Negotiated Justice

Given the focus of this research on Plea Bargaining, Sentence Discounting, and Guilty Pleas, it inevitably falls in the shadow cast by "Negotiated Justice."[17] Negotiated Justice is the seminal work that (by interviewing 121 defendants in the Birmingham

[15] Criminal Procedure (Scotland) Act 1995, section 196.
[16] Scottish Executive (2004), Chapter 20.
[17] Baldwin and McConville (1977).

Crown Court)[18] unearthed a developed system of Plea Bargaining and identified the problematically "pervasive influence of the sentencing discount."[19] That a developed system of Plea Bargaining existed is significant because at the time the public perception was that Plea Bargaining was a uniquely American phenomena. Indeed, my legal practitioner interviewees noted a similarly developed system of Plea Bargaining in Scotland at the time, despite case law seemingly being against this.[20] Thus, one key lesson from Baldwin and McConville's work is that practice may not be as transparent as expected and that rhetoric may not accord with practice.

Baldwin and McConville also demonstrate that there are good reasons to scrutinise accused persons' perspectives. Baldwin and McConville show that defendants' own lawyers can play a crucial role in inducing Guilty Pleas (sometimes via "questionable conduct").[21] The role of defence lawyers in the production of Guilty Pleas leads to questions concerning the notion that it is accused persons who decide how to plead and that lawyers merely act based on client instructions. Moreover, Baldwin and McConville suggest there are problems with Guilty Pleas as a high number of those who plead guilty make at least "some claim to be innocent."[22]

ii - Conviction: Law, the State, and the Construction of Justice

McBarnet's work exploring Sheriff Courts and District Courts in Glasgow is relevant to this thesis.[23] In her research, McBarnet conducted court observations, analysed

[18] These cases were "at the serious end of the crime continuum" (p.4), though much of what McBarnet (1981) terms the "ideology of triviality" in the lower courts continues to apply.
[19] Baldwin and McConville (1977), p.102.
[20] See Chapter 2 Section. See also Chapter 9 for how legal practitioners rationalise this.
[21] Baldwin and McConville (1977), p.41.
[22] Baldwin and McConville (1977), p.61.
[23] McBarnet (1980); McBarnet (1981); McBarnet (1983).

one court's records, and examined the formal law. Interestingly, from my perspective, McBarnet's work has a focus on the operation of lower-courts where "most of the work of the criminal law is done."[24]

McBarnet identifies a divide between rhetoric and practice in the lower courts that she terms "two-tiers" of justice:

> One which is geared in its ideology and generality at least to the structures of legality, and one which, quite simply and explicitly, is not.[25]

In making the two-tier argument, McBarnet demonstrates how the criminal system can "reproduce the ideology of justice while denying it."[26] For example, McBarnet shows that while rhetoric touts the right to a trial and individualised treatment, by the time a case reaches the lower courts, it "is already effectively decided" and a Guilty Plea is expected.[27] Thus, McBarnet shows the need to look beyond the pageantry[28] of the court. There is a need to look at antecedent events as it is these that facilitate court routines and the normalisation of Guilty Pleas. Indeed, McBarnet shows that the courtroom "is but the proverbial tip of the iceberg."[29]

Additionally, McBarnet also illustrates that what appear to be administrative motivations can be "less value-free than is normally suggested."[30] Various agendas and imperatives may be latent within the supposed neutrality of court pageantry and

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[24] McBarnet (1981), p.123.
[25] McBarnet (1983), p.140.
[26] McBarnet (1981), p.167.
[27] McBarnet (1970), p.70.
[28] While Summary Courts lack many of the "taken-for-granted legal images" associated with 'adversarial' processes (McBarnet (1983), p.123), there is still pageantry (e.g. standing whenever the judge leaves or enters).
[29] McBarnet (1981), p.80.
[30] McBarnet (1981), p.73.

routine. These motivations (such as those underlying "plea-adjustments" or court schedules) may not work in the interests of due process.

Finally, McBarnet argues that routine and normalised court practices, such as Sentence Discounting, can serve to "emasculate legal rhetoric" and create a division between rhetoric and practice.[31] However, importantly, while this gap may be normatively troubling, McBarnet argues that it is an operational strength of the law. Thus, traditional notions of closing the gap may inevitably be doomed to failure. This perspective is insightful as in my critique of the formal law (concerning its radical indeterminacy)[32] I argue that the traditional 'gap problem' is not as simple as it appears

iii - Magistrates' Justice

Carlen's work is relevant to this thesis for many of the reasons McBarnet's work is relevant.[33] Carlen (1976a) researched London's Magistrates Courts, which means her focus is on the lower courts dealing with high numbers of cases. The sociological approach Carlen takes means her interest is in describing and theorising how the courts work, rather than how they should work.[34] Perhaps the most profound insight of Carlen's work is that justice in the courts is socially produced and not merely the product of the impersonal application of formal rules.

Thus, Carlen's work is important for its focus on social relationships and how these contribute to the 'justice' produced in the courts. Like McBarnet, Carlen casts doubt on formalistic notions of how the courts operate. Carlen argues that there is an

[31] McBarnet (1981), p.75.
[32] See also McBarnet (1988) regarding how the law is amenable to various interpretations.
[33] Carlen (1976a), and Carlen (1976b).
[34] Carlen (1976a), xi.

"incongruity" between "law's imputed abstract meanings" and "its realised situational meanings."[35] Moreover, Carlen argues that the production of 'justice' in the courts renders it a "Theatre of the Absurd" whereby constructed outcomes are portrayed as natural and inevitable. In doing so, Carlen directs attention to the choreographing of court work and that what happens in court may not be entirely based upon the unique facts and circumstances of each case.

Finally, linked to constructed outcomes, Carlen explores how the defendants fit into the production of justice. In doing so, she argues that defendants are "dummy players" and that (in various ways) the system works against them. In my view, this analysis of defendants is a crucial aspect of Carlen's work. Carlen problematises the apparent passivity of defendants and highlights the need to understand their views and experiences better.

iv - The Social World of an English Crown Courts

Rock adopts an ethnographic approach and (like McBarnet and Carlen) observes actual court practice. Rock's work demonstrates the value in scrutinising normal court practice rather than just relying on analyses of the formal law. In some regards, Rock's focus on witnesses somewhat separates his work from that exploring defendants' perspectives and how Guilty Pleas frequently prevent trials. However, even with Rock being "concerned always with the events and experiences as they affected prosecution witnesses," much of his work is still relevant to this thesis.[36] Indeed, witnesses and accused persons are both lay court users and both groups are often socio-economically similar.

[35] Carlen (1976a), p.90.
[36] Rock (1993), p.27.

Notably, for this thesis, Rock demonstrates the social relationships operating in the courts. These social relationships bring "widely ramified conventions about how" legal practitioners ought to conduct themselves.[37] Thus, one key point of Rock's work is that it shows some of the limitations of assuming that the formal law alone determines practice. Moreover, Rock's work suggests a need to explore what conventions might exist in various courts and whether these might vary.

Another vital point of Rock's work, for present purposes, is that it highlights the inequality between legal professionals and lay persons in a manner reminiscent of Galanter's distinction between the "haves" and "have nots."[38] However, Rock moves further to distinguish between different types (or "circles") of 'repeat players.'[39] An interesting implication of Rock's different circles is that not all defence lawyers or prosecutors will necessarily be equal in the social setting of the court: some will be in the second circle ("habitués")[40] while others will be in the third.[41]

Additionally, Rock analyses the roles played by various staff (e.g. security staff),[42] the physical space and structure of court buildings,[43] the effects of time[44] (including waiting),[45] etc. Moreover, Rock shows how the values and understandings of lay

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[37] Rock (1993), p.132.
[38] Galanter (1974). Other works noted here also discuss this inequality (e.g. Jacobson et al. (2016)).
[39]' In Chapter 5 Rock distinguishes between three groups of legal practitioners, two of which could be called the 'core court staff:' judges, defence lawyers, solicitors, etc who routinely work in the court (compared to, for example, defence lawyers who may appear in a court infrequently or whose presence is otherwise transient).
[40] Rock (1993), p.193.
[41] An important point that is returned to in Chapter 6 when discussing views of Court 1 solicitors.
[42] Rock (1993), p.146.
[43] Rock (1993), pp.197-262.
[44] Rock (1993), Chapter 6.
[45] Rock (1993), pp.277-281.

persons can be lost in the criminal process. By drawing on Durkheim, Rock argues that lay persons' "social reality can begin to dissolve into a kind of meaningless, best described as anomie."[46] The potential for anomie suggests a need to understand how lay persons (such as defendants) make sense of the criminal process and their experiences within it.

Ultimately, Rock depicts a complex web of social relationships and how the courts' operations are socially produced. In this regard, there are similarities between Rock's work and this thesis.

v - Standing Accused

One element of this research involves interviews with legal professionals (judges, defence lawyers, and prosecutors). As such, the work of McConville et al. (1994) is useful for its exploration of defence lawyer practices and its analysis of what defence lawyers (or those they delegate to) do. Through observing what lawyers do, both in and out of court, McConville et al. (1994) challenge rhetoric surrounding adversarial ideals and the presumption of innocence.

One notable implication of McConville et al. (1994) that is particularly relevant to this research is that legal representation may promote guilty pleas and that there may, in practice, be a presumption of guilt:

> Two perspectives predominate: a presumption that the defendant is guilty; and a belief that most defendants are unworthy, and undeserving of a trial… the lawyers' efforts are directed towards processing the client by means of a guilty plea precisely because they

[46] Rock (1993), p.92.

> believe that this method of disposition is appropriate and deserved.[47]

This presumption of guilt manifests in practical ways as, for example, claims of innocence may be downplayed or ignored, and clients persuaded (through various means)[48] to plead guilty. Indeed, this work serves to problematise the idea that legal practitioners views will reflect those of accused persons.[49]

Thus, the work shows not only how the justice system can be geared towards guilty pleas, but also how the accused's plea-making decision may not be completed free of pressure. As such, there is a need to understand how defence lawyers justify their practices (both normatively and practically) because how defence lawyers view their proper role may influence case trajectories. Moreover, this work also suggests a need to interrogate whether accused persons internalise normative messages concerning their unworthiness and the 'gap' between rhetoric and practice.

vi - Inside Crown Court: Personal experiences and questions of legitimacy

One key aspect of this thesis is that it interrogates the perspectives of defendants. Thus, the thesis has something in common with works that explore defendants' experiences in court.[50] One of the most recent pieces of research is that by Jacobson et al. (2016).[51] Jacobson et al. (2016) observed Crown Court proceedings over 20 months, and the research included interviews with 90 court users, of which 41 were

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[47] McConville et al. (1994), pp.188-189.
[48] Such as a "solicitor's assertion of 'insider knowledge' concerning the desirability of avoiding a 'tough bench'." (p.198).
[49] For example, Gibbs (2016) attempts to gauge accused persons' perspectives by interviewing prosecutors.
[50] Works exploring defendants' experiences include: Jacobson et al. (2016); McConville et al. (1994); Kirby et al. (2014); Bottoms and McClean (2013); Carlen (1976a); and Swaner et al. (2018).
[51] See also Kirby et al. (2014).

defendants. Interviews with defendants are essential because, while legal practitioners may have insights, research cannot assume that legal practitioners' views offer an unmediated reflection of accused persons' perspectives.

One interesting difference between Jacobson et al. (2016) and my research is that I explored what can be called the "minor cases"[52] that constitute the bulk of the workload of the criminal system. However, despite the different levels of severity, a lot of the findings in the Crown Court are relevant to my exploration of Scottish Summary Cases.

Key questions Jacobson et al. (2016) explore include:

> The extent to which any barriers to defendants' 'effective participation' in court proceedings compromise their right to a fair trial. Whether and how experiences of court contribute to a sense of the legitimacy of the court process and, more broadly, to trust in the process.[53]

These questions are broad and raise various sub-questions. For example, if the justice system operates to make accused persons "Dummy Players," then is meaningful participation possible in the system as we currently know it? Moreover, what is 'meaningful' participation, and what would this require? While these questions are complex and not fully answered, Jacobson et al (2016) offers an analysis of these questions that is relevant to this thesis - Chapter 3 on perspectives concerning Plea Bargaining and Sentence Discounting is especially relevant.

[52] Bottoms and McClean (2013), p.12.
[53] Jacobson et al. (2016), p.2.

Additionally, for my purposes, one of the key insights from Jacobson et al. (2016) stems from the scrutinisation of "passive acceptance"[54] among accused persons, and the analysis of what contributes to the perceived legitimacy of the justice process.[55] This perceived legitimacy is vital as "court users' conformity is, in part, based on a belief in the legitimacy of the court process: that is, they obey the rules because they perceive an obligation to do so."[56] Furthermore, Jacobson et al. (2016) is also valuable for exploring the issues that the criminal process creates for accused persons. Notably, the work shows that waiting is a key issue:

> Waiting is an integral part of the court experience for victims, witnesses and defendants: there is waiting, first, for the case to come to court, then waiting at court to give evidence, further waiting for the verdict and, in many cases, for sentencing. The impact of the waiting and the frequent delays to the court process cannot be overestimated.[57]

Consequently, the work provides useful insights regarding accused persons experiences and perspectives of the criminal process. These insights are especially useful given the limited amount of work that focuses on accused persons.

vii - Other Works Relating to Defendant's Perspectives

The works noted above are some of those that are relevant to the path taken in this research. However, briefly, it is worth noting that works beyond those empirically exploring the operation of the courts and those in the courts are relevant. Notably,

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[54] Jacobson et al. (2016), p.139.
[55] Moral alignment; positive outcomes; fair decision-making; respectful treatment; and passive acceptance.
[56] Jacobson et al. (2016), p.165.
[57] Jacobson et al. (2016), p.145.

works exploring lived experiences and meaning-making more generally can be beneficial.

Due to the prevalence of socio-economic disadvantage among accused persons,[58] many are recipients of some form of State welfare. Thus, works exploring the "welfare poor"[59] and their experiences of the welfare system can have relevance to accused's experiences in the criminal system: the totalising control, the use of time as an instrument of domination, etc.

In this regard, Sarat (1990) and Ewick and Silbey (1998) (discussed more in Chapter 8) are insightful works. Moreover, relevant works are not necessarily confined to Anglo-American jurisdictions. For example, Auyero (2011) examines the perspectives of those on welfare in Buenos Aires. Notably, Auyero finds that waiting is a key form of domination that has both symbolic and objective effects:

> [Waiting is a] people-changing operation... with concrete subjective effects.... the waiting room is an area of compliance, a universe in which you "sit down and wait" instead of attempting to negotiate (or complain against) welfare authorities.[60]

Thus, Auyero finds forms of domination at work that would be familiar to court users in Scotland. Consequently, there is a much broader range of works that can speak to the experiences of court users than is directly focused on the courts themselves. Indeed, it may be that accused persons' perspectives regarding the criminal process (e.g. nihilism, passive acceptance, and diffidence towards temporal domination) may be cultivated by other encounters with the State outside of the criminal system.

[58] Jacobson et al. (2016), p.155.
[59] Sarat (1990).
[60] Auyero (2011), p.21.

3 - Structure of the Thesis

Chapter 2 explores the formal laws and policies relevant to Sentence Discounting. The chapter shows that statutory law and case law are incapable of determining Sentence Discounting in anything approaching the formalist formula of *Rules + Facts = Conclusion*. The formal law, on its own, is radically indeterminate and amenable to a variety of different interpretations. This radical indeterminacy goes beyond assumptions that the law is merely open-textured.[61]

Chapter 3 critiques the state of knowledge regarding Sentence Discounting in Scotland and shows that it is under-researched. Chapter 3 explores what information exists regarding Sentence Discounting, beyond the formal law sources analysed in Chapter 2.

Chapter 4 sets out this research's methodology and demonstrates that research should draw a fundamental distinction between the Sentence Discount a judge states that they are granting and the actual effect of the discount on a sentence. Chapter 4 shows that, at present, the actual effect of a Sentence Discount is inherently unknowable in Scotland. Research should not assume the actual effect of a discount is the same as the stated effect.

Chapter 5 argues that the radical indeterminacy of formal law means that social processes are central to the meaning of the reality of the law. These social processes play a critical role in enabling or hindering Sentence Discounting from encouraging early Guilty Pleas. This finding challenges the formalistic notions of policymakers that rules can limit social dynamics and enable greater management.

[61] HLA Hart argued that indeterminacy in the law occurred at the penumbra due to the "open texture of the law" See Hart (1958).

Chapter 6 sets out the perceived cultures of Court 1 and Court 2. In doing so, Chapter 6 tells a *tale of two courts*. The culture of Court 1 was thought to explain the lack of early Guilty Pleas. The Culture of Court 2 was thought to explain the prevalence of early Guilty Pleas. Chapter 6 scrutinises these perceived cultural traits.

Chapter 7 focuses on the role of defence lawyers. Sentence Discounting provides a reason for a defence lawyer to advise a Guilty Plea. However, this thesis shows that Sentence Discounting is only one part of a much larger dynamic. Styles of defence, Charge Bargaining, Fact Bargaining, overcharging, etc. all reduce Sentence Discounting's ability justify an early Guilty Plea.

Chapter 8 demonstrates that accused persons' perspectives provide unique insights into the practical realities of Sentence Discounting. Research cannot obtain these unique insights by asking legal practitioners for their views of what accused persons think. This contribution alone makes accused perspectives relevant to this thesis.

Chapter 9 offers an empirical conceptualisation of how practitioners understand Sentence Discounting. It also suggests how this may have broader implications for how practitioners conceptualise law more generally. Chapter 9 shows that there are two narratives drawn upon by practitioners to explain decision-making. Finally, Chapter 10 reflects upon the thesis journey and the key findings.

Chapter 2: The Formal Law Regarding Sentence Discounting

Introduction

Chapter 2 scrutinises the 'formal law'[62] regarding Sentence Discounting. This scrutiny of the formal law is vital to understanding the views of legal practitioners (judges, prosecutors, and defence lawyers).[63] Legal practitioners' accounts of Sentence Discounting involved drawing on narratives of the formal law. This formal law narrative articulates Sentence Discounting by referring to statute and case law. Thus, it is necessary to investigate the extent to which the formal law can determine Sentence Discounts in Scotland.

Sentence Discounting is the only form of Plea Bargaining in Scotland that has a statutory basis. The formal basis of Sentence Discounting makes it a uniquely overt form of Plea Bargaining at a policy level. Sentence Discounting is also the only form of Plea Bargaining with an explicit formal rationale.

Policymakers, and some academic scholars,[64] have assumed that Sentence Discounting will encourage the expedient disposal of cases via early Guilty Pleas: what is often called "efficiency." For example, Lord Bonomy's Report argued that

[62] This thesis considers the 'formal law' to be statutes and case law.
[63] 'Legal practitioners' refers to judges (sheriffs), defence lawyers (solicitors), and prosecutors (fiscals).
[64] "The conventional wisdom is that litigants bargain toward settlement in the shadow of expected trial outcomes." Bibas (2004), p.2464. See also, Easterbrook (1991).

Sentence Discounting is essential in encouraging early realistic Guilty Pleas.[65] Likewise, a 2004 report to Ministers notes that "a clear and well-understood system of discounts is likely to result in early pleas in a significant proportion of cases which currently plead at or shortly before the trial."[66]

Policymakers' assumptions that Sentence Discounting contributes to the expedient disposal of cases are untested. There is surprisingly little research on the effects of Sentence Discounting on Guilty Pleas.[67] In the absence of evidence and research, policymakers continue to assume that Sentence Discounting encourages early Guilty Pleas. Policymakers also assume that Sentence Discounting does not violate the presumption of innocence and that Sentence Discounting is necessary for the operation of the justice system.[68] This research challenges these untested assumptions regarding Sentence Discounting's effects on "efficiency" and the presumption of innocence (see Chapter 8).

Part 1 of this chapter deconstructs Sentence Discounting as a form of Plea Bargaining. Part 2 analyses section 196 of the Criminal Procedure (Scotland) Act 1995 (hereinafter section 196). Section 196 is the statutory provision that formally established Sentence Discounting in Scotland. Part 3 interrogates the case law and the formal rationale regarding Sentence Discounting in Scotland. Part 4 scrutinises the potential for Sentence Discounting to change the type of punishment an offender receives, including whether a Sentence Discount can cross the custodial threshold. Part 5 investigates whether the formal law regarding Sentence Discounting is problematic regarding the legitimate expectations that those pleading guilty ought to be entitled to have. Part 6 draws on interviews with legal practitioners to show

[65] Scottish Executive (2003), Chapter 8.
[66] Scottish Executive (204), para 14.12.
[67] There has not even been a cursory Government sponsored evaluation of Sentence Discounting.
[68] See Leverick (2006) for a discussion of Plea Bargaining in Scotland.

that section 196 is primarily a rebranding exercise and that Sentence Discounting existed informally before section 196. Part 7 investigates whether section 196 might penalise those who do not plead guilty. Finally, Part 8 concludes that the formal the law regarding Sentence Discounting in Scotland is radically indeterminate. The formal narrative alone law cannot determine Sentence Discounts in actual cases.

1 – Sentence Discounting is a Form of Plea Bargaining

Sentence Discounting is a sub-set of practices constituting what is commonly known as 'Plea Bargaining.' Padgett classifies Plea Bargaining into four types: implicit bargaining based on perceptions rather than formal agreements;[69] Charge Bargaining; Sentence Recommendations; and Judicial Plea Bargaining (which can be either informal or formal).[70]

Sentence Discounting is a unique form of Plea Bargaining in Scotland as it has a formal statutory basis. However, with Sentence Discounting there is no explicit negotiation with judges before entering a Guilty Plea. This lack of explicit negotiation means that Sentence Discounting in Scotland is difficult to characterise as an instance of either formal or informal Plea Bargaining as it has elements of both.

Regardless of this difficulty with classification, Sentence Discounting, like all forms of Plea Bargaining, involves a trade between the accused (or the accused's lawyer) and the State. The result of a successful Plea Bargain is that the accused offers to plead Guilty Plea in the expectation that they will receive something in return.

[69] Implicit perception-based bargaining may be what occurred in Scotland when a Guilty Plea was tendered before the formal practice of Sentence Discounting existed.
[70] Padgett (1985), p.75-78

In Scotland, Leverick argues Plea Bargaining consists of both an "inducement to plead guilty for a Sentence Discount, and a system of informal Charge Bargaining."[71] To this list of Plea Bargaining practices, one should also add Fact Bargaining. This research found that Fact Bargaining occurs between defence lawyers and prosecutors. As Sheriff 2 noted:[72]

> The bench is, to some extent, reliant on the information that is given. Because we can only sentence on the basis of our knowledge, which (excluding cases where a report is required) comes from the [prosecution's] narration and the [defence lawyer's] plea in mitigation.

As a result of the bench's reliance on others for information, the defence and prosecution can negotiate the facts of a case. Fiscal 1[73] noted that:

> [When Plea Bargaining], and this is quite important, maybe more important [than Sentence Discounting], is you get to control the narrative and you get to be involved in negotiating the narrative.
>
> Now the Crown takes its narrative of what happens during a crime from the police reports and the witness statements - using a combination of the two to create a picture for the judge of what happened.
>
> Often times the defence will come to you and say, "he accepts this part, but part of the narrative he doesn't accept is this." So, it gives an opportunity to discuss the overall narrative of what will be

[71] Leverick (2004), pp.360-363
[72] A sheriff is a judge who presiders over cases in the Sheriff Court.
[73] A fiscal is a prosecutor in Scotland. They are also members of the solicitor branch of the legal profession in Scotland.

> presented to the sheriff. It is not always that you will accept it, but it gives you an opportunity to negotiate.
>
> If you go to trial, the narrative is out of your hands because it will be the full narrative: what the witness has said and did, and the full emotional impact of the witness presenting their case to the court. So, getting a degree of control of the narrative is very much a pro [of a Guilty Plea].

This research also found that defence lawyers and fiscals make Plea Bargains related to co-accused. For example, Solicitor 5[74] noted that Plea Bargaining was common:

> Especially if there are two or three charges, or there are two or three accused. It is almost automatic that the lawyers involved will say, “look, there is something here that can be done." And, quite often, depending again on the nature of the charge, you will find… Well, quite often they charge like a husband and wife with a drugs charge or something. If they are in the house, they will charge both of them. Quite often the husband, usually the husband, will plead guilty so they drop the charge against the wife.
>
> That's a tactic I think, they [the prosecution] use. They just charge anyone in the house with a view to someone pleading guilty to it [the charge] and then dropping it [the charge against someone else].

Fiscal 1 noted this tactic could occur where an accused’s partner has played a minor role in an offence. For example, Fiscal 1 noted this may occur where drugs are being grown by the male partner and the female partner “maybe watered the plant or something.” Solicitor 5 also noted that:

[74] A solicitor is a defence lawyer in Scotland.

> Quite often, if you have two or three accused, they will let the accused out. And, then I see them go in the corridor, and I see the three of them toss a coin to see who is going to plead guilty… or they look at their [previous] record, "he's got less than me so he should plead guilty."

Accused 12 noted co-accused concerns like this influenced his Guilty Plea. In particular, Accused 12 noted that his lack of a previous record influenced his co-accused's opinion that he should plead guilty. Consequently, in some cases, the prosecution may charge someone with the intention of using this to Plea Bargain.[75] In other cases, the prosecution may charge several persons, but later become willing to accept a Guilty Plea from one person in return for dropping charges against others.

Thus, Plea Bargaining covers an extensive range of practices in Scotland. In part, this range of Plea Bargaining is enabled by prosecutorial discretion:

> Prosecutors have a high level of discretion in determining whether or not to prosecute a case (the key deciding factor is public interest) and, if prosecution is decided upon, in determining which court and procedure.[76]

As a result of this discretion Solicitor 4 noted that "everything is up for grabs." Consequently, the defence and prosecution routinely negotiate over the charges and facts of the case. Judges too will play a part in the plea negotiation process in subtle, but significant, ways (see Chapter 5). However, in Scotland, the judge is formally only responsible for granting the Sentence Discount. The judge does not have formal a role in the other forms of Plea Bargaining that occur between the defence and prosecution. Indeed, a judge is unlikely to be informed of the specifics of any bargain

[75] For a discussion of pretextual prosecutions see Richman and Stuntz (2005).
[76] McAra (2008), p.482.

between the defence and prosecution.[77] Complex dynamics such as this mean that Sentence Discounting is impossible to understand in isolation. As such, this research critiques Sentence Discounting in light of this broader context of Plea Bargaining.

2 - The Statutory Law on "Sentence Discounting"

Sentence Discounting for Guilty Pleas is one form of Plea Bargaining. In Scotland, "Sentence Discounting" refers specifically to the Sentence Discount for a Guilty Plea that is permitted by section 196 of the Criminal Procedure (Scotland) Act 1995. Section 196 itself says little on the specifics of Sentence Discounting. Section 196 states that:

> (1) In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account—
>
> (a)the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
>
> (b)the circumstances in which that indication was given.

At first glance, section 196 seems straightforward. Indeed, the apparent absence of legal complexity might suggest Sentence Discounting would not require an extended analysis to be fully understood. However, the apparent simplicity of section 196 is misleading. Once efforts are made to understand Sentence Discounting, including its place as only one form of Plea Bargaining, substantial complexity emerges.

[77] The judge's ignorance of particular facts is frequently part of a Plea Bargain agreed between defence lawyers and prosecutors.

A - What does Section 196 Require with Regard to Sentence Discounting?

Section 196 'requires' very little with regard to Sentence Discounting. All that section 196 states is that when sentencing, a judge takes a Guilty Plea into account. Section 196 does not explicitly set out how a judge is to take the Guilty Plea into account when sentencing. Consequently, section 196 does not set out how Sentence Discounting should operate.

The courts have interpreted section 196 to permit (but not require) Sentence Discounts for Guilty Pleas. Case law has interpreted section 196 to override previous objections of the Court of Criminal Appeal towards Sentence Discounting.[78] Interpreting section 196 as overriding the Court of Criminal Appeal is to argue that the existence of Sentence Discounting is not a judicial choice. Attributing Sentence Discounting to section 196 may partly explain the hostility towards Sentence Discounting evidenced in recent judgments. As Marsh and McConville note:

> The experience of Scotland provides an example of a jurisdiction being forced to come to terms with State-induced Guilty Pleas… the higher courts in Scotland were pitch-forked into the issue by statute… Scottish judges confront State-induced Guilty Pleas both individually and institutionally in a manner which symbolises Scotland's unique engagement with the independence of the judicial system.[79]

However, how 'forced' the judiciary were is debatable. By claiming Sentence Discounting only exists because section 196 requires it, the senior judiciary can avoid having their hands soiled by the problems Sentence Discounting raises. Yet, at the

[78] Notably, section 196 is interpreted to override the decision in Strawhorn v HMA. C.f. Scottish Office Home and Health Department (1994), para 4.13.
[79] McConville and Marsh (2014). p.190.

same time as objecting to Sentence Discounting, the courts in Scotland are reaping the (assumed) benefits of early Guilty Pleas encouraged by Sentence Discounting. Indeed, this research finds evidence that a system of Sentence Discounting has discreetly operated in Scotland long before section 196.[80] A system of Sentence Discounting pre-dating section 196 would suggest that the higher courts were not "pitch-forked" into Guilty Plea Discounts.

3 – Case law and The Formal Rationale for Sentence Discounting

The formal law on Sentence Discounting has developed slowly through case law. The courts in Scotland have the power to issue what are known as “Guideline Judgments” under the Criminal Procedure (Scotland) Act 1995. This power can be used to address important questions. As of March 2018, there have only been six Guideline Judgments (five for solemn cases[81] and one for summary cases).[82] Of these six Guideline Judgments, two relate to Sentence Discounting (*Du Plooy v HMA* (2003), and *Spence v HMA* (2007)).

The first Guideline Judgment on Sentence Discounting was *Du Plooy v HMA*. *Du Plooy v HMA* introduced the term “Sentence Discount” to explain section 196. Technically, Strawhorn v HMA (1987) used the terms “discount” and “Plea Bargaining” first (as did a White Paper).[83] However, it was *Du Plooy v HMA* that made "discount" part of the current formal legal narrative regarding Sentence Discounting. Indeed, when some legal practitioners took umbrage at the term discount, the justification I provided was that this is the term used in the case law.

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[80] See Section 6 (“Sentence Discounting as a Rebranding Exercise”) below.
[81] Solemn cases are non-jury triable. Unlike England and Wales, an accused person in Scotland cannot elect for a jury trial in ‘either-way’ cases. The prosecution has almost complete discretion.
[82] See Scottish Sentencing Council. “Guideline Judgments.”
[83] Scottish Office Home and Health Department (1994). p.23.

Du Plooy v HMA suggested that there are three rationales for section 196 Sentence Discounts. The use of three rationales creates uncertainty. The three rationales are broad, and judges cannot apply them in any clear determinative manner. The rationales advocated in *Du Plooy v HMA* were the first attempt to create a formal justification for Sentence Discounting:

> Despite the enactment [of section 196], there has been no discussion in this jurisdiction as to the basis of… any allowance" (though perhaps some inferences could have been drawn from the White Paper).[84]

The first rationale is the *efficiency rationale*, which focuses on cost and time savings (case law also uses the term "utilitarian value").[85] The second rationale is the *remorse rationale*, which focuses on the post-offence attitude of the offender. The third rationale is the *victim rationale*, which focuses on sparing victims the ordeal of a trial.[86] There are various strengths and weaknesses to these rationales.

Remorse is an intriguing reason for justifying a Sentence Discount. The role of remorse in sentencing could constitute a chapter of its own, if not a thesis. While space here is limited, this section can note that remorse has a longstanding and almost intuitive appeal as a factor in sentencing:

> That expressions of remorse – when believed – mitigate punishment in law and diminish the social disapproval of transgressors in more informal settings is by now a commonplace observation amply

[84] *Du Plooy v HMA* para 6.
[85] This accords with penal policy more generally in that there is arguably now a greater focus on utilitarianism than welfarism. (C.f. Garland (2018) and McAra (2008)).
[86] Leverick (2004), pp.360-388.

> documented both in legal and criminological scholarship and in experiments in social psychology, respectively.[87]

However, it is hard to locate a principled basis for Sentence Discounting based on remorse. Remorse is mostly irrelevant to desert-based sentencing as it does not affect culpability or harm. Remorse also has tenuous links to other espoused aims of sentencing, such as rehabilitation and deterrence. These limitations mean that remorse provides a tenuous principled basis for Sentence Discounting.

Sparing victims is also a flawed rationale for Sentence Discounting. In many cases the only witnesses are police. In other cases, victims may not desire a Guilty Plea or that the offender receives a Sentence Discount. These flaws to the victim rationale are interesting as the research found that judges may reduce a Sentence Discount once witnesses have been cited.

Gemmell v HMA means that the formal law now favours the utilitarian rationale for Sentence Discounting (also known as the efficiency rationale). *Gemmell v HMA* argues that sparing victims and showing remorse are mitigating factors. Mitigating factors are argued to be irrelevant to Sentence Discounting.[88] As such *Gemmell v HMA* states that Sentence Discounting, "is not based on any high moral principle relating to the offence, the offender or the victim."[89]

Gemmell v HMA argues that a judge should consider remorse and victim rationales as part of general mitigation.[90] To do this a judge should sentence in three stages.

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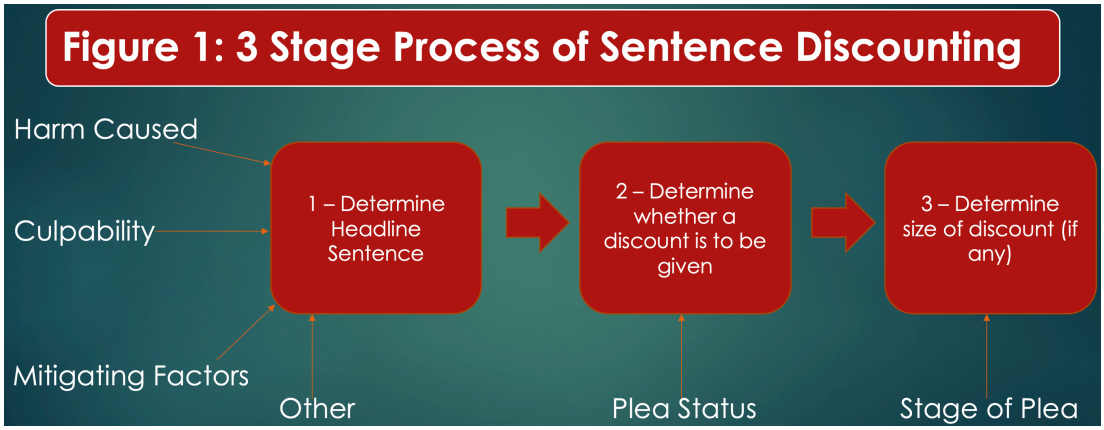
[87] Weisman (2009), p.48.
[88] Though case law does not state so, one might also assume that aggravating factors are also irrelevant. However, aggravations that cost the court (thereby 'undermining the utilitarian value' of a Guilty Plea) have prevented a Sentence Discount in some cases.
[89] *Gemmell v HMA*, para 34.
[90] The formal distinction can be seen in Figure 1.

Stage 1 encompasses all the facts and circumstances of the case, including remorse and victim rationales. The judge then considers Sentence Discount in Stage 2 and Stage 3.



However, this three-stage conceptualisation is problematic in practice. This research found that sentencing is difficult to divide into stages as judges perceive it as a "holistic process."[91] The research also found that separating a Guilty Plea from remorse is artificial. The research found that judges do not typically encounter an accused who pleads guilty but denies remorse:[92]

> Remorse should be there. One would be surprised if one pled guilty but said, "I'm pleading guilty, [in a loud booming voice] *but I don't regret what I did for a moment!*" That's not a realistic presentation of a Guilty Plea.
>
> So, most agents will say, "oh my client feels very sorry, or he is remorseful." (Sheriff 1)

Thus, this research found that the formal narrative advocates an efficiency rationale to justify Sentence Discounting. Yet, in interviews, judges and other legal

[91] Sheriffs referred to sentencing as a "holistic" process.
[92] Whether judges believe indications of remorse is another question.

practitioners spoke of all three rationales as important to Sentence Discounting. Interviewees felt there were practical problems with dealing with Sentence Discounting as an isolated decision. The research also found that the most enduring features of *Du Plooy v HMA* are that it cemented the "utilitarian" rationale for Sentence Discounting and that the maximum discount would typically be up to one-third. Other features of *Du Plooy v HMA* (such as scepticism about reducing a discount where there is overwhelming evidence) are less relevant in the current formal law narrative of Sentence Discounting.

A - "Du Plooy Revisited": The case of *Gemmell v HMA*

Currently, *Gemmell v HMA* is the most significant judgment regarding Sentence Discounting.[93] The significance *Gemmell v HMA* is reflected in Sheriff 5's description of it as "Du Plooy revisited." This description conveys the perception that *Gemmell v HMA* was rethinking the fundamentals established in earlier case law.

Interestingly, *Gemmell v HMA* is not a *Guideline Judgment* as it was not issued under the Criminal Procedure (Scotland) Act 1995. However, it is unclear what difference this makes. Being issued by a bench of five judges, *Gemmell v HMA* could be argued to carry as much precedential value as a Guideline Judgment. Even the Sentencing Council's website lists "notable cases" such as *Gemmell v HMA* alongside Guideline Judgments.[94] Thus, not being an official Guideline Judgment does not appear to be significant in precedential terms.

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[93] There have been more recent cases (e.g. *Murray v HMA* which was decided by Lord Gill who gave the leading opinion in *Gemmell v HMA*), but these have affirmed *Gemmell* rather than lead to any new developments.

[94] "The High Court itself has on occasion given guidance of the kind indicated in the Act, and has increasingly done so explicitly in the last year or so without the need for legislation." Renton and Brown (2013), para 22.17.2.

Lord Gill's[95] comments in *Gemmell v HMA* regarding Sentence Discounting are of particular interest. Lord Gill affirmed that the "euphemism" of "utilitarianism" explained the rationale for Sentence Discounting. The term "euphemism" intimates that the unabashed rationale is less philosophically justifiable. Lord Gill demonstrates this strong negative attitude towards Sentence Discounting throughout his opinion. To further stress the morally deficient quality of Sentence Discounting, Lord Gill goes on to point out that the utilitarian rationale is "not an exercise in Benthamite philosophy."[96] This comment serves to undercut potential arguments that Sentence Discounting might have a latent morally principled basis.

It is unfortunate Lord Gill's conception of utilitarianism was not explained in greater detail. Certainly, Bentham's philosophy is widely regarded as a central foundation of utilitarianism, which is the articulated reason for Sentence Discounting. However, a non-Benthamite version of utilitarianism is difficult to conceive of in this context. Indeed, Bentham famously held rights to be "nonsense upon stilts" in his quest for maximising pleasure and minimising pain.[97] This rejection of individual rights for the greater good is perhaps an apt perspective if Sentence Discounting undermines individuals' rights to save costs.[98]

Lord Gill's comments do not seem to suggest any variant of Bentham's philosophy.[99] Rather, the comments make the most sense if considered as a more colloquial and contemporary usage of the term utilitarianism. In modern usage, utilitarianism has

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[95] The most senior judge in Scotland at the time.
[96] *Gemmell v HMA*, para 34. Para 35.
[97] Bentham may disapprove of Sentence Discounting as he expressed an opinion that the accurate determination of guilt is necessary.
[98] See Schofield (2003) for an analysis of Bentham.
[99] McConville and Marsh make an argument for what Lord Gill might have meant, but there is little in Lord Gill's decision to support this. McConville and Marsh also recognise that their argument regarding what Lord Gill may have meant is contradicted later on in *Gemmell v HMA*. See McConville and Marsh (2014), pp.199-201 and p.203.

connotations of being perfunctory and only doing what is necessary. In Lord Gill's usage, utilitarianism rejects a moral virtue to Sentence Discounting and argues it is necessary to keep the justice system running. Consequently, what it appears *Gemmell v HMA* is saying (with the "euphemism" of "utilitarianism") is that Sentence Discounting is detrimental to justice:

> It involves the court's passing a sentence that, in its considered judgment, is less than the offence truly warrants. It is a statutory encouragement of early pleas.[100]

What this quote suggests is that Sentence Discounting is about promoting the expedient disposal of cases via early Guilty Pleas because it is necessary, not because it is just. In part, some reliance on an efficiency rationale is normal: "the desire to minimize the number of fully contested trials appears to be a universal criminal justice objective."[101] What is unexpected is the critical view Lord Justice General Gill expressed towards a practice that is an element in the disposal of most criminal cases in Scotland. Indeed, it seems the message conveyed is that judges should only countenance Sentence Discounting because they must.

In England and Wales, the efficiency rationale is modified by claims that Sentence Discounting also reflects the fact that Guilty Pleas benefit victims, and that Guilty Pleas show that the offender is remorseful. These other rationales are often used to impute an element of legitimacy into Sentence Discounting. Yet, *Gemmell v HMA* differs, even from *Du Plooy v HMA*, and blatantly rejects "high moral" reasons as incidental. Instead:

> The primary benefit that is realised in every case is the saving of administrative costs and the reduction of the court's workload.[102]

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[100] *Gemmell v HMA*, para 34.
[101] Hodgson (2013) p.226.
[102] *Gemmell v HMA*, Para 35.

Thus, what differentiates Sentence Discounting from Benthamite philosophy appears to be the lack of 'high moral' content. While Bentham would reject rights, his philosophy was ultimately still a moral one. *Gemmell v HMA* appears to go to lengths to make this point clear with the focus on a single rationale for Sentence Discounting.

B - Is an Accused Entitled to a Sentence Discount for Pleading Guilty?

As part of the criticism of Sentence Discounting, Lord Gill derided section 196's effect on public confidence in the justice system. To mitigate damage to public confidence, Lord Gill stated that:

> That the court's discretion to allow a discount should be exercised sparingly and only for convincing reasons.[103]

This quote is one of the most striking parts of the judgment as it runs contrary to the overall argument in *Gemmell v HMA*. The overall argument in *Gemmell v HMA* is that: (1) Sentence Discounting exists for the "utilitarian" reason that a Guilty Plea saves resources (other reasons are incidental); (2) the earlier a Guilty Plea is, the more resources it saves; and (3) a plea at any stage will save at least some resources and so attract at least a token discount.

The "utilitarian benefit" is a single reason, leaving it unclear why the plural "convincing reasons" is used. Furthermore, it is also unclear how Sentence Discounts are to be used "sparingly." Does "sparingly" mean judges should reduce the size of discounts, that judges should grant discounts less frequently, or both? While *Gemmell v HMA* states that Sentence Discounting is discretionary (a less than ideal situation when trying to determine legitimate expectations), it also states that:

[103] *Gemmell v HMA*, para 77.

> Even in a discretionary matter such as this, it is desirable that the court should exercise its discretion in accordance with some broad general principles.[104]

Precisely what these broad general principals are is unclear. The formal law does not offer an answer. The most that can be said is that *Gemmell v HMA* appears to signal a change in the attitude of the Court of Criminal Appeal regarding Sentence Discounting. Indeed, the research found that several defence lawyers described this change as reducing legal certainty and the ability to appeal (though, for reasons elaborated on later, it made little difference to their everyday practice).

C - Evaluating the 'Utilitarian' Value of a Guilty Plea

The "utilitarian" value of a Guilty Plea is indeterminate. This research found a perception that some offences will merit a reduced discount because the nature of the evidence is different. This finding is significant as *Du Plooy v HMA* had suggested that overwhelming evidence might not reduce a Sentence Discount. The rationale for this was that it is hard to assess how overwhelming the evidence might have been if contested at trial. Indeed, interviews show that there was a view among practitioners that how the evidence stacks up at a trial is unpredictable. As Solicitor 4 noted, "we have all lost trials we thought we should have won and won trials we thought we should lose." To some defence lawyers this uncertainty of how evidence will stack up was a reason to go to go trial; for others, it was a reason to secure a Guilty Plea.

Today, in Scotland, some cases may also see a reduced discount because the perception is that a Guilty Plea could "hardly be withheld":

> If there is a plea that could hardly be withheld then you know, like disqualified driving. You are either disqualified, or you are not. So, I

[104] *Gemmell v HMA*, para 32.

> think the reduction of penalty for utility reasons if someone pleads guilty to disqualified driving is not likely to be so high.
>
> [This differs from a case where] someone pleads guilty to an assault where, for example, there might have been some argument whether there was some element of provocation or self-defence.
>
> But you are either a disqualified driver, or you are not. So, there's not great utility. Or rather, you can balance the utility of saving court time against the fact that the plea could hardly be withheld based on the fact that it is well within the knowledge of the driver whether he has a licence or not. (Sheriff 1)

Thus, where an accused pleads guilty in the face of overwhelming evidence, the Sentence Discount may be less. As Accused 2 noted, in his substantial experience, "damage limitation" was not thought to be a good reason for a Sentence Discount. However, ironically, Sentence Discounts are less normatively problematic in cases with overwhelming evidence. Arguably, the cases where the evidence against an accused is weak, or guilt is doubtful, are not the ones that should be encouraged to plead guilty.

Also affecting a Sentence Discount is the costs incurred. For example, two Guilty Pleas could save the same amount of money (e.g. by avoiding a trial), but one case could be far more expensive due to the pre-trial procedures. In such an instance, the more expensive case may receive a lesser discount because of the perceived waste of resources:

> There are some occasions where the Sentence Discount is not going to make much of a difference. For example, if you take a downloading case [downloading indecent images]. I will give a discount, but I won't give as much of a discount because the saving to the public purse isn't as great.

> Because the plea won't come in until all the background reports have been done; until the cyber-crime analysis has been done. It is only then the accused will face up to it. And if all that work has been done then why should he get a significant discount? The answer is he shouldn't, and he doesn't. (Sheriff 2).

Also interesting is that the nature of the witnesses is significant. That the witnesses being police officers may reduce a discount was a point made in *Gemmell v HMA*. The reason that police witnesses reduce the discount was that there were no members of the public to inconvenience, and no victims to spare. These considerations conflict with the argument in *Gemmell v HMA* that the Sentence Discount focuses on the "utilitarian" value of the Guilty Plea in terms of time and cost savings.

Regarding the type of case affecting the Sentence Discount, Sheriff 2 summed this up nicely:

> The utilitarian value of the plea is *one* of the factors I will look at.
>
> For example, I got a plea of guilty this morning to quite a serious dangerous driving [charge], involving a pursuit by the police over forty minutes… Now, he's pled guilty at the first appearance in Court.
>
> So, you would think that the utilitarian value is quite significant? And, I take that point.
>
> But, no members of the public have really been saved time from coming to court because every single person who was going to be a witness, in this case, is a police officer who was going about their business…
>
> So, the utilitarian value, in that case, is not as great as it might have been if members of the public were involved. So, yes, he will get a discount at the end of the day. I can't tell you what the discount will

> be because I had to defer for reports, and I don't know what the sentence is going to be.
>
> But I will factor in the discount, though it won't be the one-third that you might think would be the norm for a plea at first instance. So, I think you have to look at the nature of the offence and the utilitarian value of the plea to the overall administration. And, then you do a balancing act, which is case specific.
>
> Which doesn't help your analysis, but it's true.

Consequently, the utilitarian value of a Guilty Plea is complex. It is not just related to the savings a Guilty Plea brings, but potentially to the wasteful costs that an accused is thought to place upon the justice system.[105] Other sheriffs agreed with this view. Notably, driving offences are cases where the full Sentence Discount is less likely due to perceived waste. Judges also thought there was waste in cases where persons repeatedly re-offend. Sheriff 6 noted that:

> There are exceptional cases where I say, "well it is within my discretion not to give the discount." That is generally in repeat offending cases. Especially Road Traffic offences for some reason, I don't know why.
>
> But if it involves a breach of a court order, which driving while disqualified, entails, then I think… I probably do say, "well in my discretion I could give you X discounted to Y, but I am choosing not to because you just keep doing it again and again."
>
> As long as you can justify it. As long as you can justify it… I would hope that the Appeal Court would uphold you on that. But they do.

[105] This perception of wasting court time is partly why accused persons may be punished more severely for being perceived to be trying to game the system.

These are significant points that show the complex considerations that are involved with Sentence Discounting. Despite a significant portion of *Gemmell v HMA* arguing that Sentence Discounting is an isolated consideration, Sentence Discounting may vary based upon the type of case and perceptions of how the accused wastes resources inappropriately. This variation of Sentence Discounting is not necessarily problematic in itself. However, it does highlight the indeterminacy of the formal law on Sentence Discounting.

4 - Sentence Discounting and Custodial Threshold

A fundamental question that remains unclear from the formal law is whether a Sentence Discount can change the type of disposal an offender receives. One of the most important considerations in sentencing is whether an accused receives a custodial sentence. Crossing the threshold to a custodial sentence has practical consequences for an accused. Any engagement with the justice system tends to result in negative consequences.[106] Moreover, there is also evidence that the subjective burdens of custodial sentences do not scale linearly with length. Social stigmas from being an ex-prisoner, the pains of adjusting to prison life (no matter how long the sentence) all place a burden on individuals. Accordingly, it makes sense that this research found that an accused will wish to know if their Guilty Plea and a Sentence Discount may affect whether they receive a custodial sentence.[107]

The formal law on Sentence Discounting is indeterminate or "discretionary." As such, the formal law is unclear about the effect a Sentence Discount may have on the custodial threshold. Indeed, it is not possible to predict the effect of Sentence Discounting relying only on the formal law. However, since *Du Plooy v HMA*, it has

[106] For example, it has been argued that "The deeper the usual suspects penetrated the system, the more likely it was that their pattern of desistance from involvement in serious offending was inhibited." McAra and McVie (2012a), p.360
[107] Chapter 8 will address accused persons perspectives.

been considered hypothetically possible that a Sentence Discount may cause a sentence to cross the custodial threshed. This hypothetical possibility was thought to be part of the discretionary nature of Sentence Discounting. Yet, examining whether this happened in practice provided interesting answers.

All defence lawyers felt that a Sentence Discount could take a case from a custodial sentence to a non-custodial sentence. Most based this perception in the fact that they had seen this occur. Solicitor 3 felt it was "not uncommon" and other solicitors generally felt the same. Solicitor 6 noted that:

> It regularly does. “You are not getting any discount,” and this is me quoting sheriffs, “you are not getting any discount. The discount is, you are not going to prison." Regularly.

The main outlier was Solicitor 4 who noted that it happened “occasionally,” but then concluded that it was not a rare occurrence:

> Occasionally. Generally speaking not in summary cases. Occasionally you will get a sheriff who will be asked to step back from custody and give the max available (for example 2 years supervision, 300 hours community service). The discount being they are not going to prison. And they will say that.
>
> It is not that often, it is not rare, but there are not that many cases that are such a fine line. And usually not in summary – usually we are talking about that on indictment cases involving assaults or frauds, or cannabis.

The interviews with fiscals showed similar views. Fiscal 1 noted that:

> Sure. Normally it can be that if a crime is on the precipice of custody. It could be a high-end CPO, and an early plea could bring it back down

> to them favouring an alternative disposal like a CPO. So, an early plea can be the difference between jail and an alternative to custody.

From this, it would seem that Sentence Discounting's ability to affect the custodial threshold appears to be primarily limited to "borderline" cases where a custodial sentence is a distinct possibility, but not inevitable.

Interviews with sheriffs on the custodial threshold were interesting. There agreement that the formal law permitted a Sentence Discount to move a case from a custodial sentence to a non-custodial sentence. Sheriff 6 even noted:

> Yeah, definitely. I will often say, “you are getting 300 hours of unpaid work and the discount is that you are not going to prison today.” Definitely. And then they know, when they come back having breached their order, that the next stop is prison.
>
> I know the High Court have not particularly approved of that way of thinking, but I don’t see anything wrong with it because the next step up from a CPO with 300 hours of unpaid work, in my book, is prison.

However, Sheriff 2 outrightly stated, "no" a Sentence Discount could not change a custodial sentence to a non-custodial sentence:

> In my view, if the alternative is available, then I shouldn’t be imposing a custodial sentence. You have to start with, if you like, almost a linear equation. You start at the top determining if custody is the only appropriate sentence. If the answer to that is no, then you are looking at other disposals…
>
> I personally, and this is a personal view, I wouldn’t then discount to a non-custodial disposal. Because I don’t think that is what the utilitarian value is about. I think the utilitarian value is to decide on the appropriate sentence and give a discount within that ambit.

This answer is the result of Sheriff 2's way of conceptualising the custodial threshold. Sheriff 2 felt the custodial question was something to be determined in light of all the facts and circumstances of the case. However, Sheriff 2 felt that Sentence Discounting could form part of this overall consideration. Sheriff 2's view was not entirely different from other sheriffs who argued that a Sentence Discount could change the type of disposal, but that this had to be looked at 'holistically.' This holistic notion of sentencing, again, shows problems with conceptualising Sentence Discounting as an isolated factor.

Sheriff 1 suggested this difficulty with implementing the Sentence Discount as an isolated consideration. While initially open to the *possibility* (though not enthused by it) Sheriff 1's view changed as they began to "logically" reflect on the question. Sheriff 1's reflection encompassed a variety of considerations when sentencing, which included contrition:

> I think it does. If someone could well go to prison, but they plead guilty at an earlier stage they *may*, "may" being underlined, escape custody in favour of a high tariff community disposal.
>
> So, someone accused of assault who could well go to custody. But, if they plead guilty early, and the assault is within the margin of appreciation. Then they might well get a high-end CPO as an alternative to custody, but they might be told: "I've also had regard to the fact that you've pled guilty and spared witnesses." So that goes back to our question of contrition coming into it too.
>
> So, I think that it can happen, but I don't think it happens that much. I think it does happen. You see, the total sentencing exercise is to weigh a number of factors: the seriousness of the offence; the record of the accused; the impact on the public; personal circumstances of the accused; his or her contrition. And in weighing all that up, it may

> well be that the sentence is so serious that the outcome has to be custody.
>
> There may be a number, but very, very limited cases, where it would be appropriate to say then, "ok I'll reduce custody to a non-custodial sentence."
>
> *I'm not ruling it out, but the more I think about it, the more I think that actually, logically, it probably doesn't happen in my experience very much.*
>
> I think that if you've already decided it's going to be a custodial disposal and then you reduce it (I don't like the word "discount"), you then reduce it to reflect the utility value of the plea. So, four years down to three years or whatever it might be.

These quotes show that there are different conceptions of how to rationalise the sentencing process. While the formal law suggests Sentence Discounting should be an isolated consideration, this is difficult to do in practice. This difficulty is evident when the theoretical isolation begins to falter upon further practical reflection by Sheriff 1. Indeed, ultimately Sheriff 1 came to articulate a view similar to that of Sheriff 2. Likewise, Sheriff 5 noted that:

> You're not sentencing in isolation. And in my view, you should never sentence in isolation…
>
> I think the aim of section 196 is to look at the utilitarian value of the plea in the round of the whole circumstances. And not just in a wee isolated bubble. But that may or may not be a personal view… I'm not sure that is universal. I just don't think that's right… I am quite clear about that.

When Sheriff 4 was asked whether a Sentence Discount might cause a sentence to cross the custodial threshold, they answered:

> Yes, of course it can. If it is a borderline case, then that might be the thing that tips it.

This answer from Sheriff 4 was straightforward insofar as it related to an abstract question. Sheriff 4 went on to argue that, in practice, matters were not straightforward:

> But, again, it is fact specific and I can't really give you any real guidance on it. But in a borderline case, it might make you more likely to… It is a difficult one because, as you know, the discount is given purely for pragmatic purposes. It is purely to reflect the saving to the administration and so forth. Issues which are mitigatory are entirely separate. But, it is difficult sometimes to separate the early plea from the expression of remorse.

Thus, there are difficulties with formalistic notions of the decision-making process for section 196 discounts. The formal law currently argues that Sentence Discounting is an isolated consideration. However, sheriffs viewed this as problematic since sentencing is perceived as a holistic process. This problem contributes to differences in whether sheriffs said the Sentence Discount, on its own, could affect the custodial threshold. In analysing these accounts given by legal practitioners, the research finds that there is a complex process at work. In explaining their answers, legal practitioners were shuttling between accounts of the formal law and their culturally-embedded understandings of context (discussed in Chapter 9).

5 - What is an Accused Entitled to Expect when Pleading Guilty?

Debate on Sentence Discounting in Scotland, and elsewhere, has focused little on what an accused is entitled to expect when pleading guilty. Most debate focuses on the risk that accused persons benefit too much. For example, concerns have been

raised about 'double counting.'[108] Double counting is where accused persons are thought to benefit repeatedly from pleading guilty. A significant concern with double counting is that accused persons will benefit once through Charge Bargaining and Fact Bargaining, and again through Sentence Discounting. The concern is that the accused person is receiving an unduly lenient sentence.

Concerns about the excessive benefits of Sentence Discounting are curious. The case law seems more willing to tolerate Sentence Discounting's detriment to principles than accused persons benefiting too much from Sentence Discounting. However, one problem with the formal law on Sentence Discounting is that little is guaranteed. The formal narrative of law argues that Sentence Discounting is discretionary, and this makes it uncertain what an accused should be able to expect by way of a Sentence Discount. Indeed, to avoid limiting judicial discretion, *Gemmell v HMA* noted that "the level of discount, if any, is and must always be a matter for the discretion of the judge."[109]

This lack of entitlement is inequitable in the sense of being one-sided. A sufficient degree of certainty (at least in principle) is a necessary part of a fair process. For example, in administrative law, there is a "doctrine of legitimate expectations," estoppel, and personal bar in several jurisdictions. Unfortunately, in Scotland "the development of the doctrine [of legitimate expectations] has been impeded by a lack of extended analysis, either in academic literature or in judicial pronouncements."[110]

[108] For example, see *Gemmell v HMA* para 50.
[109] *Gemmell v HMA*, para 30.
[110] Reid (2006).

6 – Is Sentence Discounting a Rebranding Exercise?

The research found strong perceptions that Sentence Discounting existed before the implementation of section 196. The prior existence of Sentence Discounting is a critical finding that challenges perceptions that the Scottish judiciary was "pitch-forked"[111] into discounting sentences

The main practical difference following section 196 is that judges now state that they have given a Sentence Discount. With regard to such policies, Sheriff 6 noted that:

> I can't believe they don't think that we took that in to account before. It is just a part of the whole circumstances of the case...
>
> I think we would have taken in to account the timing of the plea, and maybe not said it in so many words. It would be one of the factors you would process in your mind… It had to impact on your decision… Now, of course, you have to say it.

Solicitor 7 noted that:

> Du Plooy put into law something that already happened. All Du Plooy did was try to regiment how big a discount you got for pleading at what stage.

Legal practitioners noted that things such as sparing witnesses and saving courts time were always things the court would consider in sentencing. Indeed, the descriptions of sentencing as "holistic" exclude very little from consideration. What the official practice of Sentence Discounting did was to make the potential reward for pleading guilty more transparent.

[111] McConville and Marsh (2014). p.190.

Some felt section 196 helped to improve transparency. The belief for those of this view was that if discounting happened, it should be clear. It was also felt that this transparency led to a greater incentive to plead guilty as Sentence Discounting became known to accused persons.[112] However, legal practitioners also thought that Sentence Discounting offered little incentive in most summary cases.

Interestingly, some solicitors thought that more significant discounts were given before Du Plooy, but that they were not stated:

> The discount for pleading Guilty before may have been more than one-third. (Solicitor 2)

Sheriff 6 was asked about section 196's seemingly modest effect on daily practice:

> I think there is very good reason for that… Before we were doing it, but the statute just put in place what we were doing before. You now have to verbalise it; you have to say it. So, we all understand the benefit of it and why we do it.
>
> So of course, we are going to do it…. We have all just carried on doing what we were before because it is the right thing to do…
>
> [So, it was] more a formalisation of what happened before. I think probably that is the case… It was happening before. It just wasn't verbalised in the same way.

Other Sheriffs expressed the same sentiment. Sheriff X noted that:

[112] Though as Chapter 8 shows, accused persons get information from lawyers and would have been told about informal Sentence Discounting before section 196.

> One thing, and I don't know if any of the agents have said anything to you about that… In all the years of my practice up to the Strawhorn case, discounting happened.
>
> It just didn't happen officially. And it was disguised as, "My Lord you will take account of the fact that: he saved the witnesses having to come and give evidence; he saved this female from the distressing experience of having to be cross-examined in court; and blah de blah."
>
> So, in fact, unofficially we all knew the courts did apply discounts, and it was just never described as such. It was nothing new under the sun. And what Sheriff David Smith did [in Strawhorn v HMA] was say it instead of doing this by a, if you like, 'a nudge and a wink.'
>
> And it happened in a lot of courts, and it happened in the High Court of Justiciary as well. It was well known if you were acting for somebody in a rape case, the sentence would be very much less if you pled [guilty] than if you took it to trial and the victim was cross-examined.
>
> Everybody knew that. But it was disguised, if you like, as remorse and contrition, and all the rest of it. And effectively, it was a discount system. And all that David Smith did was instead of leaving this unsaid or unwritten, he was very (as you know in that judgment) very upfront and bold in his position. And he was berated for it at the time, ahead of [laughs] a change in the attitude to these things.

This persistence of established practice also explains the limited effect of *Gemmell v HMA* on sheriff summary cases. *Gemmell v HMA* suggested that discounts should be used sparingly, but in practice, sheriffs carried on doing as they have always done. That sheriffs carried on as before does *not* mean that they are 'ignoring' the law or

paying "lip service" to it.[113] Rather, sheriffs are continuing with what they think is the "right thing to do." This practice is perfectly compatible with the formal law, which is indeterminate in its application.

However, the research found that *Gemmell v HMA* still has significant implications for notions about what accused persons ought to be entitled to expect. Sheriffs felt that Gemmell was intended to send a message to the bar and to deter appeals. Sheriff 1 was asked whether section 196 was focused on summary cases or solemn cases:

> I suspect it was aimed at both. But, you have to look at it in the context.
>
> A lot of these cases came up at times when the High Court was getting behind in terms of its own targets. In terms of getting through the business. If people plead guilty, there were going to be fewer trials. So, the High Court would have the same amount of business, but it would make the same amount of business more manageable. So, I think that is part of the background context, even if not explicitly stated in Gemmell or Murray.

Sheriff 4 also understood *Gemmell v HMA* in light of this 'context:'

> The recent cases, as you are aware, have emphasised that it is a matter for sheriffs' discretion… I think Gemmell was trying to make a fairly blunt point to the bar about appealing these matters and treating as if it is a ready reckoner. (Sheriff 4)

This message was received by solicitors (and Accused 2) who felt that there was less scope to appeal based on a Sentence Discount. Some were critical of the lack of

[113] Brown (2017), p.226.

certainty. Solicitor 7 noted that while *Du Plooy v HMA* and *Spence v HMA* provided some legal certainty:

> They are now clawing back at that. There are now cases where they are saying, "though it is a section 76, it wasn't tendered until quite late in proceedings. So, you are only getting a quarter instead of a third."
>
> I think you've gone away from the mathematical certainty that Du Plooy had, which was if you plead guilty straight away you get one-third off, plead guilty from a preliminary hearing one-quarter off, and if you plead guilty from the trial you get ten percent off. That kind of thing. That is now much more fluid, and each case is looked at in its own circumstances.

Yet, while the formal law is now more uncertain about Sentence Discounting, the effects in routine practice were felt to be minimal:

> Gemmell gives the court more discretion, but I think in terms of practice they still view it in terms of Du Plooy. (Solicitor 7)

Likewise, Solicitor 6 noted that *Du Plooy v HMA* had more certainty:

> There is very much a system in place now. With [section 196], Du Plooy and all that sort of stuff. It has almost become cast in stone what the discounts are.

As with other solicitors, Solicitor 6 noted that in practice discounts were still predictable despite *Gemmell v HMA* stating they are "discretionary:"

> They are [discretionary according to Gemmell]. But [in practice] they are not. Generally speaking, it's a third, quarter, and fifth. There are some exceptions who don't do it.

Other solicitors interviewed expressed the same sentiment. For example, Solicitor 4 noted that:

> The broad brush is that it is a third up to the Intermediate Diet, maybe reducing to a quarter depending on what you say.
>
> Quite often you can give an explanation as to why it was not a Guilty plea at the outset, and it might not be anything to do with me or my client, and you will still get your third… I think that works across the board.

These quotes show that while legal practitioners perceive the law to be important, they also feel that there is more to Sentence Discounting than the formal law narrative stemming from statute or case law. Legal practitioners shuttled between both a formalistic account of Sentence Discounting and a practical account. Solicitor 6 expresses this well with "They are [discretionary according to Gemmell]. But [in practice] they are not."

The research found these two views in interviews with all legal practitioners. The thesis returns to this point in Chapter 9, where it argues that practitioners have internalised two distinct narratives of law and practice. These two narratives allow practitioners to believe in both formalistic legal notions, and their culturally-embedded understandings of the context relevant to Sentence Discounting. These two narratives are why the formal law, on its own, is not thought to be determinative, even though legal practitioners consider it to be vital.

In sum, practitioners felt that the formal law was critical to Sentence Discounting, but that the formal law did not operate independently:

> Like most things that start at a Government level, they can only be successful if they are done not in isolation, and if they are part of a

> wider change. You can't just say we are going to give plea discounts and not change anything else.
>
> You have to facilitate that happening, and nothing has changed to facilitate that expect that there appears to be less manpower in the fiscal service to deal with it rather than more. (Solicitor 2).

Thus, a key finding of the research is that section 196 is not a radical change to daily practice as some have assumed. Section 196 may have served to change the narrative of the formal law, rather than routine practice. Legal practitioners reported an established system of Sentence Discounting operated long before section 196. As Chapter 3 will note, this prior system of Sentence Discounting was not incompatible with the formal law at the time. While Strawhorn v HMA called a policy of Sentence Discounting an "objectionable practice" it did not necessarily forbid it. Consequently, the permissibility of the prior routine of Sentence Discounting, emphasises the *radical* indeterminacy of the formal law when analysed in isolation.

7 - Is Section 196 a 'Discount'?

Whether Sentence Discounting is a "discount" is one of the great controversies of contemporary criminal justice systems. This research found that legal practitioners tend to refer to section 196's effect on a sentence as something like a 'sentence discount' or 'reduction' that 'rewards' a guilty plea. This articulation of Sentence Discounting is how policymakers maintain that the formal law does not undermine the presumption of innocence.

However, some have argued that practices of Sentence Discounting are little more than sophistry to assuage the embarrassment of routinely and systemically violating the presumption of innocence. For instance, Darbyshire argues that the so-called discounts:

> 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.[114]

Likewise, Alschuler has argued that:

> It is doubtful that any polity would sentence 95 percent of all offenders to less than they deserve or to less than is necessary to protect the public. Officials seem far more likely to impose “extra” punishment on a small minority of offenders to discourage the exercise of the right to trial.[115]

That Plea Bargaining might violate the presumption of innocence is not a new debate. However, this debate regarding the presumption of innocence has not been resolved. Instead, concerns over the presumption of innocence have become part of the background noise of what little policy debate still occurs regarding Sentence Discounting:

> There is a lot of philosophical issues that I am no better qualified to answer than anyone else… I appreciate that there are counter-arguments, but you don’t hear them very often now... Maybe it is a philosophical argument more than it is a real-world issue.
>
> People in the past have argued about the sort of blackmail thing. About the danger of pleading to get the discount rather than

[114] Darbyshire (2000), p.901.
[115] Alschuler (2017), pp.18-19.

> gambling, if you like, with a higher sentence and whether that goes against basic moral principles.
>
> That is not for me to answer, but as you know, back at the time of Strawhorn, and other cases, that was an active academic discussion… And I don't have the answer to it. But, it is not something you hear bandied about on a day to day basis. (Sheriff 1)

Yet, concerns regarding the presumption of innocence are still relevant both in legal practitioners' minds and in academic discussion. The formal law in Scotland posits section 196 as a system of Sentence Discounting. However, critics argue that by seeking to encourage early guilty pleas section 196 risks undermining the presumption of innocence by bypassing the safeguards a trial is argued to provide. Some even argue that we must ask whether these *encouragements* to plead guilty amount "to institutionalized coercion."[116] In fact, a significant finding of this research is that Sentence Discounting is so contentious that some legal practitioners strongly objected to the use of the term "Sentence Discount."

I – Alternative Terminology for Sentence Discounting

Legal practitioners' objecting to the term "Sentence Discount" is notable. Case law uses the term "Sentence Discount," but section 196 itself does not. Given the acceptance of "Sentence Discounting" in case law, it is significant that some judges and defence lawyers still found Sentence Discounting objectionable terminology. Those who objected to the term "Sentence Discount" felt that there were negative connotations that trivialised justice.

One defence lawyer likened the term "Sentence Discounting" to the terminology used in perpetual furniture store sales (Solicitor 2). A judge objected to the term

[116] McCoy (2005), p.90.

“Sentence Discounting” and noted that they are "not selling sweeties" (Sheriff 1). Several other legal practitioners expressed a dislike for the term Sentence Discounting. That any legal practitioner found the established term "Sentence Discounting" a cause of discomfiture shows how normatively challenging Plea Bargaining remains today. While the counter-arguments to Plea Bargaining may not be “bandied” about often, when debate occurs, Plea Bargaining raises troubling questions.

Legal practitioners who objected to the term Sentence Discount proposed alternatives such as “sentence adjustment” and “sentence modification.” These alternatives seek to avoid using the word "discount" because of the negative connotations it carries. However, it is not clear whether these alternative terms are any less contentious. For example, Sheriff 6 felt there was little benefit in renaming Sentence Discounting as the term promoted transparency in sentencing. Sheriff 6 noted that the term “Sentence Discounting” was "calling a spade a spade."[117]

Other legal practitioners felt that there was merit in the use of the term "discount" because accused persons understood it. Indeed, as Chapter 8, notes accused persons do use the term "discount." However, problematically, accused persons also share some legal practitioners' views of “discounting” as trivialising justice. This trivialisation of justice means that, like defence lawyers and fiscals, accused persons view the justice process as involving gamesmanship. Accused persons’ notions of justice as a game may undermine efforts at desistance. Moreover, accused persons may be punished more severely if they are perceived by the court to be gaming the system.

[117] See Tata and Gormley (2016) for an argument that "Sentence Discounting" may be better characterised as a punishment for proceeding to trial.

Consequently, the research finds that the terminology used regarding Sentence Discounting conveys essential messages to practitioners and accused persons. These messages can have significant consequences beyond mere semantics. It is possible that the Scottish Sentencing Council will consider the importance of the terminology and the various perspectives when it comes to issuing guidelines on the subject. Indeed, the official guidelines in England and Wales avoid the term Sentence Discounting. However, for now, this thesis uses the term Sentence Discounting for clarity.

8 - The Formal Law in Isolation is Radically Indeterminate

Subsequent chapters of this thesis will continue to demonstrate that Sentence Discounting is a deceptively simple practice. Much of the complexity of Sentence Discounting relates to the social dynamics that form part of legal practitioners' conception of how decisions are made (see Chapter 5). What enables social dynamics to play a crucial role in summary work is the radical indeterminacy of the formal law when considered in isolation.

For example, case law suggests that a Sentence Discount should "should not normally exceed a third of the sentence which would otherwise have been imposed."[118] However, this is not an absolute rule, as Sheriff 4 notes:

> There are no hard and fast rules as you know… Du Ploy set down that it should be a maximum of no more than *perhaps* a third. And I am not aware of any sheriffs that have taken it upon themselves to go beyond that.

Given judicial proclamations of individualised sentencing in Scotland, is there such a thing as a 'normal' case? Is it not true that every case is regarded as unique? As such,

[118] *Du Plooy v HMA* 2005, para 26.

in any given case, a Sentence Discount, going by the formal law alone, can be anything from one hundred percent to zero percent.[119] This indeterminacy of the formal law has implications for Rule of Law values and ideals of legal certainty.

To take one example, consider John's[120] case which was observed in Court 1. John was in his early twenties and was a first-time offender. He was charged with possession of class A drugs (cocaine). John admitted that he had intended to use the drugs recreationally over the weekend and pled guilty at the first opportunity.

The formal law says little about what sentence John might expect. There is some formal law concerning first-time offenders. As Sheriff 1 noted:

> There are certain statutory rules, which you're familiar with I'm sure, that for someone who has never been in custody you've got to be convinced that no other disposal other than custody would be appropriate before sending someone to custody who has never been there.
>
> For young offenders, a similar test applies even though they've got previous convictions. You've always got to look at young offenders differently.

On their own, formal presumptions against custody mean instrumentally little. After all, when would a judge sentence someone to custody if they were unconvinced that the disposal was 'appropriate'? The formal law is also radically indeterminate

[119] Where a Guilty Plea leads to no punishment it is typically described as an absolute discharge. Indeed, no known case of a one hundred percent 'Sentence Discount' exists in Scotland. However, it is theoretically possible, even though no sheriffs have "taken it upon themselves" to do this.
[120] Not his real name.

regarding when custody becomes the only suitable alternative. Moreover, the formal law says little[121] about what the quantum of John's sentence is to be.

In John's case, it might be thought that custody is highly unlikely (though there is little in the formal law to base this conclusion on). Most likely John was looking at a fine, or possibly a Community Payback Order. Certainty, at least some punishment would be expected to fall within the range of the going rate.

However, John was argued to be exceptional in that he had no previous record, was of good repute, had suffered a great deal from going through the criminal process, had pled guilty, and was remorseful. Ultimately, John received an absolute discharge and received no punishment (not even a criminal record). Thus, there is not even a rule that a proven violation of the criminal law for possession of Class A drugs will lead to some formal sanction.

This example raises questions of what constitutes law nicely in the context of a case that is claimed to be 'exceptional.' These exceptions are typically assumed to be distinct from the routine cases – what legal practitioners termed the 'trivial' cases that dominate summary work and matter little beyond the need to dispose of them. Yet, in practice, every case can be argued to be exceptional in some regard (see Chapter 4 and the analysis of individualisation).

The inability of the formal law to determine outcomes poses problems for formalistic notions of the law. Some have argued that the formal law's inability to determine cases is confined to particular areas. For example, Hutton has argued that indeterminacy is more prevalent in areas such as sentencing. The argument is that,

[121] Sheriffs can refer to other cases for guidance. However, considering the formal articulation of individualised sentencing, this is not determinative.

in some fields, the law operates as formalistic thinking assumes because there exist enough rules to enable this.

However, Hutton argues that sentencing is not one of these areas where formalistic assumptions work, because the law in this area is limited and sentencing decisions are discretionary. [122] Others, such as Kagan, also suggest that sentencing decisions are different from other legal decisions. Kagan's typology situates sentencing decisions as more akin to administrative decisions. For Kagan, sentencing decisions rely on discretion and function to "get the work of society done." Getting work done differs from other formalistic legal decisions that "determine the legal coordinates of a situation in light of pre-established legal rules."[123] Legal practitioners can mirror these views when they talk of certain summary matters as trivial and not *the real stuff of law*.[124]

Yet, this assumption that sentence is unique in its indeterminacy is questionable. This research found even where there are seemingly clear rules this core legal certainty does not necessarily materialise. Indeed, a literature review reveals that formal rules never seem to be entirely determinate of outcomes on their own. For example, McBarnet has noted that even where there are detailed tax laws, there is a "the two-sided nature of law, as a means of controlling and a means of escaping control."[125] Likewise, with regard to EU and ECHR labour law, (an area with many 'rules'), "the conflict between social and economic rights is far from settled."[126] The number of areas in which formal law is unable to determine outcomes challenges formalistic conceptions of legal certainty and the role of formal law. Indeed, this wider

[122] Hutton (2014).
[123] Kagan (2010), p.163. See also Hutton (2014).
[124] See McBarnet (1981).
[125] McBarnet (1991).
[126] Busby and Zahn (2004), p.170

implication makes this research a case-study of law, not simply of Sentence Discounting.

Conclusion

Part 1 of this chapter contextualised Sentence Discounting as one form of Plea Bargaining in Scotland. This context is important as Sentence Discounting is perceived by legal practitioners as part of a larger whole. Even case law cannot avoid recognising Sentence Discounting as part of a larger whole in some regards. Case law argues that Sentence Discounting should be an isolated consideration, but case law also recognises the larger whole when it laments double counting, etc. Thus Part 1 shows the importance of understanding Sentence Discounting as part of a broader context.

Part 2, Part 3, Part 4, and Part 5 thoroughly scrutinised the formal law regarding Sentence Discounting. Part 2 analyses section 196 of the Criminal Procedure (Scotland) Act 1995. Part 3 explores case law and the formal rationale for Sentence Discounting in Scotland. Part 4 scrutinises the potential for Sentence Discounting to change the type of punishment an offender receives. Part 5 critically analyses whether the radical indeterminacy of Sentence Discounting is problematic for the legitimate expectations accused persons ought to be entitled to have.

Part 6 shows that Sentence Discounting was able to exist before section 196. That the formal law was not necessary for the operation of Sentence Discounting is a crucial finding. This finding shows how the formal law does not determine sentencing practice. Part 7 investigates the normative problems that section 196 poses by potentially infringing against the presumption of innocence. The argument was that as long rhetoric posits trials as a critical element of due process, then it is hypocritical to avoid these.

In sum, this scrutiny of the formal law reveals that, while formalistic conceptions of Sentence Discounting are vital to practitioners, the formal law is limited in various ways. Statutory law and case law are incapable of dictating Sentence Discounts in anything approaching a formalistic conception of *Rules + Facts = Conclusion*. The law is radically indeterminate and amenable to radically different interpretations. As Sheriff 2 noted:

> The difficulty for us, and yourself, is that sentencing is such a huge concept… there isn't always a right and a wrong answer. There may be some answers which are more right than others, and there may be some answers that are complexity inappropriate. But there isn't a right or wrong answer.

While these different answers can lead to radically different results, they are all are formally permissible. No particular practice of Sentence Discounting can be logically determined to be definitively correct. Thus, Part 8 argues that the formal the law regarding Sentence Discounting in Scotland is *radically* indeterminate. These findings challenge assumptions that the formal law largely determines Sentence Discounting and that the law is only moderately indeterminate, contextual, or "open-textured."[127] Moreover, Part 8 argues that this radical indeterminacy extends beyond Sentence Discounting. This wider implication makes this research a case-study of law more generally, not simply of Sentence Discounting.

[127] See Hart (1958).

Chapter 3: What is the Knowledge Gap Regarding Sentence Discounting?

Introduction

This chapter investigates existing information about the practice of Sentence Discounting in Scotland. This investigation complements the scrutiny of the formal law undertaken in Chapter 2. To date, research has not set out to thoroughly scrutinise Sentence Discounting in Scotland. Indeed, no research has explicitly focused on Sentence Discounting since the implementation of section 196. This lack of research is odd given that some assessment of the impact of section 196 would have been prudent. However, there has not been even a dedicated cursory evaluation of section 196. As such, the thesis begins from a position whereby almost nothing is known about Sentence Discounting in daily practice.

Part of the reason for the lack of research is that Sentence Discounting seems straightforward. While Chapter 2 demonstrates that Sentence Discounting is complex, policymakers have assumed Sentence Discounting is simple. Indeed, policymakers assumed Sentence Discounting to be so simple that there was no formal discussion of its rationale until after the implementation of section 196.[128] Moreover, this research found that there are assumptions among legal practitioners and policymakers that detailed information on Sentence Discounting exists (see Chapter 3, Section 2(A)). The assumption is that such information must already be somewhere: either in official data or in sources designed to guide practitioners.

[128] *Du Plooy v HMA* para 6.

This chapter aims to challenge these assumptions. The chapter finds that the limitations of existing sources regarding Sentence Discounting mean that there are significant knowledge gaps.

Part 1 of this chapter focuses on research in Scotland that touches upon Sentence Discounting. Part 2 critiques the available official data in Scotland and demonstrates severe limitations regarding Sentence Discounting. Finally, Part 3 reflects on the sizable knowledge gap that this chapter identifies. In this reflection, Part 3 critiques assumptions regarding Freedom of Information and that courts in Scotland are 'public places.'

1 - Existing Research in Scotland

Chapter 2 shows that formal law alone cannot determine Sentence Discounting. As such, the routine practice of Sentence Discounting in sheriff summary cases is unclear if only looking to the formal law for guidance. The best empirical research to touch upon the reality of Sentence Discounting comes from the "Evaluation of the pilot Public Defence Solicitors Office" by Goriely et al. (2001). To a lesser extent, there is also some additional research carried out in the "Evaluation of the Reforms to Summary Criminal Legal Assistance and Disclosure," by Bradshaw et al. (2012). The next section will focus on Goriely et al. (2001) as this offers the most useful analysis of Sentence Discounting.

A - The PDSO Study by Goriely et al. (2001)

The research by Goriely et al. (2001) is unique in being the only large-scale statistical study on sentencing in Scotland.[129] Goriely et al. (2001) analysed the operation of a pilot Public Defence Solicitors Office (hereinafter the PDSO). The PDSO pilot was

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

based in Edinburgh and utilised salaried defence lawyers who were employed by the State. PDSO lawyers contrasted with other defence lawyers who were private[130] and either paid by clients[131] or through the Scottish Legal Aid Board (SLAB).

Part of the enthusiasm for the PDSO stemmed from the belief that the PDSO could resolve cases more expediently. Policymakers were also enthusiastic about the PDSO because they believed that rising Legal Aid costs were attributable to "supplier-induced demand:" a belief that defence lawyers were drawing out cases to secure more remuneration.[132] Policymakers' belief in supplier-induced demand also resulted in significant changes to Legal Aid, which moved from a "time and line" basis[133] to one of fixed fees.[134]

Goriely et al. (2001) utilised research methods such as interviews, Logistic Regression, and Multiple Regression (discussed more in Chapter 4). While Goriely et al. (2001) did not focus on Sentence Discounting specifically, the research did generate significant findings regarding the effect of a Guilty Plea and perceptions regarding Guilty Pleas. One feature that enabled these findings was that PDSO clients were randomly selected.[135] Another feature of note was that the PDSO generally "resolved cases at an earlier stage."[136] This earlier resolution meant that the PDSO had more Guilty Pleas at Intermediate Diets and Trial Diets. Consequently, Goriely et al. (2001) were researching something akin to a natural experiment. This natural experiment meant

[130] Working themselves or as part of private law firms.
[131] Only a small percentage of criminal clients pay their lawyers directly.
[132] Tata (2007a); and Tata et al. (2004).
[133] A system where remuneration was based on the work done and the time spent.
[134] The effect of Legal Aid on Guilty Pleas will be returned to in Chapter 7 as it featured prominently in interviews with defence lawyers.
[135] Though clients could opt out, which may have introduced some selection bias.
[136] Goriely et al. (2001), p.3.

that, if all else were equal, PDSO clients should receive lesser sentences if there were a practice of Sentence Discounting for Guilty Pleas.

In reaching conclusions, one issue Goriely et al. (2001) had to overcome was what is known as individualised sentencing (discussed more in Chapter 4). Goriely et al. (2001) approached the problem by statistically analysing a large number of cases to identify probable "underlying patterns."[137] The result of this research was that the study found that (except for sexual offence cases) there was limited evidence of the timing of Guilty Pleas impacting on sentencing:

> 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.[138]

Indeed, the primary difference between PDSO and non-PDSO clients was a small, but statistically significant at the 99% level, increase in the likelihood of conviction. 87% of PDSO clients were convicted compared to 83% of non-PDSO clients.[139] Various figures suggest that the longer a case proceeds, the higher the odds it will collapse or be dropped. The early Guilty Pleas of the PDSO clients meant that they generally missed this small chance of a case collapsing.[140]

Accordingly, the PDSO research suggested that there was "little in the way of Sentence Discounting." By contrast, PDSO clients who plead guilty early were likely to fare worse due to an increased chance of conviction.[141] That pleading guilty early may not bring benefits and may be detrimental is striking. It is even more striking given that "interviews with accused persons suggested that the expectation of near-

[137] Goriely et al. (2001), p.54.
[138] Tata (2007a), Footnote 82.
[139] Goriely et al. (2001), p.95 and p.105.
[140] Goriely et al. (2001), p.96.
[141] Tata (2007a), Footnote 82.

automatic discounts was widespread."[142] Moreover, as noted in Chapter 2, this research found that legal practitioners (judges, prosecutors, and defence lawyers) perceived there to be an informal practice of Sentence Discounting operating at the time of Goriely et al. (2001). This lack of evidence of Sentence Discounting means that the most significant statistical research in Scotland provides a reason to question the perceived effects of Guilty Pleas on sentences. The findings of Goriely et al. (2001) also mean that current research should not assume that the stated Sentence Discount is the same as the actual effect of the Sentence Discount.

The caveat to the findings by Goriely et al. (2001) is that discounts for Guilty Pleas could have been present but not detectable. Discounts may have been undetectable because of the relatively small sentences[143] possible in summary cases at the time.[144] Discounts may also have been undetectable if "discounting was widespread in Scotland during Goriely et al. (2001), but only in specific kinds of cases and at specific stages" (e.g. sexual offence cases).[145] Indeed, this research found that some types of cases may be less likely to receive a Sentence Discount (see Chapter 2).

However, it is also possible that Goriely et al. (2001) did not detect differences in sentences because there were none. Three possibilities present themselves to explain similar sentences between PDSO and non-PDSO cases. The first possibility is that Sentence Discounting did not occur. This first possibility seems unlikely given this research found legal practitioners (including judges) stated their perception that Guilty Pleas affected sentences.

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[142] Tata (2007a), Footnote 82.
[143] The maximum sentence in the Sheriff Summary Court is significantly higher today at twelve months compared to six months at the time of Goriely et al. (2001).
[144] Goriely et al. (2001), p.109.
[145] Goriely et al. (2001), p.130.

The second possibility is that Goriely et al. (2001) did not detect differences because Sentence Discounts may have been given equally for early and late Guilty Pleas. Indeed, Sentence Discounts for late Guilty Pleas are possible. This research even found that some legal practitioners were critical that Sentence Discounts are given too generously for late Guilty Pleas (e.g. Solicitor 3).

The third possibility, to explain the similar sentences of PDSO and non-PDSO cases, is that later Guilty Pleas may have received better Charge Bargains and Fact Bargains. These better Charge Bargains and Fact Bargains could balance out a reduced Sentence Discount.[146] This possibility seems likely given that evidence suggests later Guilty Pleas may put the prosecution under more pressure to negotiate.[147] Crucially, if Charge Bargains and Fact Bargains do benefit from later Guilty Pleas, then some forms of Plea Bargaining provide a reason to delay pleading guilty (discussed more in Chapter 8). This reason to delay pleading guilty would be ironic given that policymakers assume that Plea Bargaining promotes the expedient disposal of cases.

Consequently, while Goriely et al. (2001) found that Sentence Discounts did not appear to exist in Scotland, it could be that they were difficult to detect or limited to specific cases. However, it could also be that other forms of Plea Bargaining undermine the advantages of pleading guilty early. Unfortunately, Goriely et al. (2001)'s findings were only a by-product of a comparison of case outcomes. As such, Goriely et al. (2001) did not focus specifically on Sentence Discounting and could not explore these questions further.

B - After Goriely et al. (2001)

While there has been no research equivalent to Goriely et al. (2001), it is interesting to note the findings from interviews by Chalmers et al. (2007). During these

[146] Goriely et al. (2001), p.110.
[147] Tata (2007a), p.512.

interviews, some practitioners expressed their belief that stated Sentence Discounts did not materialise. The suspicion was that judges increased the headline sentences to negate the stated discount.[148] Interviewees expressed similar concerns in the Evaluation of the Reforms to Summary Criminal Legal Assistance and Disclosure. Some respondents suspected that stated Sentence Discounts were not as "real as they seemed."[149] Moreover, Brown also argues that judges may inflate the headline sentence to negate stated Sentence Discounts.[150]

Research such as that of Chalmers et al. (2007) again highlights that research should differentiate between the stated Sentence Discount and the empirical effect of a Sentence Discount. The stated Sentence Discount is the one that a judge says they have granted because of the Guilty Plea. The theory is that the judge makes this statement by assessing what the sentence would have been in the counterfactual situation where the accused had pleaded not guilty and was convicted following a trial. By contrast, the empirical discount is the actual effect the Guilty Plea had. This empirical effect of a Guilty Plea may be different from the stated Sentence Discount. This distinction is crucial as it affects how research on Sentence Discounting should be undertaken. Research must use caution when relying on the stated discount (discussed more in Chapter 4).[151]

Due to the discretionary nature of sentencing in Scotland, any potential manipulation, or subconscious alteration, of the headline sentence to undermine Sentence Discounting would be difficult to detect. Indeed, to better understand the Sentence Discount in positivist terms would require better quality data than is available in Scotland (discussed below). This lack of quality data means that the real

[148] Chalmers et al. (2007), para 6.26.
[149] Bradshaw et al. (2012), paras 6.9-6.11.
[150] Brown (2017), p.226. This is discussed further in Chapter 9.
[151] For example, Roberts and Bradford (2015) do this in their multivariate analysis of Sentence Discounting in England and Wales.

effect of a Sentence Discount is inherently unknowable if relying on available official data.

2 - The Limitations of Available Official Data

The law requires that judges state Sentence Discounts in open court. Practice Note 1 of 2008 requires that the court record the size of the discount in a form such as

> The sentence imposed was discounted in terms of section 196 of the Criminal Procedure (Scotland) Act 1995 and would otherwise have been X.[152]

Despite this requirement on the court to record the Sentence Discounts, official data is unable to provide significant insight into routine Sentence Discounting practices. Indeed, Chalmers has noted that "statistics on Guilty Pleas and trial outcomes are surprisingly difficult to obtain."[153]

Available data is severely limited and suffers from excessive ambiguity.[154] There is also a lack of information on the inter-relationship between pleas *and* sentences. There is some aggregate information on pleas[155] and some information on sentences.[156] However, information on pleas and sentences are published separately. Being published separately means that it is not possible to combine the different sets of aggregate data to analyse the relationship between pleas and sentences. This limitation means that available official data provides little basis from which to make even an educated guess about the reality of Sentence Discounting.

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[152] Lord Justice General (2008).
[153] Chalmers (2006).
[154] Leverick (2006).
[155] Scottish Government (2010b); Scottish Government (2014), p.4; Scottish Government (2014b).
[156] Scottish Government (2014b).

Perhaps the biggest problem with official data is that that there is no logically cohesive system for gathering, storing, managing, and accessing data. There are several factors that contribute to the lack of a cohesive official data set. One factor is a silo mentality among different criminal justice organisations in Scotland.[157]

The sources of official data in Scotland also create limitations. Scottish Government statistics are sourced primarily from police data.[158] As with other criminal justice institutions, Police Scotland records data in a way that, while possibly meeting their operational requirements, does not readily facilitate further analysis. A key finding of this research is that this silo mentality when recoding data means that different institutions' datasets are often incompatible. Different institutions may use different time frames, label cases using different unique identifiers, etc.

A further issue is that government statisticians also convert data into their own standard format. Government statisticians convert data to a format based upon a schema that differentiates between "crimes" and "offences." I investigated this format to analyse how it was devised and for what purpose. The finding was that the format is longstanding and has been in use for decades:

> All criminal conduct, whether classed as a crime or an offence, is serious and the separation of crime and offences statistics is a long-running practice, to facilitate understanding of the statistics. However, this distinction is solely for statistical purposes and ensures that the figures are consistent and keep track of trends over time...

[157] Scottish Government (2012).
[158] Justice Analytical Services (2016) and Scottish Government (2010),

> The separation of crime and offences statistics has been in place since the 1920s and the statistics have been presented in the bulletin in the same format since 1983.[159]

As with official data in England and Wales, "innovation in presentation or analysis" has been rare and the focus has been on maintaining "comparability of what is being measured year to year."[160] The list of crimes and offences is published online and has been continually updated to adjust for changes in the law (e.g. when new offences are created). The belief among Government statisticians appears to be that this standard format simplifies data and aids analyses. However, precisely how converting the data aids a detailed analysis is unclear.[161] It may be that the format used in Scottish Government statistics is intended to provide more straightforward descriptive statistics. Unfortunately, the cost of this format is that it adds another layer of complexity by abstracting the reported data from the raw data upon which it is based.

The distinction between crimes and offences itself is also a limitation. Official statistics regard crimes as generally more serious. However, as the format is so old, it is unclear as to how these categories were devised. Certainty, there is no legal distinction between crimes and offences in Scots law. There are also limitations to how this format ranks seriousness. Indeed, describing an abstract crime as more or less severe than another is inherently problematic.[162] The practice of classifying offence severity without considering the broader context of the offence and offender exacerbates this problem. For example, this research found that previous analogous

[159] Email correspondence with Justice Analytical Services.
[160] Maguire and McVie (2017), p.165 and p.171.
[161] Those carrying out longitudinal studies may dislike change, but this does not mean the current format is more beneficial than raw data.
[162] See Chapter 4 for a discussion of the difficulties in measuring seriousness.

convictions are important to the perceived seriousness of an offence. There are also related issues concerning the recording of multiple offences (discussed below).

A - Multiple Offences

Court observations conducted in this research found that 'complaints'[163] in sheriff summary cases consist of a single offence. For example, it is not often a complaint only contains one charge like possession of an offensive weapon (in a public place) without lawful authority or reasonable excuse.[164] Instead, an accused in the sheriff summary court will generally face a multitude of charges. Some of these charges will be related, but some will be unrelated and have occurred at different times.[165]

The effect of multiple offences is complex. A key finding of this research is that multiple offences are not perceived to have a linear and logical effect.[166] As sentencing is thought to be a holistic process, legal practitioners consider multiple offences as a whole. All the charges together "create a picture for the judge of what happened" (Fiscal 1). Indeed, defence lawyers will take account of the effect of multiple offences when they decide to plead:

> Because, if you have say three or four summary cases. You've got one that day, you know there is three or four in the pipeline. Then to plead guilty, get a sentence, and then plead guilty at a later stage to some or all of the others will generally lead to a consecutive sentence

[163] A 'complaint' is the charges brought by the prosecution.
[164] An offence under Section 47(1) of the Criminal Law (Consolidation) (Scotland) Act 1995.
[165] Unrelated charges can be 'rolled-up' by the prosecution so that they are prosecuted and sentenced in the one court case. The aim 'rolling-up' cases is to save resources.
[166] Lovegrove (2000) has argued that each additional offence should increase the sentence (though this is a normative, not empirical claim).

> Where, if you get them all together, you'll either get a concurrent sentence or you'll get a consecutive sentence, but of sentences that are much less than they would be. Because, you know, it is very rare that… you start getting eighteen months, two years, two and a half years in a cumulo sentence. So, there is that reason for perhaps delaying a guilty plea. (Solicitor 3)

In light of the importance of multiple offences, one of the most significant limitations to public data is that it is insensitive to multiple offences. Where there are numerous offences, available official data typically records what is considered the most serious offence. Recording the most serious offence is known as a 'principal sentence approach.' The principal sentence approach is an indirect measure of seriousness. Using the principal sentence approach is flawed where previous analogous convictions result in a different offence carrying more weight at sentencing.[167]

The principal sentence approach also means that official data will ignore the 'lesser' convictions. Ignoring convictions is troublesome as the 'lesser' convictions may be significant. For example, a case involving a single theft is probably less severe than one involving ten similar thefts. However, in available official data, both cases would show as a single theft. Any research comparing these two theft cases, based on such data, would only see two theft cases with what may (misleadingly) appear to be inconsistent sentences.

Consequently, official data is "a 'jigsaw puzzle' with missing pieces."[168] Even the Sentencing Commission could not find reliable data upon which to base its conclusions:

> Whilst there may be limited empirical research evidence available that indicates that sentencing in Scotland lacks consistency and

[167] Tata (1997), p.399.
[168] Maguire and McVie (2017), p.183.

> shows the extent and prevalence of such inconsistency, we are persuaded that there is a significant body of anecdotal evidence which demonstrates that inconsistency in sentencing actually occurs. Whatever the actual degree of inconsistency in sentencing in Scotland, we are satisfied that there is a very clear perception amongst both practitioners and the public in general that sentencing in this country is inconsistent.[169]

That even the Sentencing Commission had to proceed based on limited evidence is not an ideal position given the rhetoric advocating informed policymaking. Some efforts to improve public data in Scotland are underway. For example, there have been consultations and a drive to reduce the silo mentality.[170] However, despite these efforts, official data in Scotland is still limited. The limitations identified in this chapter challenge quite pervasive assumptions regarding the usefulness of criminal justice data.

B – The Limitations of SCTS Data

The research also assessed data held by SCTS (the Scottish Courts and Tribunals Service). This SCTS data is not 'public' in that it is not publicly available. However, SCTS is a *quasi-public* body.[171] Interestingly, despite the limitations of official data, SCTS assumed their data were useful and advocated relying on their data (see Chapter 4).

A key finding of the research is that SCTS's suggestion that their data could be useful for the research was not borne out. SCTS could not offer insight into Sentence Discounting. In fact, the limitations of SCTS data went beyond the quality of the data.

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[169] The Sentencing Commission for Scotland (2006), para 1.9.
[170] Scottish Government (2015).
[171] Chapter 3, Section 4 argues that SCTS is not considered "public" under the Freedom of Information (Scotland) Act 2002.

The research established that SCTS could not provide data on the stated Sentence Discounts. SCTS cited technical and resource constraints as resulting in their inability to provide the data.

The significance of this finding should be emphasised. While SCTS report that they hold data on Sentence Discounting, this is not, in practical terms, accessible. Thus, presently, SCTS data on Sentence Discounting may as well not be recorded as it brings no benefits to informing policymaking. This inaccessible information also begs the question, in what other areas might assumptions about usable data also be severely flawed? Indeed, incorrect assumptions about public data in Scotland are detrimental. These incorrect assumptions conceal the pressing need for vastly better data to inform policymaking.

C - The Limitations of Practice Sources in Scotland

Practice sources focus on the jurisprudential and procedural aspects of court work. The authors intended for them to be a practitioner's guide. However, these sources are mostly unconcerned with Sentence Discounting and are dated. Practice sources in Scotland include: Morrison (2000), Stewart (1997), and Nicholson (1992). There are also a limited number of 'Sentencing Statements' available online. However, none of these sources offer enough detail to provide a substitute for empirical research.

One interesting point to note is that Nicholson (1992) argues that *Strawhorn v McLeod* did not necessarily mean a "lower sentence on account of a plea of guilty should never be given."[172] This point draws attention to the radical indeterminacy of the law on Sentence Discounting and how the formal law can be interpreted in vastly different ways. Indeed, the interpretation that Nicholson offers would mean that the widespread perception of Sentence Discounting prior to section 196 is not

[172] Nicholson (1992), Para 9-36

problematic in law (see Chapter 2). Rather, the formal law is so indeterminate that it can be argued to both permit and prohibit Sentence Discounting.

3 - Freedom of Information

Research is vital to enabling informed policy decisions. Research is also essential for transparency and accountability in public institutions. Legislation formally recognises Freedom of Information (FOI) values in various jurisdictions. FOI aims to promote transparency and accountability. The belief is that FOI will benefit democracy, inform decision making, and promote public confidence.

Throughout the UK FOI ideals are enshrined in legislation. In Scotland, the Freedom of Information (Scotland) Act 2002 (FOISA) is the relevant statute, while the Freedom of Information Act 2000 (FOIA) applies to the rest of the U.K. When introduced, Tony Blair lauded the Freedom of Information Act:

> The very fact of its introduction will signal a new relationship between government and people: a relationship which sees the public as legitimate stakeholders in the running of the country and sees election to serve the public as being given on trust.[173]

This was a bold promise that helped to create a climate of expectation that public institutions would be open. However, while FOI can engender trust in government, it is not always a painless process. While FOI ideals may have been good for accountability and transparency, FOI has been a burden to those who became more transparent and accountable as a result. This burden has made FOI less popular than it once was with policymakers and key stakeholders in organisations. Indeed, Tony Blair later expressed a negative view of FOI:

[173] As quoted by the BBC News (2010).

> You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it.[174]

Thus, FOI is perceived as a double-edged sword. FOI promotes accountability and transparency. These are good virtues in theory, and an open government may be one that promotes public confidence. Yet, being open can also result in revelations that can damage trust and make life more difficult for those within organisations. Consequently, organisations may portray themselves as supportive of FOI, even if in practice FOI is not desired.

This competition between macro democratic values and micro self-interest is problematic. FOI rules are radically indeterminate. It has proven possible for organisations to interpret FOI in a way that undermines its effectiveness. In Scotland, evidence suggests that FOI "requests are being handled with little if any sense of democratic considerations."[175] Burt and Taylor argue that:

> The dominant view... is that FOISA has been implemented by public bodies within a rational-legal frame of reference that stresses the letter rather than the spirit of the law.[176]

Burt and Taylor argue the issue is that institutions apply the letter of the law and that this violates the spirit of FOI. However, this neutral view of a rational-legal frame of reference ignores that "it is important to give due emphasis to the active and creative role of [actors] in working against the spirit of the law."[177]

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[174] As quoted by the BBC News (2010).
[175] Burt and Taylor (2007).
[176] Burt and Taylor (2007).
[177] McBarnet (1988), pp.118-119. See also McBarnet and Whelan (1991) for an analysis of the "spirit" of the law.

FOI is not interpreted restrictively by chance. Effort and creativity go into undermining the spirit of FOI because this meets the perceived interests of those subject to FOI. The political nature of criminal of criminal justice makes undermining FOI especially problematic. There is a strong imperative for those within organisations to minimise their exposure and to seek FOI avoidance strategies. Indeed, even Burt and Taylor recognise that there is more to FOI decision-making that a "rational-legal frame of reference:"

> Public bodies must serve political masters… we have found that all of our case study organisations are making judgments about FOI requests and responses that consider the perceived imperatives of the political environment.[178]

My research found that factors such as "ministerial sensitivities" were noted as a concern in decision-making by SCTS. As a result, even seemingly reasonable exemptions to FOI become vulnerable to be used creatively to limit access to information in ways that undermine FOI principles. For example, data protection[179] has been strategically used to minimise requirements to share data under FOI.[180] Indeed, designating a request for information as "FOI" may now be done to withhold information by using one of the many wide-ranging exceptions that are now argued to apply.[181]

With regard to this research, court records are exempt from FOI laws by virtue of section 37 of the FOISA.[182] Consequently, while courts are often said to be public places, courts are not public authorities for the purposes of the FOI in Scotland. The

[178] Burt and Taylor (2007).
[179] The same issues will most likely reoccur with the EU General Data Protection Regulation (GDPR) – perhaps to an even greater degree.
[180] Burt and Taylor (2007).
[181] BBC News (2015).
[182] There is a similar exemption in England and Wales under in s.32 of the FOIA.

aim of excluding court records from FOI seems to have been to shield information held only because of court proceedings:

> Courts are not public authorities for the purposes of FOISA and so are not required to make information available in response to FOISA requests. (While FOISA covers the Scottish Courts and Tribunals Service, it is responsible only for providing administrative support – in the form of staff, buildings and technology – to Scottish courts and tribunals).
>
> Section 37 of FOISA ensures that FOISA does not override existing procedures governing access to information generated by or used in court (and other legal dispute resolution) proceedings. The exemption ensures that where authorities hold information solely because of their involvement in court proceedings, an inquiry or arbitration, they are not required to disclose the information outwits those proceedings.[183]

This provision is defensive but sensible in several regards. However, it seems to have assumed that only the parties in court are of interest. Policymakers have neglected that courts themselves are crucial institutions that require research. Moreover, while the FOISA does include SCTS, the dominant interpretation is that FOI does not extend to information held by SCTS on behalf of the Lord Justice General. This interpretation *practically* makes SCTS exempt from FOI as everything it does can be argued to be on the Lord Justice General's behalf.

Consequently, while Scotland does appear formally to have more FOI rights than various other jurisdictions, there are severe practical limitations. These limitations to FOI have led to problems for academics and journalists. Indeed, there is an open

[183] Scottish Information Commissioner (2015), paras 6-7.

letter of complaint[184] concerning the way FOI requests are managed and rejected in Scotland. There has also been an inquiry into the management of FOI requests. Thus, for research like this, FOI is of minimal use. The reason this research has been possible is due to an openminded judiciary, not FOI.

A - Are Courts "Public Places"?

The research found that Sentence Discounting cannot be understood only through court observations. This finding is significant given that there is a widespread notion that courts are 'public places.' This notion exists among practitioners and accused persons. For example, Accused 7, Accused 8, and Accused 9 referred to the courts being "public." Indeed, it is true that the public may observe aspects of criminal proceedings in court. However, in the summary justice process, more occurs behind closed doors than in public.

The public trial has a critical ideological place in adversarial Liberal Rule of Law justice systems. The Liberal Rule of Law, with its suspicion of the state, would *seemingly* create a natural preference for public trials. It seems that the underlying idea is that *sunlight makes the best disinfectant*[185] and that publicity will bring transparency and hence accountability. This transparency and accountability is thought to deter abuses and misuses of power. In the context of criminal work, publicity may also be thought to project due process values such as the presumption of innocence and the right to a fair trial.

The history of the public trial can only be briefly summarised here. The right to a "speedy and public trial" is enshrined in the U.S. Sixth Amendment. The Sixth Amendment likely adopted this from English common law.[186] However, Radin has

[184] Briggs et al. (2017).
[185] Adapting the phrasing of Brandeis (1913).
[186] Radin (1931), p.383.

questioned whether this right to a public trial actually benefited the accused given the other limitations of due process at the time: the inability to mount a strong defence due to pre-trial detention; limited disclosures made to the accused; a lack of legal representation; etc.[187]

Moreover, Radin argues that the right to a public trial was not an intentional move to promote Liberal Rule of Law values and that "the historical foundation created for it is purely mythical."[188] Instead, Radin argues that:

> It is likely that the word "public" was introduced into the list of the rights of free men from the statements in Hale and Blackstone, without very much concrete example in mind of what publicity implied and without a clear idea of what it was meant to secure…. What happened, then, was that a traditional feature of English trials, more or less accidental, was carried over into the American systems.[189]

Accordingly, the public trial may not originally have been an invention to serve a greater good. Instead, it may have been an accidental by-product of an old system of trials that developed for a variety of reasons: not the least of which may be that "the presence of a jury-involving a panel of thirty-six men and more-already insured the presence of a large part of the public."[190] Thus, the idea of public trials gained favour because it was part of the legal process and the rationale for public trials was crafted retrospectively.

Publicity being a matter of historical accident, to the extent that its rationale is retroactive, may partly explain why the obligation on the State that trials be public is

[187] Radin (1931), pp.383-384.
[188] Radin (1931), pp.389.
[189] Radin (1931), pp.388.
[190] Radin (1931), pp.388.

unclear in critical regards. One fundamental question is whose interests the right to a public trial is supposed to serve. Does the right to a trial serve the accused as a bulwark against illegitimate uses of power? Or, does the right to a public trial work to the benefit of the public by allowing them to ensure those who exercise power are transparent and accountable? Alternatively, do publicity and the accompanying 'theatrical' practices enable the law to self-legitimate?[191]

In Scotland, the purpose of the public trial is unclear. Accused persons have little influence on whether their trial is public. This research found that accused persons can resent the presence of the press (e.g. Accused 1 and Accused 10) and the perceived humiliation of having the charges and their address read in open court (e.g. Accused 1, Accused 3, and Accused 6).[192]

That accused persons disliked publicity suggests the public trial may not serve an accused person's interests. A public trial may also not serve the public's interests as there are severe limitations to note-taking, accessibility, etc.[193] As noted by Radin:

> Nor is there any good reason why the modern methods of communication should be rejected. Photographing the scenes in the courtroom," broadcasting the proceedings, may affront the dignity of the court, but if a constitutional right is involved, the dignity of the court can hardly weigh much in the balance. These devices will neither disturb the proceedings nor obstruct them.[194]

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[191] See Chapter 9, Section 2 for an analysis of how legal practitioners may require this self-legitimation for reassurance.
[192] Interestingly, it is considered appropriate to have these details public in court. However, if one makes an FOI request in Scotland they will likely be denied as the details will *then* be deemed private.
[193] The courts have adverts that warn that criminal sanctions back these restrictions.
[194] Radin (1931), p.392.

Indeed, the publicity of the courts can be tenuous. For example, in 2011 journalists lamented that "the banning of all media reporting in a minor case at a Scottish Sheriff Court could be setting a very dangerous precedent."[195] This case was a typical closed session, but what was exceptional was that the court exercised its discretionary powers to ban all media reporting. In doing so, the court emphasised that there is no enforceable public right to observe court proceedings.

Consequently, the prevailing notion that courts are 'public places' is mostly a misnomer in reality. While elements of the courts are open, more occurs behind closed doors than not. The 'backstage'[196] nature of the majority of a court's work is bad for traditional notions of accountability and transparency. However, some element of privacy may be better for the dignity of the accused, victims, and witnesses. Indeed, the research found that information in court proceedings may be withheld from the public to respect the privacy of the accused.

This research found that lawyers withhold information from the public by, for example, whispering near the bench and passing notes. Judges may also regard reports as sensitive. For example, in one case the judge stated, in open court, that he had considered the "tragic" life history detailed in the reports before him. The judge stated that he would not go into detail in court because the reports were so sensitive, but that these details were a key reason he determined a non-custodial sentence is appropriate. However, while this consideration of privacy might suggest publicity is subject to the accused's interests, this is not always the case.

Despite legal practitioners' sensitivity to some accused persons' privacy, the summary process routinely reveals extremely personal information in front of everyone. The range of personal details announced in court is varied. Accounts of

[195] The Guardian (2011).
[196] Backstage is an allusion to Goffman (1956).

abuse during childhood, learning difficulties, health issues, etc. are common. For example, in one summary case, a defence lawyer was offering a plea in mitigation for a late-twenties client who assaulted another male. The defence lawyer argued that the client's insecurity motivated the assault because he believed that the victim was flirting with his new partner. The plea in mitigation stressed the fact that this new partner was the client's first sexual relationship and that this may explain his behaviour.

In many cases, this personal information may be helpful to a sentencing judge. Personal details may help judges to empathise with offenders who often have troubled lives that are very different to their own. However, one can wonder how accused persons feel having these highly personal details broadcast in a busy court. The accused interviewees in this research did not even like having their address and the charges being made public.

Thus, privacy in criminal cases is not necessarily bad. Unfortunately, at present, those in a criminal court have almost no input into what elements of their case are made public (beyond choosing to plead guilty to minimise public shame).[197] This lack of choice means that those in court have little ability to seek privacy for some issues or publicity for others.

B – Is Plea Bargaining Public?

Sentence Discounts are stated in open court. However, this research found that stating Sentence Discounts in court has limited advantages for public transparency and accountability. Few attend summary courts who do not have to. Most people in summary courts have little interest beyond their self-interest. For example, most are pre-occupied with their own case or that of a family member, friend, etc. This lack of

[197] See Chapter 8 for a discussion of factors that can pre-dispose accused persons to plead guilty.

general interest means that, normally, the only persons paying attention are those directly involved with the case. Thus, practically, the stated Sentence Discount is not as public as it might seem.

Once court proceedings are finished, recorded information is also not all that public (see above). Even basic information on Sentence Discounting and appeals is not publicly accessible in most cases. For example, this research attempted to follow up on a case observed in court where there was an appeal against the sentence. However, the outcome of this appeal is not available from public data. As such, despite rhetoric that the courts are public, legal actors have the "the freedom to make decisions without complete oversight."[198] Indeed, from this perspective, there is very little external oversight bar the occasional reporter from a newspaper, or very rarely a researcher.[199] Moreover, this research found that the bulk of the workload in generating Guilty Pleas surrounds Plea Bargaining. However, Charge and Fact Bargaining are subject to minimal scrutiny: "these are deals behind closed doors, with no record of terms or reasons."[200]

Consequently, Plea Bargaining is even less public than the courts generally. Additionally, the effect of defence lawyers and fiscals Plea Bargaining is that even less of a case is discussed in court. Plea Bargaining often means that various details of an offence will not be stated in open court. For example, Fact Bargaining means that it is common to omit exactly what an accused said during an incident. Solicitor 8 related this to a recent case:

> There might be things in there [the statement] you don't want them to say, because it's all negotiated. So, say if the guy has multiple

[198] Portillo and Rudes (2014), p.322
[199] This insularity is supported by strict prohibitions on what can be recorded.
[200] Hodgson (2013), p.228.

> verbal's, the Crown just needs to bring out enough evidence in the summary of evidence to substantiate bringing the charge.
>
> But if you've got a guy that's like "Fuck you" and it degenerates to "I'm going to fucking kill you," right. If he is just a section 30 Breach of the Peace, you'd be saying that in exchange for a plea of guilty just "fuck you repeatedly" or just "fuck repeatedly. 'Not, "I'm gonna fucking kill you" because it then puts a different flavour on it in terms of seriousness.

In some instances, the agreed narrative can be for "cosmetic" reasons. For example, Solicitor 4 noted that sometimes a client might wish to have a particularly embarrassing feature removed from the narrative.[201] As noted above, omitting some details has advantages. However, the cost of omitting details is that the full nature of the case is even less public. Consequently, Plea Bargaining is not public. Plea Bargaining also has the effect of reducing the publicity of the court process.

Conclusion

This chapter has scrutinised the limitations of available information on Sentence Discounting in Scotland. The aim was to challenge assumptions that research on Sentence Discounting is unnecessary because information already exists. In challenging these assumptions, the chapter has argued that surprisingly little can be discovered about the empirical reality of Sentence Discounting from existing sources.

Part 1 demonstrated that existing research is limited. No research in Scotland has explicitly focused on Sentence Discounting. The best research that touches on Sentence Discounting pre-dates section 196 and relevant case law. Part 2 demonstrated that available official data is also limited. Available official data does

[201] For example, incontinence while intoxicated.

not include information on pleas *and* sentences that an analysis can use. Moreover, available official data suffers from limitations regarding previous convictions and multiple offences, which are essential factors for sentencing and Sentence Discounting. Moreover, Part 2 notes that data held by SCTS (that is not publicly available) is practically useless.

Part 3 critiqued the poor public accessibility of information. While FOI provisions do exist, they are limited. In practice, various institutions in Scotland have resisted FOI and have worked to undermine the spirit of FOI. Moreover, court records are exempt from FOI and are inaccessible. Indeed, Part 4 argued that these limitations mean that courts are not public places to the extent many assume.

In conclusion, Chapter 3 shows that the thesis starts from a position whereby almost nothing is known about Sentence Discounting in Scotland. This lack of knowledge means that even the insight that stated Sentence Discounts typically follow fixed patterns as suggested in *Spence v HMA* is a significant finding. Moreover, there is practically no knowledge about accused persons' perceptions of Sentence Discounting and what effect Sentence Discounting has on the plea decision-making (see Chapter 8). However, from the limited information available, there is enough reason to caution against assuming that the stated Sentence Discount is the same as the actual Sentence Discount.

Chapter 4: How Should Sentence Discounting be Understood?

Introduction

How research should understand Sentence Discounting is debatable. This debate raises fundamental epistemological questions of "how do we know what we know."[202] In terms of methods for researching Sentence Discounting the key question is:

> Should one take a behaviorist perspective in which certain stimuli (factors, variables) are thought to elicit predictable responses in the decision-maker?... On the other hand, should one take an interpretive approach to understand naturalistically how decision-makers interpret the cases before them (Hawkins 1992; Tata 2007)?[203]

Positivist paradigms suggest Sentence Discounting should be researched based on measurable or inferable parameters. Numerous studies have utilised statistical techniques to analyse sentencing in various jurisdictions. Positivist studies on sentencing have focused on a variety of issues: racial bias in sentencing,[204] gender disparities in sentencing,[205] Sentence Discounting in England and Wales,[206] etc. Those using statistical methods to analyse sentencing and Guilty Pleas have typically relied on statistical techniques such as regression analysis, multivariate regression analysis. Indeed, Goriely et al. (2001), noted in Chapter 3, used regression analysis to explore

[202] Bevir and Rhodes (2002), p.2.
[203] Tata and Gormley (2016).
[204] Spohn and Holleran (2000).
[205] Starr (2012).
[206] Roberts and Bradford (2015).

sentencing and the effect of Guilty Pleas in Scotland. Some research on sentencing and Guilty Pleas has also utilised more modern techniques such as parametric propensity score matching, instrumental variables, etc.

McAra and McVie argue that part of the popularity of positivistic methods relates to "disciplinary migration" of those familiar with them, and because they "continue to 'make sense' to policymakers."[207] Thus, part of the appeal of statistical methods is "science envy"[208] and their ability to bolster the perceived legitimacy of research. Being able to rely on accepted statistical standards provides a study with a defence against criticisms of its methodological rigorousness. Having a defence against criticism is a useful feature for research on the criminal justice system, where access may be withdrawn[209] or the research may be politically sensitive.[210]

The alternative way to understand Sentence Discounting is from an interpretivist perspective. An interpretivist perspective entails a focus on subjective perceptions and experiences in making sense of Sentence Discounting. There is less focus on ascertaining an objective reality of Sentence Discounting. Research adopting an interpretivist paradigm has relied on research techniques such as interviews and observations to inquire into various groups' perspectives.

This chapter offers a critique of both positivist and interpretivist approaches. Firstly, this chapter scrutinises the fundamental debate over whether sentencing should be conceptualised as a single-stage or a two-stage process. Chapter 8 returns to this question as it is vitally important to arguments concerning whether Sentence Discounting conflicts with the presumption of innocence. Secondly, this chapter investigates the challenges of relying on 'factors' to explain sentencing in a

[207] McAra and McVie (2012b), pp.535-536.
[208] Glanert (2012), p.64.
[209] E.g. Ashworth et al. (1984).
[210] Baldwin and McConville (1979).

jurisdiction that notionally adheres to individualised sentencing. Thirdly, this chapter critiques two statistical techniques that have been used to research sentencing in Scotland (Multiple Regression and Logistic Regression). Fourthly, the chapter sets out why this research employed an interpretivist approach rather than a positivist approach or mixed methods. Finally, the chapter sets out the methods used in this research.

1 - Is Sentencing a Two-Stage or a Single-Stage Process?

Whether one conceives of sentencing as a two-stage or a single-stage process has implications for Sentence Discounting. The most common approach is to conceive of sentencing decisions as occurring in two stages.[211] According to a two-stage conceptualisation, in stage one the judge determines what type of sentence an offender will receive. For example, in stage one a judge might decide whether to issue a custodial sentence or a Community Payback Order. Stage two is where the judge determines the quantum of sentence. For example, if a judge has decided upon a custodial sentence in stage one, the judge will decide upon the length of that sentence in stage two.[212]

Conceiving of sentencing as a two-stage process means Sentence Discounting in Scotland is thought to affect a sentence in two ways. First, a Sentence Discount may be thought to affect a judge's decision in stage one. If Sentence Discounting is believed to affect stage one of the sentencing process, then Sentence Discounting may change the type of punishment an offender receives. For example, a custodial sentence may become a non-custodial sentence on account of the Sentence Discount.

[211] Starr (2012), p.1 and pp.5-10.
[212] Roberts and Hough (2011), p.182.

The second way a Sentence Discount may be thought to affect sentencing is by influencing the judge's decision in stage two. If Sentence Discounting influences stage two, then the Sentence Discount may affect the quantum of punishment. For example, a Sentence Discount may mean that a sentence of twelve months becomes a sentence of nine months.

An advantage of the two-stage conceptualisation of sentencing is that it does not require a means to equate one type of sentence with another. For example, a two-stage approach does not require a way to show what Community Payback Order would be equivalent to a three-month custodial sentence. While some have attempted to devise ways to equate custodial sentences and non-custodial sentences, this is controversial. There is no agreement on whether it is possible to equate sentences of different types, let alone agreement on how to equate sentences of different types. Equating one type of sentence with another becomes even more contentious when considering how accused persons subjectively experience punishment.

It might also be argued that the two-stage conceptualisation of sentencing is more intuitive and accords with how practitioners perceive the process. For example, some argue that in deciding whether to issue a custodial sentence judges use a threshold test. This threshold test involves a two-stage conceptualisation of sentencing. The threshold test means that the judge first considerers whether the offence has crossed the 'custodial threshold.'[213] Having decided whether a case has crossed the custodial threshold in the first stage, the judge then decides the quantum of the type of punishment selected.

A two-stage conceptualisation of sentencing also has advantages in that models built around a two-stage approach will be able to provide data on the custodial threshold

[213] Roberts and Hough (2011), p.182.

itself. Data on the custodial threshold would be useful as the custodial threshold is one of the most critical aspects of sentencing. Indeed, the presumption against short sentences in Scotland is an attempt by policymakers to alter the custodial threshold. Thus, data on the custodial threshold would be useful for informing policymaking. Moreover, the custodial threshold will be of interest to accused persons who wish to know whether a Guilty Plea can avert a custodial sentence if convicted (e.g. Accused 3 and Accused 4).

However, although the two-stage conceptualisation of sentencing is dominant, some studies have regarded sentencing as a single-stage. For example, Starr argues that a single-stage approach is beneficial. The argument she makes is that a two-stage approach risks:

> Serious sample selection bias if there is a disparity in the first stage. The best solution is simply to treat sentencing as a single process and estimate disparities in all sentences, including the zeros.[214]

Consequently, the two-stage conceptualisation of sentencing is contested. A single-stage conceptualisation may be logical in terms of how those like Starr and Abrams[215] perceive that sentencing should be analysed. However, artificially assigning a value to equate non-custodial sentences with custodial sentences is problematic. For example, in Abram's analysis, he valued non-custodial sentences as zero (the same as an acquittal).[216] While non-custodial sentences (e.g. a Community Payback Order in Scotland) *may* be less severe than imprisonment, they are still greater than zero in

[214] Starr (2012), p.1 and p.7.
[215] See Abrams (2011). Abrams is an economist. He argues for the reporting of the unconditional expected value of the sentence (including sentences of zero due to acquittals and dropped charges).
[216] Abrams (2011).

terms of punitiveness. Indeed, Community Payback Orders can be very onerous, and in some circumstances, a custodial sentence may be less punitive.[217]

A single-stage conceptualisation of sentencing also seems to be at odds with how practitioners perceive the process. Judges and lawyers in this research talked of sentencing as a two-stage process. Interviewees first spoke of deciding what type of disposal is appropriate. After deciding upon the type of disposal, they then spoke of the quantum of the disposal. Likewise, the accused interviewees seemed to have a two-stage conceptualisation of sentencing. Some accused interviews felt that potentially avoiding custody was essential: one interviewee even claimed they plead guilty while innocent to avoid the risk of custody.[218]

Ultimately, it is not possible to definitively state whether a single-stage or a two-stage conceptualisation of sentencing is correct. However, while both conceptualisations of sentencing can be argued to be appropriate, a two-stage conceptualisation of sentencing is more intuitive to those interviewed in this research. Accordingly, this research finds that a two-stage conceptualisation of sentencing better addresses the issues perceived by the interviewees in daily practice.

2 - Choosing Factors to Explain Sentence Discounting

Chapter 2 argues that the formal law on sentencing and Sentence Discounting is radically indeterminate. Beyond mostly informal notions of "going rates" and a few limitations on sentencing powers, formally there is little to curtail sentencing discretion. This sentencing discretion poses a challenge for research seeking to

[217] Sometimes, a short custodial sentence may be preferable to a longer non-custodial sentence. This preference for custodial sentences is seen in the Netherlands where some prisoners opt to serve the remainder of their sentence in prison, rather than on community supervision. See van Wingerden et al. (2014).
[218] The early stages of imprisonment can be more difficult than later stages for an offender. See Visher and Travis (2003).

measure the effect of a Sentence Discount upon a sentence. Positivist research has attempted to measure the effects of factors on sentences by employing statistical techniques.

Research using a statistical technique first has to identify what factors appear salient. It is seldom possible to use every conceivable factor in an analysis. Using too many factors (or 'explanatory variables') can lead to problems. One problem of using too many factors is "overfitting." Overfitting has the effect of making results "artificially good because they fit the sample yet provide no generalizability."[219] Without generalisability, a statistical analysis is of little use. Thus, issues like overfitting mean that statistical research must be selective in choosing what factors to analyse.

In the case of Goriely et al. (2001), data on the factors chosen had to be gathered by the researchers. Given that gathering data can be time consuming and expensive, selecting the right factors is essential. However, selecting what factors to incorporate into statistical research is complicated. The availability of data may influence the choice of factors. For example, research might use existing survey results because these are readily accessible. Statistical research may also draw on interpretivist research in deciding what factors to analyse. For example, statistical research may analyse factors that judges perceive to be significant.

Complicating the selection of factors for statistical analyses is that criminal cases can be broken down into an innumerable range of factors. Selecting a few of these factors poses a challenge as there will always be something to distinguish one case from another. For example, factors may include:

- The nature of the offence (e.g. violent or non-violent);
- The offender's previous criminal record;

[219] Hair et al. (2014), p.21. See also Lazer et al. (2014) for an example of the risks of overfitting.

- The age of the offender;
- The harm caused by the offence;
- Whether there is thought to be a local issue with this type of offending (e.g. a perceived surge in drug crime in Court 2).

Judges in Scotland are expected to take account of these many factors in what is commonly known as 'individualised sentencing.' Individualised sentencing is where judges tailor the sentence to the unique facts and circumstances of the case:[220]

> The idea of fitting a sentence to the particularities of each individual case is fundamental to common sense conceptions of justice, and individualized sentencing deploys classic rhetorical devices to persuade audiences that it is the only process which can guarantee the production of justice in sentencing.[221]

However, if individualised sentencing does occur, it would mean that there is a high risk of inter-case incompatibility for the purpose of making cross-case comparisons. Inter-case incompatibility would create a problem for statistical research.

Whether a judge can ever take account of every factor when sentencing is doubtful. A judge taking account of every factor when sentencing in a busy summary court may seem even more doubtful. Constraints on judges' resources and capacity to gather and understand information lead to what Simon has called "bounded rationality."[222] Time and cognition limitations can mean that judicial decision-making is "impacted upon by decision-making short-cuts."[223] These limitations to decision-making mean

[220] SPICe (2009), pp. 6-9; and Hutton et al. (1994), pp.255-257.
[221] Hutton (2014), p.4733.
[222] Simon (1955).
[223] Burns (2016), p.327.

that decisions may have to rely on standardisations and typifications.[224] Standardisations and typification mean that legal practitioners (judges, prosecutors, and defence lawyers) do not consider all of the unique aspects of a case.[225]

Nonetheless, individualised sentencing is not dismissible out of hand. First, there is truth in the claim that each case is different in some ways. Judges may take account of many of these differences, even if they cannot take account of every difference. Secondly, the indeterminacy of the formal law in Scotland means that judges can pursue different ends in sentencing at their discretion. These different ends mean that even theoretically identical cases may legitimately receive different individualised sentences.

Individualised sentencing has led to arguments that there cannot be consistency in sentencing outcomes (though consistency in approach may be thought possible).[226] However, as Hutton has pointed out, individualised sentencing in Scotland operates in a jurisdiction that has a doctrine of precedent. Judges themselves emphasise that "the sentencing decision is derived from experience."[227] Others argue that judges are experts who draw on their experience to reach sentencing decisions.[228] Likewise, the Sentencing Commission has argued that cases can be similar.[229] Indeed, the formal law's concept of "stare decisis" and sentencing guidelines require that different cases have key elements in common.[230]

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[224] See Waegel (1981).
[225] For example, pleas in mitigation are generally of a standardised type that draws attention to the offender's circumstances, their remorse, etc. See McConville et al. (1994).
[226] SPICe (2009), p.7.
[227] Tata and Hutton (1998), pp.342-343.
[228] Brown (2017).
[229] SPICe (2009), p.7.
[230] Tata (1997) pp.396-397, Macfayden (2006) para 4.13.

Accordingly, those pursuing empirical research in Scotland can argue that there are salient factors that make cases similar enough to compare. The challenge is "defining what is to count as a 'similar case.'"[231] Some argue that there may be general factors that apply to cases. Hutton et al. (1994) argue that these general factors, if useful, will speak to the seriousness of the case.

A - Are there General Sentencing Factors in Scotland?

In Scotland, there is no consensus about what general factors might be used to identify similar cases. Common law and statutory classifications are too vague to be useful on their own.[232] Additionally, research has found that factors can be context dependent. For example, being intoxicated at the time of committing an offence can be a mitigating or aggravating factor depending on the perceived context.

Thus, the effect of a factor will depend on the 'whole facts and surrounding circumstances of each case.' For example, a Guilty Plea at the first opportunity might ordinarily result in a discount of one-third. However, Sheriff 2 noted a case where there was a Guilty Plea at the first opportunity that would not get the discount that "you might think would be the norm." The reason for the reduced discount was case specific.

Even factors that are generally accepted as important can be contentious. For instance, this research found that sheriffs felt that the seriousness of the offence is a vital factor in sentencing. Other research supports this finding. For example, Spohn argues "that the seriousness of the crime and the culpability of the offender are the

[231] Tata and Hutton 1998, p.342.
[232] Hutton et al. (1994), pp.263-265.

primary determinants of sentence severity."[233] However, while generally accepted as crucial factors, contention arises because these factors are challenging to quantify. Indeed, the "Scottish Sentencing Information System Project" found case seriousness to be thought vital by judges, but difficult to quantify.[234]

Others have attempted to craft their own definitions of seriousness. For example, von Hirsch considered assessing seriousness based on the harm caused[235] by the offence (possibly evaluated based on a "living-standard") and the culpability of the offender.[236] While some methods could be used to describe seriousness (e.g. on a 10-point scale), the process would involve subjectivity in deriving a useful metric. Moreover, any metric for a factor would also have to contend with the context-dependent effects that legal practitioners perceive factors to have.

As a potential solution, Tata (1997) advocated an approach to reflect the way practitioners conceive of cases as narratives that are "typified whole offence stories." Tata argues that when viewed in isolation individual factors do little to inform about the nature of an offence or offender. For example, Tata highlights that judges conceive of sentencing as a holistic process.[237] Tata also argues that offence and offender characteristics cannot be meaningfully separated as both are required to make a sentencing decision.

What is interesting about the "typified whole offence story" approach is that it explicitly recognises sentencing decisions are based on standardisations and typifications. The concept of a typified whole offence story suggests that judges make sentencing decisions by mapping the factors of a case on to a general typology.

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[233] Spohn (2009), p.104. However, Spohn caveats this by noting that "background characteristics" and "case processing factors" may also be important.
[234] Hutton et al. (1994).
[235] Or the harm that the offence risked causing.
[236] von Hirsch (1992).
[237] Tata (1997), pp.406-407.

Mapping a case on to a general typology turns the unique case into a standard case that legal practitioners can pigeonhole. Within this pigeonhole, "factors" may have an effect that is different from the same factor's effect in another pigeonhole.

This process of standardisation can save time and may be encouraged by the cultures in which summary criminal work is carried out. Indeed, Rugmay notes that:

> The courtroom is a poor environment for effective information processing, involving often poor quality information, piecemeal rather than sequential delivery, and pressure of time (Fitzmaurice and Pease 1986; Hogarth 1971; Shapland 1987). In such a context, simplifications and shortcuts in reasoning are to be expected.[238]

In suggesting that in everyday decision-making judges make use of standardisations and typification, Tata argues that legal decision-making, "may not be very different in character from other administrative decision processes."[239] As a consequence of the character of legal decision-making, Tata notes that some statistical attempts to model the decision process are conceptually flawed. The flaw lies in assuming decision-making is a "deductive, linear, analytical, and mechanical activity."[240] This research found that this criticism of how it is assumed decisions are made applies to Sentence Discounting and sentencing in general (see Chapter 9).

Others like Kautt (2009) highlight psychological research into decision-making that contradicts assumptions that decision-making is logical and mechanical. Kautt argues that not all factors have an equal effect. While a "summing" or "tallying" method is possible, decision-makers are more likely to rely on "weighting (or lexographic rules)"

[238] Rugmay (1995), p.214-215.
[239] Tata (1997), p.405.
[240] Tata (1997), p.407.

to process information.[241] Thus, Kautt argues that some factors will be considered more important than others depending on the context.

Moreover, Kautt raises questions regarding how logical decisions are. She argues that there are two types of decisions: System 1 and System 2. System 1 decisions are argued to be fast, rely on "intellectual shortcuts," and are largely automatic.[242] System 2 decisions are slower, more deliberate, and closer to what most statistical models expect. However, a shortage of time means that quick System 1 decisions may be used more in busy criminal courts.

Interestingly, and contrarily to the argument here, Kautt suggests that quick System 1 decisions may "creep" into sentencing rather than be a key part. Kautt assumes that the visibility of judicial decisions may encourage more System 2 decisions from judges than some other decision makers.[243] However, as noted in Chapter 3, summary work in Scotland is not as public as Kautt might assume. Moreover, research suggests that reason giving may not affect the decision-making process, but instead operate to produce reasoned arguments that support the intuitive decision.[244]

Consequently, while statistical techniques may have capital in terms of their perceived legitimacy, there are many challenges. The very selection of 'factors' leaves room for dispute. Even more fundamentally, statistical research must decide whether to conceptualise sentencing as a single-stage or a two-stage process. There is no clear agreement on how future statistical research on sentencing should decide these questions. However, while there are no definitive answers, interpretivist research may partially address potential disputes. Interpretivist research could provide some evidence upon which future statistical research could draw.

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[241] Kautt (2009), p,194.
[242] Kautt (2009), p,193.
[243] Kautt (2009), p,193.
[244] Tata (2002); Hutton (2013); Lloyd-Bostock (1992).

3 – Analysing Factors That May Explain Sentence Discounting

Selecting 'factors' (or 'explanatory variables') for a statistical analysis of sentencing is a challenge. Another area of contention is choosing the statistical technique with which to analyse the effect of factors on sentencing. While research has used various techniques, Multiple Regression and Logistic Regression are popular choices for research on sentencing. Both techniques are accepted in legal research, and both were used by Goriely et al. (2001) in their study in Scotland.

Multiple Regression and Logistic Regression share similarities. Logistic Regression is a combination of Multiple Regression and Multiple Discriminant Analysis.[245] Both Multiple Regression and Logistic Regression are dependence techniques. Dependence techniques distinguish factors as being 'independent variables' or 'dependent variables.' Dependence techniques aim to predict the dependent variable (e.g. the effect of Sentence Discounting on sentences) using the independent variable(s).

An advantage of using Multiple Regression and Logistic Regression is that these techniques generate a baseline from which to assess the effect of a plea on sentences. This research shows that having such a baseline would be valuable as the radical indeterminacy of the formal law poses a key issue for evaluating the impact of any factor on sentencing (see Chapter 2). Currently, all that exists are some broad ranges (e.g. maximum sentencing powers) and practitioners' informal understandings of "going rates." As one interviewee noted:

> There is no tariff in this country (well I suppose for some things there is). But, generally speaking, we will all have a rough idea of what two

[245] Hair et al. (2010). p.16.

> kilograms of cannabis is worth with three previous convictions for drugs (not for commercial supply). But, if you've got three previous convictions for drugs and you are done for a commercial two kilos. We know roughly what you are going to be looking at. (Solicitor 6)

While practitioners perceive that they know the 'going rates,' this knowledge is difficult to access, and its reliability and validity are untested. This difficulty with estimating sentences means that generating a baseline using a statistical technique, where research can demonstrate how it derived the benchmark, has advantages.

For research on Sentence Discounting, the main difference between the two statistical techniques is that Logistic Regression is suitable for a non-metric dependent variable/factor. Non-metric factors would include whether there was a 'Guilty Plea' or 'Not Guilty Plea.' By contrast, Multiple Regression uses numeric dependent variables. Numeric factors would include a custodial sentence length in days.[246]

While Goriely et al. (2001) used both Multiple Regression and Logistic Regression, it used Logistic Regression to explore the effects of pleas on sentences (see Chapter 3 for more detail). An advantage of Logistic Regression is that it is less affected by violations of the statistical assumptions (such as 'normality' of the data) than Multiple Regression.[247] Being more resilient to violations of assumptions is advantageous when using real-world data where these assumptions might not be met. Indeed,

[246] There are ways to use Multiple Regression and Logistic Regression with other variable types. For example, 'dummy variables' may be used to give factors like 'Guilty Plea entered' and 'Not Guilty Plea entered' a metric value (such as by assigning the former a value of 0 and the latter a value of 1).
[247] Hair et al. (2010), p.312.

violations of statistical assumptions with data gathered in Scotland was an issue Goriely et al. (2001) faced.[248]

A - Analysing the stated Sentence Discount by the judge as a factor

In England and Wales, studies analysing Sentence Discounting include Steeples and Bell (2011), Pina-Sanchez (2014), and Roberts and Bradford (2015). These studies relied upon the Sentence Discount that judges stated they gave as a factor in the analysis. Using the stated Sentence Discount as a factor was feasible because the data required was readily available. In England and Wales, section 174 of the Criminal Justice Act 2003 requires that judges state the Sentence Discounts they have given. Moreover, in England and Wales (at the time) sentencing surveys were carried out that provided a record of stated Sentence Discounts.

Thus, for research in England and Wales (in the past), data on various factors like the stated Sentence Discount was *relatively* easy to obtain. However, there are limitations to the survey data that limit the ability to draw generalisable conclusions from it. The survey made use of tick boxes containing a range (e.g. 1% to 10%). Using these tick boxes is less exact than recording the precise discount. Furthermore, the survey's response rate was only about 60%.[249] This response rate means that there may be a selection bias in the results. For instance, it may be that those more liberal with Sentence Discounts are more likely to complete the survey. This potential selection bias is a severe limitation, and no research exists to explain why some judges responded and others did not.

[248] Goriely et al. (2001) had to employ a "Bootstrapping method to determine due to non-normality of data to determine that, "that the models were robust to this non-normality." See Goriely et al. (2001), p.257
[249] Pina-Sanchez (2013).

A more fundamental issue with analysing the survey data pertains to using the stated Sentence Discount as a factor in an analysis. There is no guarantee that the stated Sentence Discount is the same as the actual effect of the Sentence Discount. Potentially making the stated Sentence Discount invalid as a reflection of the actual Sentence Discount are: the limitations to how judges can explain sentences; the ability to alter the headline sentence to negate a stated Sentence Discount;[250] the complications relating to remorse and Guilty Pleas; etc. These limitations mean that research cannot assume that the stated Sentence Discount is the same as the actual Sentence Discount. Indeed, any analysis relying on stated Sentence Discounts should clearly distinguish these from the actual effects of Sentence Discounting.

4 - Why Take an Interpretivist Approach?

So far, the thesis has established that the formal law, and its methodologies to study the effectiveness of sentencing, are radically indeterminate on their own. Legal practitioners argued that Sentence Discounting must be understood holistically as part of a broader context and that it is dependent upon 'all the facts and circumstance of each case.' These facts and circumstances of each case are themselves indeterminate 'factors' whose meanings change based on the context (see Chapter 4, Section 2).

Consequently, an interpretivist approach is a useful way to scrutinise how Sentence Discounting is understood and given meaning in Scotland. Interpretivism is best suited to interrogating how interviewees understand and perceive Sentence Discounting. These are vital questions that bear upon notions such as the Presumption of Innocence. Moreover, interpretivism is vital to interrogating legal practitioners' notions of 'culture,' which were encountered repeatedly in interviews.

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[250] See Chapter 3, regarding research that found perceptions that this occurred in Scotland.

A - The Preference for an Interpretive Approach

An interpretivist approach emphasises inter-relationships between what positivists would think of as objects. Positivists attribute each object with a singular, static meaning:

> Positivist approaches tended to examine [the justice system] from the 'top down,' focusing on the impact of macro-level institutions and social structures and how they impose on and constrain individuals.[251]

Positivism has been "chided variously for being too focused on the individual… embracing an outmoded and crude form of scientism as a method, and for being inherently conservative in orientation."[252] Moreover, a disadvantage of positivism is that it is deterministic. It suggests that:

> People are puppets of society… controlled by social forces… [positivists] believe that just as there are natural laws governing chemicals, plants, animals, etc., so are there social forces or laws governing and determining the operation of the social world.[253]

Positivistic research tends to largely ignore the importance of ideas such as culture. Positivism dismisses ideas as "any reference to the… subjective is excluded as meaningless."[254] Dismissing subjective experiences tends to compromise the ability to apprehend how people make sense of the social world. Indeed, Merry has argued that:

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[251] Carter and Fuller (2015), p.1.
[252] McAra and McVie (2012b), p.531
[253] McNeil (2005), p.26.
[254] Holden and Lynch (2004), p.402.

> There is no social world except as it is lived and experienced, and events become socially meaningful only when they are interpreted.[255]

In the case of this research, positivism ignoring culture is a severe limitation as sentencing can be regarded as "cultural practice."[256] Moreover:

> Interpretivist thinkers, such as Max Weber (1921/1978) and Peter Winch (1988), have argued that the objective of finding causal laws modelled on the procedures of natural science is misplaced. From this philosophical perspective, conceptual problems arise even when one compares groups and institutions with similar cultural values in the same society. The problems cannot be managed through greater care in defining variables, or achieving precision in measurement, but require a significant change in how we conceptualise comparative research.[257]

Consequently, positivist research suffers from several limitations. Notably, the use of "statistical methods has been criticized for its atheoretical approach" and for neglecting how "trajectories may be socially produced."[258] For example, in their investigation of consistency in sentencing using the Crown Court Survey in England and Wales, Pina-Sanchez and Linare (2013a) pursue a positivistic approach. They rely on fixed explanatory variables and "real data" to explore sentencing. These explanatory variables incorporate 'legal factors' such as whether there was a Guilty Plea "at the first *reasonable* opportunity." While this variable may appear to have a

[255] Merry (1986), P.254.
[256] Hutton (2014).
[257] Travers (2008), p.389.
[258] McAra and McVie (2012b), p.550.

static meaning, "any term, even the simplest, is embedded within a cultural context, or milieu, that gives it its meaning."[259]

Even basic terms such as "reasonable" connote an "open-texture"[260] that requires meaning-making to be given effect. Indeed, the Sentencing Council of England and Wales notes that "the stage at which the defendant has the first reasonable opportunity to enter a plea will vary depending on the circumstances of the case."[261] As noted above, these facts and circumstances are themselves indeterminate factors whose meaning changes based on the context

Indeed, this research[262] found that there is debate over when the first reasonable opportunity to plead guilty arises. Determining whether a Guilty Plea arises at the first reasonable opportunity involves subjective processes of meaning-making. Some consider the first opportunity to plead guilty to be when the defence lawyer has assessed the case, but some consider it to be earlier. Interestingly, this research also found that local court cultures play a part in collectively attributing meanings to notions such as the first reasonable opportunity to plead guilty.

Positivist analyses, such as Pina-Sánchez and Linare (2013a), do not unearth the complexity and variability of meaning-making that underlie the taken-for-granted explanatory variables. Statistical analysis of "real data" neglects the processes that are involved in creating this "real data." These issues of positivist approaches exist in addition to the inadequate quality of much of the "real data" that exists on sentencing.

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[259] Melossi (2001), p.404.
[260] Hart (1958).
[261] Sentencing Council of England and Wales (2011), section 1.5.
[262] In Chapter 2, Section 7.

These limitations of positivism incline me to prefer an interpretivist approach. This research sets out to interrogate Sentence Discounting in situ.[263] Analysing Sentence Discounting in situ involves analysing the subjective processes of meaning-making that occur in the criminal process. These meaning-making processes are contextually-situated and have to be understood as part of a broader context.

Indeed, on one view, the criminal process operates to create meaning and legitimate the disposal of cases. The criminal process works to create meaning by defining crimes, offenders, victims, etc. Sentences provide meanings such as condemnation, the level of disdain for conduct, etc. These meaning-making processes are central to the operation of justice systems and not ancillary effects. Thus, Garland argues that:

> [T]he conventional distinctions drawn between instrumental activities and symbolic activities, or between 'social action' and 'cultural meaning' are of little use here… [A] separation which in reality does not exist…., in penality the instrumental is symbolic, and the social act of punishment, however symbolic, is at the same time an expression of cultural meaning."[264]

Thus, the cultural practice of sentencing has essential functions beyond, for example, a formal disposal. The meanings and symbols that the justice process generates (offender, remorse, catharsis, justice, etc.) matter and:

> Connect what we think we know with what we are trying to grasp, and thus unite, under each potent symbol, those diverse domains that must seem to cohere if life is to be rendered comprehensible.[265]

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[263] Regarding this research, I recognise the value of ethnographic research, which is more thoroughly immersive. However, senior sheriffs considered ethnographic research too intrusive and defence solicitors were disinclined.
[264] Garland (1990), p.255.
[265] Rosen (2006), p.9.

Consequently, the idea of the stated Sentence Discount, distinct from the 'real' Sentence Discount, is important. What discounts a court states it is giving, why it is giving (or refusing) a discount, etc. is significant. Consequently, this research cannot ignore the symbolic.

B – The Advantages of an Interpretivist Approach for Researching Culture

An interpretivist approach complements the focus of this research on routine practice in summary criminal work. Chapter 2 demonstrates that the formal law on its own cannot objectively determine routine practice. Instead, the research finds that legal practitioners explain routine practice through both a *narrative* of the formal law and a culturally-embedded *narrative* of context (see Chapter 9). In this sense:

> Culture refers to sets of shared meanings or collective representations. To study culture is to examine the ways in which meanings are defined, enacted, mediated, communicated, and shared by a range of actors and audiences.[266]

While culture may seem to be a simple term, the "notion of 'culture' is notoriously multivalent, both as a theoretical concept and as an object of analysis."[267] Notably, culture has been analysed at both micro and macro levels. In many ways, the sharp distinction between micro and macro cultures is an analytical falsehood. Macro-level cultures influence and help constitute the micro-cultures that this thesis interrogates. Thus, a focus on micro-cultural understandings offers "both a window into the larger culture and, no less importantly… an often under-valued window into legal processes themselves [such as Sentence Discounting]."[268]

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[266] Hutton (2014), p.4727.
[267] Garland (2006), p.420.
[268] Rosen (2006), p.12.

The use of culture in this thesis draws on both of Garland's characterisations of culture. Garland argues that, on one view, culture refers to a perceived "web of meanings" (such as those in a local court culture).[269] On another view, Garland argues that culture is a way "to describe making meaning" (such as how local court cultures, defence cultures, judicial cultures, define what the *right* Sentence Discount is in a given case).[270] Garland himself accepts both uses of culture as legitimate:

> In fact, one can point to instances where both usages are condensed in a single idea — as with the concept of 'subculture', which is used to highlight the cultural characteristics of a specific group (the style, dress, taste, attitude, argot, etc. of group members, as distinct from their economic class position, or political orientation) and to differentiate this specific culture from the culture of 'the mainstream' or from other subcultures.[271]

Thus, on the one hand, this thesis explores legal practitioners' perceptions of cultures. For example, the research explores Court 1's perceived culture and Court 2's perceived culture ("*this* culture as opposed to *that* culture").[272] This interrogation of cultures reveals how court culture works in "shaping a repertoire of habits, skills and styles from which people construct 'strategies of action.'"[273] On the other hand, the thesis also shows how the notion of culture found in this research (the 'contextual narrative') is perceived by legal practitioners (i.e. lawyers and sheriffs) to be to be distinct from the formal law ("not-culture").[274]

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[269] Hutton (2014), p.4274.
[270] Hutton (2014), p.4274.
[271] Garland (2006), p.425.
[272] Garland (2006), p.422.
[273] McAra (2004), p.25.
[274] Garland (2006), p.422.

Moreover, McAra has argued that "a key task for sociology is to analyse the structural constraints and historical circumstances within which struggles for cultural domination take place."[275] This research undertakes this task and shows the perceived micro-historical circumstances that led to the dominant cultures in Court 1 and Court 2 (see Chapter 6).

I – What is Culture?

The analytical concept of culture is widely used in the field of social anthropology, and social anthropology has generated a diverse range of theoretical concepts of culture. Some of these concepts of culture are broad, and (especially more recently) some concepts are narrower. One of the most cited works is that of Geertz who advocates a narrower concept of culture concerned with examining meaning-making:

> The concept of culture I espouse, and whose utility the essays below attempt to demonstrate, is essentially a semiotic one. Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning. It is explication I am after, construing social expressions on their surface enigmatical.[276]

This thesis focuses upon what can be called 'legal culture.' The thesis uses culture in what Garland argues to be two distinct ways. However, the concept of culture requires additional elaboration before moving on. Research and common parlance often refer to culture as a concept, but it is often used with little analytical clarity. Indeed, "culture is one of those words which it is particularly difficult to define and

[275] McAra (2004), p.25.
[276] Geertz (2000), p.5.

easy to abuse... as a residual explanation when other explanations run out."[277] The main critique of culture is that its complexity leads to oversimplifications.[278] Indeed, as Nelken notes, "some authors have even suggested that ['culture'] is so misleading that it should be abandoned."[279]

The totalising use of culture, or any grand-meta narrative, risks reductionism and should be managed carefully.[280] As this thesis shows, there are intricate details at work in explaining the meanings that are given to practices like Sentence Discounting and early Guilty Pleas. These details provide a more nuanced picture than, for example, simply ascribing stereotypes to Court 1 and Court 2.

In this thesis, it would not be enough to merely say 'Court X operates as it does because of its culture.' While the culture of courts is crucial to understanding the operation of a court, 'culture' alone is not an explanation. This would result in an unenlightening, circular claim:

> Culture is not a power, something to which social events, behaviours, institutions, or processes can be causally attributed; it is a context, something within which they can be intelligibly… described.[281]

To interrogate culture, it is insufficient to assume that processes of meaning-making are self-evident or to engage in "comparison by juxtaposition" – which "often leads to a dead end."[282] Research has to show what a perceived culture is, what components are thought to contribute a culture, how culture creates meaning, etc.

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[277] Nelken (2004), p.8.
[278] Williams (2015), p.154.
[279] Nelken (2004), p.2.
[280] Valverde (2010).
[281] Geertz (2000), p.14.
[282] Nelken (2011), p.185.

Consequently, this research must show the perceived legal and social conditions that legal practitioners feel explicate Sentence Discounting and Guilty Plea practices.

The thesis will draw on mid-level analyses of culture to explicate different (though inter-related) aspects. Various chapters of this thesis interrogate legal practitioners' perceptions *of* culture. Legal practitioners' perspectives are what Friedman calls "internal legal culture."[283] This internal aspect is crucial:

> Given that culture is, to no small extent, a matter of struggle and disagreement... Much that goes under the name of culture is no more - but also no less - than 'imagined communities' or 'invented traditions', though these may of course be real in their effects."[284]

By exploring the perceived culture, the thesis does not contend that these cultures exist as objects apart from the interpretations of legal practitioners. However, the thesis does argue that even the perception of culture is significant.[285] What legal practitioners perceive to occur is how they make sense of their practice. This is not necessarily to say that these perceptions explain decision-making in a positivistic sense.[286] However, these perceptions are how legal practitioners give meaning to the formal law, which on its own is radically indeterminate.

II – How this Thesis Examines Culture

An analysis can divide culture in many ways. "Legal scholarship contains at least twelve approaches that connect the concepts of law and culture."[287] For example, Swindler distinguishes between "settled culture" ("traditions and common sense")

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[283] Friedman (1990), p.517.
[284] Nelken (2004), p.6.
[285] See Garland (1990), p.255.
[286] Whether it does or does not is beyond the scope of this thesis.
[287] Mautner (2010), p.841.

and “unsettled culture” (“ideology”).[288] The thesis could analyse much of what legal practitioners conceive of as culture in terms of "settled culture” and “unsettled culture.”[289] Alternatively, Williams divides culture into four mid-level concepts that are between the micro and macro level:[290]

These are all useful ways to keep an exposition of culture from becoming too abstract and to create a:

> Theoretically more powerful concept of culture to replace E. B. Tylor's famous "most complex whole," which, its originative power not denied, seems to me to have reached the point where it obscures a good deal more than it reveals.[291]

However, this thesis divides culture differently. This thesis divides culture into two parts: the formal narrative and the contextual narrative. I chose this division because this is how legal practitioners divided their explanations of decision-making. Based on my empirical work, first, legal practitioners spoke of the “formal law,”[292] which was a cultivated narrative of the law. Then they spoke of everything else as “culture,” “practicalities,” “common-sense,” etc.

Already, in Chapter 1, the thesis has scrutinised the formal law regarding Sentence Discounting. This thesis defines the ‘formal law’ as law-texts: case law and statute.[293] These sources of law are words on a page. Being words on a page, the formal law has

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[288] Swidler (1986), especially p.282.
[289] While generally thought to be stable, the cultures practitioners described were not entirely "settled." For example, there is a fierce contest over defence lawyer culture and the idea of what role defence lawyers should perform (see Chapter 7).
[290] I was inspired to consider this after listening to Professor Stewart Field’s (Cardiff Law School) presentation “Understanding Youth Justice” at the University of Strathclyde CLCJ. Also see Longhurst (1991).
[291] Geertz (2000), p.4.
[292] For example, section 196, *Gemmell v HMA*, etc.
[293] Other definitions are possible.

features independent of the meaning that legal practitioners ascribe to it. For example, if a judgment was issued but never read and forgotten by all those involved, this would still be formal law in jurisprudential terms. Likewise, Lord Gill's judgment in Gemmell uses particular words regardless of whether any legal practitioner reads those words, or whether they confuse one word with another, etc. However, to apply the formal law in a real case, legal practitioners must give meaning to the words on a page. Part of the process of giving meaning to the formal law is the creation of a 'formal narrative' of the law. This formal narrative is largely abstract and independent of real cases. Moreover, the formal narrative is not *a priori,* and decisions are not inevitable.

Legal practitioners did not consider the formal narrative as 'cultural.' Indeed, they considered the formal narrative to be the same as the formal law. However, legal practitioners cannot explain the formal narrative in formalistic terms. For example, the formal law alone does not enable legal practitioners to explain why the legal discourse quotes one part of a case and not another.

The creation of the formal narrative is part of the way that legal practitioners generate meaning from law-texts. Moreover, the perception that the law can have an abstract meaning in largely formalistic terms (independent of subjective culture) is also part of the legal professional culture. Thus, what this thesis calls the 'formal narrative' is not independent of culture. It is 'formal' because it is a narrative of the law-texts, not because it determines decision-making as formalistic thinking assumes (Chapter 9 explores this paradox in more detail).

In the following chapters, the thesis breaks down culture further by investigating what is called the 'contextual narrative.' This contextual narrative is what legal practitioners conceived of as *other* than the formal law. The contextual narrative is

what legal practitioners believe are their practical understandings and 'street-smart' skills gained from practice.[294]

Chapter 5 demonstrates that legal practitioners conceive of case disposal via Guilty Pleas as a social process based upon culturally-embedded understandings of relationships and judicial culture. Chapter 6 interrogates legal practitioners' perceptions of unique cultures within Court 1 and Court 2. Chapter 7 analyses culturally-embedded notions of defence lawyers' roles. Chapter 8 investigates whether there may be clientele cultures among accused persons.[295]

Chapter 8 demonstrates that legal practitioners accounts of clientele culture are underdeveloped. Legal practitioners' explanations of Sentence Discounting and early Guilty Pleas focus on rational choice assumptions. For example, the argument typically made by legal practitioners was that Sentence Discounts encourage early Guilty Pleas because the advantages are obvious.[296] When these assumptions were not borne out, legal practitioners attributed this to "culture" as a residual catch-all for the unknown. To address this limitation Chapter 8 explores the legal consciousness of accused persons revealed from interviews with accused persons. These interviews offer insight into the possible clientele cultures that could not be read off from legal practitioners' accounts. Indeed, legal consciousness proved to be a useful approach "concerning the relationship between law and culture."[297]

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[294] Regarding William's four differentiated elements of culture (*Intellectual formulations of culture,* "*Structures of feeling,*" *The effect of institutions, and Tradition*), the "culturally-embedded narrative" includes the latter three.
[295] Mautner (2010), p.842.
[296] However, due to the small size of Sentence Discounts in summary cases, this encouragement was thought to be small.
[297] Mautner (2010), p.841.

Finally, Chapter 9 argues that legal practitioners shuttle between the formal narrative and the contextual narrative. By shuttling between "these seemingly unconnected realms, collective experience appears to [legal practitioners] to be not only logical and obvious but immanent and natural."[298] This shuttling process provides 'the law' with a perception of certainty. Thus, creating and cultivating meaningful decisions requires more than formalistic legal reasoning. It requires a cultural process where meaning-making is shown to be (practically speaking) law-making.

C - Mixed Methods Research

By now the pressing need for interpretivist research on Sentence Discounting has been established. An interpretive approach is the best way to assess this core concept of culture. However, the need for interpretivist research does not mean that positivistic research is not needed. There are important questions that can be addressed by well-implemented models of the social world.[299] Indeed, this research considered using mixed methods. Mixed methods research is compatible with the perspectives of legal practitioners:

> Both approaches are in fact justifiable, and judges themselves operate and flip between positivist and interpretive idioms. Thus, it would be sensible to research the sentence differential using both approaches.[300]

However, in rejecting a mixed methods approach, this research considered the inadequate quality of official of data in Scotland. The limitations of official data regarding Sentence Discounting are set out in Chapter 3. These limitations to data available in Scotland make well-executed statistical research on Sentence Discounting an unlikely output. Even the most advanced statistical technique cannot

[298] Rosen (2006), p.4.
[299] McAra and McVie (2012a) and (2012b) argue for critical positivism.
[300] Tata and Gormley (2016).

escape the truism of 'garbage in, garbage out.' Given that official data is limited, this would require well-executed positivist research to gather bespoke data. Gathering bespoke data was feasible for the large-scale study conducted by Goriely et al. (2001), but unfeasible for a single researcher.

Consequently, this research takes an interpretivist approach to researching Sentence Discounting. Interpretivism allows the research to address critical sub-questions regarding culture and Sentence Discounting (noted above). Moreover, this research's interpretivist approach also suggests various "factors" that future positivist research may wish to explore. In suggesting these factors, this research may facilitate future positivist research having a better theoretical approach to understanding case trajectories.

5 - Research Methodology

A - Negotiating Access

Before seeking approval for the research from Scottish criminal justice organisations, I examined various courts to appreciate their procedures and inform my research design. During this background investigation, I became aware that anecdotally each court was thought to have its own 'culture.' Court cultures raised interesting questions concerning formalistic notions of law, and it seemed prudent to try and capture some of the particulars of what these cultures were. However, as local court cultures in Scotland were unresearched, there was little existing information.

As a result of the potentially significant cultural differences between courts, I decided to compare two similar courts. I identified Court 1 and Court 2 as ideal research candidates due to their many similarities. However, despite the two courts having many similarities, Court 1 took substantially longer than the national average to reach

a Guilty Plea while Court 2 was significantly faster.[301] Indeed, Court 1 and Court 2 are as close to a natural experiment concerning court cultures as is possible in Scotland. Thus, with the ideal courts identified, the next step was to formally seek approval from Scottish criminal justice organisations.

The Scottish Courts and Tribunals Service (SCTS) has documentation stating that they should first approve research proposals and, if approved, they (SCTS) will submit the research proposal to the Lord Justice General for further consideration and approval.[302] This process situates SCTS as a key 'gatekeeper' for research involving the courts. While it can be necessary to work with gatekeepers, there are risks researchers need to be cognisant of.[303] Notably, gatekeepers can hinder research for various reasons (such as risk aversion to anything that may tenuously be considered politically sensitive).

Anecdotal evidence indicated that SCTS, in their gatekeeping capacity, effectively operated bulwarks against research. Moreover, I was also suspicious of the dearth of published research involving the courts and judiciary in Scotland since 2004.[304] Given the anecdotal evidence, I avoided SCTS in the first instance. Avoiding SCTS initially proved to be wise as my experience supports the view that SCTS are hinderances to research. For example, even after the Lord Justice General approved my research, "ministerial sensitives" were cited as a key concern over releasing basic non-contentious statistical data. Indeed, issues regarding access and SCTS prompted the *tempered* critique of FOI in Chapter 3.

[301] This was legal practitioners' perception, and it is borne out in official data.
[302] SCTS (2019).
[303] Broadhead and Rist (1976).
[304] Tombs (2004).

Instead of approaching SCTS, I first sought what Project Management terms an institutional/project "champion."[305] An institutional champion is someone within an organisation who can support the research. Having an institutional champion is regarded as best practice and in my case proved to be essential.[306] Thus, with the ideal courts determined, I began seeking access by assessing whether Sheriffs would be interested in participating in the research. To do this, I spoke to various Sheriffs at conferences and discussed my proposed research. I found Sheriffs to be inclined, and they also shared valuable insights about how the research could be conducted.

Next, confident that Sheriffs seemed inclined, I approached the relevant Sheriff Principal following an introduction from an inclined Sheriff. One topic we discussed (and in which the Sheriff Principal was eminently helpful and insightful) was the possibility of mixed methods research. A pilot data collection exercise using court records was planned to assess the feasibility of including a quantitative element in the research.[307] After two meetings, the Sheriff Principal agreed to support the research. At this point, I wrote to the Lord Justice General, but the letter was redirected to SCTS. Therein began an 18-month ordeal that supports anecdotal evidence of SCTS as bulwarks against research. Twelve months was spent attempting to get SCTS to approve the research. During this time, among other things, SCTS contested the data collection from court records and told the Sheriff Principal that they already had usable high-quality data on Sentence Discounting. The Sheriff Principal, therefore, requested I make use of this SCTS data.

Unfortunately, SCTS required that (before they approve the research) I specify exactly what data I wanted from SCTS records. However, SCTS would not provide detailed

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[305] I undertook several courses in Project Management at Strathclyde University as part of the PG Cert.
[306] Pinto and Slevin (1989).
[307] The ambition was to model this after Goriely et at (2001) but on a smaller scale. This small replica, it was hoped, could have used the original data from Goeirly et al. (2001) to examine changes over time.

information on their data (i.e. metadata concerning variables they hold and in what format they are held) without the research first being approved by the Lord Justice General. This was an absurd Catch-22 situation wherein the research proposal would not be approved unless it specified details that SCTS would not disclose without approval. The ridiculousness of this situation was compounded by the fact that metadata is not sensitive[308] and that it was SCTS that advocated the use of their data.

I turned to the Sheriff Principal, my 'institutional champion,' to seek a solution. In the eventual end, even the Sheriff Principal did not make progress with SCTS, and I had no choice but to write again to the Lord Justice General – bypassing SCTS. While this was successful, by this point (12 months later) it was too late to perform the pilot using court records. Six months after this (18 months in total) SCTS eventually conceded that I had approval to use their data – at which point SCTS informed me that their data was not usable! Thus, this research used only qualitative methods.

B - Court Observations

Court observations were carried out in Court 1 and Court 2 over 12 months. Court observations allowed me to observe daily routines and the roles played by sheriffs, defence lawyers, fiscals, security staff, court officers, etc. Court observations also enabled me to note what is not visible in courts: the choreographing of the court routine. This lack of transparency in the court process was useful for informing interview questions and (along with FOI issues) prompted me to question whether courts are 'public' places as popular discourse suggests.

My court visits were unannounced though the Sheriff Principal notified sheriffs that I would be present at the start of the research. I kept a diary and initially tried to document in full detail the legal details of the cases (the charges, the sentences, the

[308] There is no personally identifiable information in metadata. Metadata is simply a description of data itself.

discounts, etc). However, while I could get a good sense of the charges, working out the exact charges (there were often many) was problematic. One important issue was that in court charges are usually referred to in short as 'Charge 1,' 'Charge 2,' etc. Thus, I came to note the offence in general terms and focused more on the relationships and routines I observed in court (e.g. whether court staff were abrupt with lay persons, whether and how the accused participated in the process, dialogue between legal practitioners, what was said during sentencing, etc).

On reflection, access to court papers (or court records) would have enhanced the court observations. To secure access to court papers, in the future, I would seek defence lawyers to shadow in the courts. Shadowing defence lawyers would enable me to better research the plea decision-making process. Of course, this would be no easy task. However, having spent time in the courts and having spoken to defence lawyers I think it might be possible (though still challenging) to find lawyers to shadow. One way to approach this could be to make a general announcement via the relevant local bar and then approach defence lawyers who are familiar with me or seem amenable.

My notes focused on the social dynamics (e.g. the demeanours of those in court and how they related to others) and "sign-vehicles" that I observed in court.[309] I also noted striking features or events I observed and (following Carlen) what I thought constituted the regular and mundane (e.g. impressions of court ambience, what it was like being in court for extended periods).[310] Perhaps the most notable element of the humdrum routine of the courts was the absence of drama and passion in most cases. There is undoubtedly pageantry in courts (e.g. rising when the judge enters or leaves), but even this is imbued with a monotonous quality.

[309] Goffman (1956).
[310] Carlen (1976a).

From my obversions, I found routinised social dynamics to be enduring despite the particularities of the case. The accused (the "dummy player")[311] seemed virtually interchangeable as far as court proceedings are concerned. Thus, as one defence lawyer noted, summary court work is like "groundhog day" in the sense of being repetitive. However, there was a lot that I was able to unpack about the operation of this routine. Additionally, an interesting finding from my observations was discovering how much happens just outside the courtroom. For example, outside the courtroom forms part of the "backstage"[312] where, among other things, the routine for inside is choreographed and accused persons are often given their script (usually to do as little as possible) by defence lawyers or court officers.[313]

C - Interviewee Overview

I interviewed 7 sheriffs (judges), 8 solicitors (defence lawyers), 2 fiscals (prosecutors), and 12 accused persons (defendants). The interviews were semi-structured (see Appendix 1 and Appendix 2). Legal practitioner interviews generally lasted about an hour. Accused interviews typically lasted about 20 minutes, though the interviews with Accused 2, Accused 5, Accused 9, and Accused 10 were about an hour. The tables below summarise the interviewees and the court to which their experience primarily relates.[314] For accused persons, the table also includes a description of their principal offence.

Sheriff 1	**Court 1**
Sheriff 2	**Court 1**

[311] Carlen (1976a).
[312] Goffman (1956), p.70.
[313] I had thought lawyer-client interactions would be confined to the lawyer's office with the court being the front-stage, but this is often not the case.
[314] Several solicitors have experience in Court 1 and Court 2. I note their primary/'home' court.

Sheriff 3	**Court 2**
Sheriff 4	**Court 2**
Sheriff 5	**Court 1**
Sheriff 6	**Court 2**
Sheriff 7	**Court 2**

Solicitor 1	**Court 1**
Solicitor 2	**Court 1**
Solicitor 3	**Court 2**
Solicitor 4	**Court 1**
Solicitor 5	**Court 1**
Solicitor 6	**Court 2**
Solicitor 7	**Court 2**
Solicitor 8	**Court 1**

Fiscal 1	**Court 1**
Fiscal 2	**Court 1 and Court 2**

Accused 1	**Court 1**	**Breach of the peace and resisting arrest**
Accused 2	**Court 1**	**Assault**
Accused 3	**Court 2**	**Benefit fraud**
Accused 4	**Court 2**	**Threatening or abusive behaviour**
Accused 5	**Court 1**	**Assault**
Accused 6	**Court 2**	**Assault**
Accused 7 and 8	**Court 1**	**Breach of the peace**
Accused 9	**Court 1**	**Breach of the peace**
Accused 10	**Court 1**	**Supply of Drugs**

Accused 11	**Court 1**	**Threatening or abusive behaviour and assaulting a police officer**[315]
Accused 12	**Court 1**	**Fixed Penalty Notice (FPN) for careless and inconsiderate driving**[316]

ii –Interviewee Recruitment

Sheriffs were self-selected from a call for participation sent out by the Sheriff Principal. Solicitors and fiscals were written to and approached directly. Upon reflection, a more systematic method of recruitment for defence solicitors could have been more efficient. Initially, I had contacted the relevant local bar associations to recruit solicitors. However, when I did not hear back, I did not pursue this. In hindsight, this was probably a mistake. I had thought that I could easily recruit solicitors in court, but (as Solicitor 4 noted) they bounce "around the courts like a ping-pong ball taking care of their other business" and when that is done swiftly return to their offices. Thus, catching a solicitor to speak to in court is difficult as they barely have time to briefly speak to their clients. Consequently, I ended up writing to solicitors (sometimes repeatedly) or dropping by their office in order to set up interviews.

Accused interviewees were predominantly recruited directly. However, Accused 12, came to speak to one of my solicitors when I was there. As both parties were happy, I was able to observe the initial lawyer-client meeting. For Accused 5, I observed his pleading diet. For others, I observed their sentencing. For those I could not interview at the time we met, but expressed an interest in speaking, I initially handed out a

[315] The initial incident was one of threatening or abusive behaviour and matters escalated from there when the police became involved.
[316] There is an argument that a FPN is an administrative alternative to a criminal charge. However, Accused 12's experience shows that 'direct measures' can be perceived as criminal matters by accused persons.

copy of the information sheet and consent form (containing my contact details). Relying on people to contact me was not an effective strategy, and I did not hear back from any of these individuals. I suspect that contacting a researcher did not rank high on people's list of priorities. Indeed, this is not an issue unique to accused interviews, and I was (perhaps) naïve to think this would work. I, therefore, began asking if I could contact persons later and taking a phone number. Following up myself proved more successful but was still limited in that many persons seem to have pay-as-you-go phones and changed these frequently.

In terms of sample representativeness, most accused interviewees are from Court 1. Due to this sample bias and the small sample size, the research cannot draw any conclusions about local clientele cultures – though it can point out that defence lawyers seem to influence client decision-making strongly.

Thus, on reflection, a more systematic approach to recruiting interviewees would be preferable. Notably, a better balance between accused persons from the two courts and combining lawyer-client observations with accused interviews would be ideal (though finding willing defence lawyers would be a challenge). Additionally, more interviews with accused persons would seem to be warranted as there is still more we need to understand about their perceptions and experiences.

D – Legal Practitioner Interviews: Social Positioning

Interviews with sheriffs, fiscals, and solicitors aimed to explore the perspectives of court staff most directly involved with the Sentence Discount. In drafting the interview schedule, I conceived of interviews as existing on a spectrum of unstructured to structured.[317] Being wary of the plausibility of the formalistic account of Sentence Discounting (see Chapter 2), very structured and closed questions were

[317] These are 'ideal types' in the Weberian sense.

undesirable. However, legal practitioners did not respond well to unstructured questions during informal discussions. Indeed, a lack of structure is alien to legal practitioners given that summary work is highly structured and repetitive. Thus, some practitioners felt uneasy with a lack of structure, and some (I suspect) took a lack of structure to be a poor indication of my knowledge and understanding of legal practice.

That I felt the need to demonstrate I was knowledgeable is one reason I came to analyse legal practice in the Bourdieusian terms of "fields" that require "social capital" to enter. Indeed, throughout my engagements with legal professionals, I emphasised my 'law' credentials:

> This research is being undertaken by Jay Gormley, a PhD **(Law)** student at the University of Strathclyde who holds a Bachelor of **Laws** with First Class Honours and a Masters **(Law)**...[318]

Thus, I adopted a straightforward structure for the interviews based on the language of legal practice and the formal law. For example, initially, I asked 'simple' questions such as what advantages a Guilty Plea may have. These simple questions eased legal practitioners into the interview. Moreover, in asking simple questions, I positioned myself as the diligent law graduate who lacks experience and needs to learn 'how things work.' Consequently, experienced legal practitioners viewed me as something akin to a trainee who needs tutoring in the practicalities of law. For example, Sheriff 3 gave me the advice they give to others who are new ("know your sheriff!").

This approach was successful, in large part, because it was an excellent way for the interviewer (me) and interviewee to understand each other. Particularly useful for sheriff interviews was that this social positioning avoided the issues of elites controlling the interview or the reverse issue of the researcher being perceived as a

[318] The Participant Information Sheet for Legal Professionals (see Appendix 4).

threat. This general comfort enabled interviewees to speak more freely than they might otherwise have done and enabled me to ask questions I could not otherwise have asked.

E - Accused Participant Interviews: Social Positioning

One concern with accused interviews was that the social positioning could be reversed with me positioned as the elite. Such social positioning would be problematic as I did not want accused interviewees to take their cues from me. Instead, I wanted to allow accused persons as much scope as possible to convey their views honestly and openly.

When introducing myself, I used clear terms such as 'PhD student.' Simple language worked well as interviewees understood the term student and, as with legal practitioners, were keen to be supportive. Additionally, something that may have helped with the recruitment of interviewees was that I had joined a gym near Court 1. Over time I came to wear sports gear when just observing Court 1 for comfort and convenience.[319] A by-product of this casual attire, in hindsight, was that it helped to make me more approachable in Court 1. Certainly, breaking the ice was the hardest part of recruitment. Once the ice was broken, the interviews ran smoothly as I was able to explain in detail who I was, why I was there, and provide the information sheet and consent form. Indeed, Accused 9 offered his advice on how I should carry out future interviews which also provided insight into how he perceived me (as a student that he was happy to help) and what he got out of the experience (a voice):

> *You'll sail it [referring to my PhD]… There are plenty of punters [accused persons in court]. Just jump in [to court] wearing a pair of trackies [sports gear] - see the way you're dressed just now [pointing to my gym trainers]?*

[319] I wore a suit if interacting with legal professionals.

[Interviewer nods]

Just sail in like your average fucking Joe like the way you're doing it today… there's that many people about. Everyone in court always speaks, "alright pal, where you from?"

Just charge up… [People] will speak to you about court because they all fucking hate it [the inability to speak]. End of the day [tell them]:

> *"I'm only wanting honesty. I couldn't give a fuck who you are or what you've done. I only want to hear what your side of the shit is, and what you think. I'm not wanting it made up. There's no good; there's no bad. There's no nothing."*

You're only wanting a wee bit of honesty. You'll be fine. [Being an accused person] stuck in court all day you can't do fuck all [so people are happy to talk].

Accused 9's comments are reassuring that interviewees felt free to discuss their experience honestly. However, upon reflection, there are some points I could have probed in more depth relating to the pleading decision in the specific case. While interviewees self-selected some aspects of their case to discuss, I avoided probing questions relating to any alleged offence and focused on more macro-level perceptions. On reflection, more specific questioning could have been beneficial. In particular, I feel there is a pressing need to know more about how interviewees understand the process. For example, we need to know more about whether accused persons feel their sentences are fair and just and, if (for example) the sheriff gives a 'second chance,' what the person sentenced takes this to mean.

Conclusion

This chapter has explored how Sentence Discounting can be understood and how research might go about scrutinising Sentence Discounting in Scotland. The chapter begins by scrutinising the fundamental debate concerning whether sentencing should be conceptualised as a single-stage or a two-stage process. The chapter argued that both conceptualisations have merit, but that a two-stage conceptualisation better accords with the perceptions of legal practitioners and accused persons. A two-stage conceptualisation was also argued to be useful for shedding light on the custodial threshold.

Secondly, this chapter explores the advantages and disadvantages of relying on “factors” to explain sentencing in a jurisdiction that notionally adheres to individualised sentencing. If sentencing is genuinely individualised, making comparisons between cases could be problematic. However, the chapter argues that comparisons between cases are possible. While every case may be unique, cases may be similar in salient regards so that research can make useful comparisons. The challenge is in determining what "factors" or "variables" should be used to identify cases as similar.

Thirdly, this chapter critiques two statistical techniques that have been used to research sentencing in Scotland: Logistic Regression and Multiple Regression. The chapter noted that statistical techniques could, in theory, be beneficial in shedding light on questions related to the nature and extent of Sentence Discounting. However, the chapter highlights that statistical techniques are not a panacea for answering questions on sentencing. In particular, there are issues around assuming the stated Sentence Discount is the same as the actual effect of the Sentence Discount.

Fourthly, the chapter sets out the advantages of using an interpretivist approach to research Sentence Discounting. The chapter noted that interpretivism is best suited to answering key sub-questions concerning the perceptions of accused persons and legal practitioners. It was also noted that an interpretivist approach allows the research to explore notions of 'culture' and how legal practitioners ascribe meaning to Sentence Discounting.

Finally, the chapter sets out and reflects on the research's methodology. The research involved court observations and interviews in two selected courts. These two courts were ostensibly similar, neighbouring, medium-sized Sheriff Courts: named Court 1 and Court 2. Differences in pleading patterns, between these two otherwise similar courts, made these courts especially interesting for this research. Interviews were carried out with four different groups in the two courts: sheriffs, solicitors, fiscals, and accused persons. While mixed methods research would have been ideal, various issues prevented this. Indeed, although the lack of mixed methods research is unfortunate, uncovering the issues that prevent quantitative research is part of the key findings of the thesis.

Chapter 5: The Social Dynamics and Culture of Doing Justice

Introduction

This chapter interrogates the social dynamics that legal practitioners (judges, prosecutors, and defence lawyers) identified as playing a crucial role in day-to-day legal practice. These social dynamics mean that legal practitioners think that there is more to disposing of a case than simply applying formal laws to facts. Even in a notionally adversarial system, legal practitioners believe that trust is an essential component in getting routine work done. Indeed, one of the critical findings of this research is that legal practitioners perceive there to be local court cultures that arise from these social dynamics (Chapter 6 scrutinises local court cultures).

Part 1 of this chapter argues that disposing of a case involves social processes. Part 1 demonstrates that Plea Bargaining, including Sentence Discounting, is based upon the working relationships of those in court rather than formal rules. Part 1 also notes that trust is a vital component of these working relationships. Part 2 analyses how these social dynamics can exist in a system that policymakers assume to be rule-bound. Part 2 argues that since the formal law is radically indeterminate, it cannot replace social dynamics. To reinforce this argument that social dynamics are vital, Part 2B demonstrates the limitations of rules curtailing prosecutorial Plea Bargaining, which interviewees perceived to be stringent.

To further exemplify the importance of social dynamics, Part 3 shows that the justice system does not operate as formalistic thinking assumes by critiquing "National Initial Case Processing Hubs." Part 3 shows that legal practitioners believe that policymakers' attempts to promote 'efficiency,' based on formalistic notions of how the justice system operates, have been counter-productive. Legal practitioners

criticised innovations such as National Initial Case Processing Hubs as problematic because they do not account for the social dynamics that are responsible for the expedient disposal of cases via Plea Bargaining. As a consequence of failing to consider the operation of social dynamics, legal practitioners feel that National Initial Case Processing Hubs have made the expedient disposal of cases via Plea Bargaining more difficult.

1 - Case Disposal as a Social Process: Plea Bargaining

When explaining Sentence Discounting, legal practitioners first presented a formal narrative. They quoted aspects of the formal law such as section 196 of the Criminal Procedure (Scotland) Act 1995, *Du Plooy v HMA*, etc. (discussed in Chapter 2). In presenting the formal narrative, legal practitioners think in formalistic terms and talk in the abstract. This formalistic thinking creates an impression that cases will proceed through various stages in a mechanistic fashion. By the end of this process, the formalistic model assumes that the case will reach an expedient disposal. Within this formalistic model, there is little room for working relationships.

However, this research found that legal practitioners could not apply the formal law on Sentence Discounting in a straightforward manner to determine outcomes. To explain their decisions, legal practitioners also drew on a contextual narrative (see Chapter 4). This contextual narrative explained the reality of the criminal justice system as a "human process" (Solicitor 2 and Fiscal 1). Legal practitioners described the justice system as being fundamentally based on social dynamics. For legal practitioners, successfully managing subjective relationships with others was essential to being a competent legal practitioner. The importance that legal

practitioners attribute to social dynamics severely challenges formalistic assumptions about Sentence Discounting.[320]

In practice, the courts dispose of most cases through a Guilty Plea. This research found that the social relationships between legal practitioners facilitate Guilty Pleas. It is social relationships that enable Plea Bargaining:

> It's a human process, and I think that it's a hard process. But the plea negotiation element is an intrinsic part of your job. (Fiscal 1).

Legal practitioners feel social dynamics are vital throughout the justice system. Indeed, based on the formal law alone, Plea Bargaining is uncertain and inequitable (see Chapter 2). Plea Bargaining has disparate effects in committing the accused but not the court. Yet, defence lawyers routinely and confidently enter into these seemingly inequitable and uncertain Plea Bargains. Interviews revealed that mutual trust is what is enables this confidence. Defence lawyers' understandings of the social dynamics give them certainty that the other parties will uphold their end of any deal.

The perception of fundamental social dynamics means that legal practitioners consider the formal law on Sentence Discounting to be only *part* of the equation. The perceived role of social dynamics affects the meanings that legal practitioners attach to Plea Bargains. For example, based on the formal law, an early Guilty Plea is rational where the likelihood of conviction is high. However, social dynamics mean that, from charge to disposal, there is an expectation of Plea Bargaining. This expectation of Plea Bargaining means that legal practitioners do not expect Guilty Pleas without the rigmarole of Charge Bargaining and Fact Bargaining (offers, counteroffers, bluffs, etc). As Solicitor 7 noted:

[320] See Chapter 9 for an analysis of how legal practitioners reconcile these two narratives.

> Sentence Discounting is a small part. What is much more important is what you plead to, what the wording is, and what the narration is.
>
> There are certain things that you want to get out if you can. A kick in the head or a stamp in the head is a great example. A stamp in the head will more often than not attract a custodial sentence.

Charge Bargaining and Fact Bargaining are attempts to make cases fit certain "typified whole offence stories."[321] Crucially, legal practitioners (who shape the views of accused persons)[322] perceive these informal Plea Bargains to be more important than the formal effects of stated statutory Sentence Discounts. For example, Solicitor 6 noted that they often sacrifice the Sentence Discount to carry on Charge Bargaining and Fact Bargaining:

> Your negotiation with the fiscal doesn't have a bearing on the discount. All it might do is, if they say "no" to what you suggest, knock it on to an Intermediate Diet while you try and get them to take what you want them to take. You would only do that if what you are trying to get rid of is bigger than the discount.

Consequently, social dynamics lead to Charge Bargaining and Fact Bargaining. These informal forms of Plea Bargaining can undermine Sentence Discounting's ability to encourage early Guilty Pleas. Legal practitioners' belief in the importance of Plea Bargaining based on social dynamics makes Sentence Discounts less significant in summary cases.[323] For example, Sheriff 4 thought that discounts "must get to a de minimis point where it is not going to affect behaviours." Indeed, legal practitioners generally thought policymakers intended Sentence Discounting for more serious solemn cases and only applied it to summary cases for parity:

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[321] See the discussion of Tata (1997) in Chapter 4.
[322] See Chapter 8.
[323] With the possible exception that it may help an accused avoid custody in 'borderline' cases.

> That's logical. If you are going to say, "you get credit for pleading early," then why should you only get credit for pleading guilty in serious cases? But whether it affects behaviour… I think it becomes diluted as it comes down [from High Court and indictment cases to summary cases]. (Sheriff 4)

That legal practitioners perceive formal Sentence Discounting to be less important than informal, socially based, Plea Bargaining presents a fundamental challenge to policymakers' formalistic assumptions. These social Plea Bargains show that legal practitioners do not conceive their practice in purely formal law terms. Indeed, informal Plea Bargains are highly uncertain in terms of formal law guarantees. However, legal practitioners are still confident in Plea Bargaining.

A - The necessity of trust

This research found that legal practitioners and accused persons perceive Plea Bargaining to be essential to most Guilty Pleas in Scotland. Plea Bargaining practices are dependent upon the social dynamics that exist in courts.[324] Legal practitioners were of the view that congenial working relationships and trust are essential in enabling effective Plea Bargaining. The finding that legal practitioners perceive trust as vital is significant given policy innovations such as centralised prosecution offices (see Chapter 5, Section 3). As Sheriff 4 noted:

> The whole process of plea negotiation between Crown and defence, a lot of it, works on the basis of trust between Crown and defence. And on the basis of people having trust in the other's integrity. And that works well if you all know each other.

[324] Sentence Discounting has a formal statutory basis, but the radical indeterminacy of the formal law means that social dynamics still play a key role (see Chapter 2 and Chapter 9).

Defence lawyers and fiscals commented on the pitfalls of being perceived of as “untrustworthy," "tricky," or "dishonest." The perception was legal practitioners would not Plea Bargain with those who are untrustworthy: in essence ostracising those who violate cultural norms. Not being able to Plea Bargain was thought to make it impossible to operate as a viable defence lawyer or fiscal. For example, Solicitor 2 noted:

> If you ever make a mistake, it is best to hold your hands up and admit it straight away. It is better to be known as someone who makes mistakes than as someone who is dishonest.

Both fiscals shared this view. Fiscal 2 noted of the Plea Bargaining process that:

> It is very much based on trust. And if you have that good working relationship and a sense of trust on both sides, then it makes a big difference to the way that the business is dealt with.

Fiscal 1 noted:

> Dialogue is essential to the plea. If an agent comes in that I have a bad relationship with, or that is unable to enter into effective dialogue, or has been sneaky (to put it shortly) in the past. I am less likely to trust a dialogue or trust the negotiation process. In which case I would simply say, "plead guilty, or we go to trial. Either way that’s what we are talking about here.” Or, “plead guilty to two charges out of three.” And that’s it.
>
> And I wouldn't entertain… There are some agents that you just won’t entertain a dialogue with. They have hindered dialogue in the past by doing something that’s made that difficult.

Even judges must trust others in court. Judges cannot have informal discussions as defence lawyers and fiscals do. Nor can judges access information other than that

provided in court.[325] Moreover, as Sheriff 3 noted, it is "not cost-effective" to call for reports in most cases. These limitations judges face mean that they are profoundly reliant on the prosecution and the defence plea in mitigation for information:

> You can never underestimate the importance of a good plea in mitigation in view. Particularly in borderline cases. (Sheriff 3)

Judges trusting others for information is necessary for proceedings to operate as they currently do. For example, this research found that trust is what enables minimal scrutiny of Guilty Pleas in court to be acceptable. The sheriffs trust that whatever plea deal the defence and prosecution have agreed is appropriate.[326]

John's case, noted in Chapter 2, is an excellent example of legal practitioners' interest in maintaining trust. This example concerns the dialogue between John's defence lawyer and a sheriff in requesting an absolute discharge. The nature of the exchange concerned a young male who was pleading guilty to using cocaine at home for recreational purposes. The defence lawyer had set out the mitigatory context as one where John was of good repute (no previous convictions) and would lose his employment upon pleading guilty to the offence.

Considering the imminent loss of employment, the defence lawyer adopted good practice and tactfully suggested that an absolute discharge might be appropriate. The skill in doing this is that court etiquette does not allow defence lawyers to say what sentence is warranted.[327] However, "the clever ones" (Sheriff 1) can moot possibilities for the sheriff to consider without violating court etiquette.

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[325] Though there may be coded dialogue in court (see Chapter 9).
[326] Sheriffs can disrupt a Fact Bargain by asking follow-up questions. Defence lawyers and fiscals noted there is no deal they can make to prevent this. However, sheriffs usually trust the defence and prosecution and do not ask prying questions.
[327] Scottish sheriffs are strong proponents of judicial independence. Thus, saying what sentence is warranted is considered the judge's prerogative (see Chapter 5, Section 5).

The defence lawyer suggested that the loss of employment was punishment enough and, if the sheriff was with him on that, that the court might spare John a criminal conviction that would haunt him throughout his life. Avoiding the conviction was crucial as this research found that first-time accused interviewees were more concerned with a criminal conviction than with any criminal sanction (e.g. Accused 12 resented his criminal conviction more than the custodial sentence).

The sheriff's follow-up question concerned the employment status of John. The sheriff enquired whether John was "*now* unemployed" because of the offence. This was a tricky question for the defence lawyer to answer. Technically, John was employed at the time of the question, but the employer had indicated he would be dismissing John upon his Guilty Plea. Presently, the accused had pled guilty, but the proceedings were still on-going. The answer the defence lawyer gave was crucial as court dialogue suggested that becoming unemployed was necessary to satisfy the sheriff that no further sanction was required.

The defence lawyer's reply was careful. He did not risk attempting to trick the sheriff as this would have future ramifications.[328] The defence lawyer answered, "no, but…" The defence lawyer explained that the employer had indicated they would terminate John once he pled guilty. This caveat was careful as it did not commit the defence lawyer should the employer not follow through. Yet, as John was pleading guilty now, the sheriff again queried, whether he was unemployed because of the offence.

[328] Knowingly or recklessly deceiving the court is prohibited by lawyers who are 'officers of the court.' However, this is ambiguous and there is a grey area regarding what is acceptable. Yet, within this grey area, there is also what is acceptable in terms of the social dynamics of the court.

The defence lawyer paused, collected his thoughts, and stated he would “like to be clear.” The defence lawyer explained that he had spoken to the employer and that the employer stated that they would terminate the accused if he pled guilty to a drugs offence. This explanation made it clear that the defence lawyer cannot guarantee the future actions of the employer, only what he was himself told.[329] However, the termination, while seemingly inevitable, had not yet occurred as the accused was in the process of pleading guilty.

Thus, the defence lawyer explained that John was "in limbo" employment wise. The sheriff, now clear on the situation, was content to move on to sentencing. Ultimately, the accused was granted an absolute discharge as the court considered the loss of employment enough punishment. In doing so, the court trusted the defence lawyer’s representation to establish the accused would lose their employment (neither the court nor the Crown verified this).[330]

Crucially, the defence lawyer did not attempt (as some might expect lawyers to do) to rely on ‘technicalities.’ A simple ‘yes’ would not have been unequivocally misleading in this context. However, in terms of social dynamics, a simple ‘yes’ might have damaged others trust in the defence lawyer. In turn, the court (sheriff and fiscal) trusted the defence lawyer's representation and sought no proof of the employer's intentions. This short dialogue is an excellent example of the trust legal practitioners have in each other, and how they strive to maintain an image of being forthright in their dealings.

[329] Defence lawyers routinely send signals to distance themselves from responsibility for submissions. This distance can protect their credibility.
[330] To verify all matters such as this would be costly and time-consuming.

B – Social Dynamics and the Timing of Guilty Plea

Social dynamics mean that defence lawyers generally feel they cannot plead guilty until they Plea Bargain. Likewise, fiscals expect Plea Bargaining and add-in charges to remove during negotiations with defence lawyers. These expectations of Plea Bargaining are self-perpetuating, and they make early Guilty Pleas appear less viable. Indeed, "one of the principal ironies… [is that] institutions create the conditions of their own existence."[331] The issue with these expectations of Plea Bargaining is that they delay early Guilty Pleas until defence lawyers and fiscals can negotiate. This issue challenges widespread assumptions that Plea Bargaining promotes the expedient disposal of cases.

Solicitor 1 described how their working relationship with the fiscals largely dictated their behaviour with regard to Plea Bargaining and the timing of a Guilty Plea. In explaining this, Solicitor 1 mirrored the sentiment of Solicitor 8 that defence lawyers "just have to go with what the system is." Solicitor 1 noted that they the best time to negotiate a plea is at a late stage:

> But for example, I know today was Intermediate Diet day. So, it's [Fiscal X's] court. I know I'll never really phone [Fiscal X] after court because [he/she] has got so much follow up to do – so I'll give [him/her] an opportunity to do that. But we've got an Intermediate Diet court on Monday, so I know [he/she] will have an office day tomorrow where [he/she] will do [his/her] Intermediate Diet work. So, any Intermediate Diets calling on Monday I will speak to [Fiscal X] tomorrow…
>
> For trials, try and get trials as early as possible and hope that someone will call you back. But, more often than not it is: four

[331] McAra and McVie (2012b), p.545 and p.556. McAra and McVie are discussing juvenile justice, but this research finds that the point has wider implications.

> o'clock, phone the fiscal, find out who is doing the trials court, and let's see if we can get it hashed out. Especially with summary stuff. Solemn stuff not so much, but with summary stuff, I usually tell my clients "you might not hear from me in terms of any type of plea [deal] until the night before your trial."

In giving this answer, Solicitor 1 was drawing on several points. Notably, they drew heavily on the need to have a relationship with the fiscal. This relationship extended to an intimate knowledge of which fiscal would be involved, how to contact the fiscal directly, and the fiscal's working practices and dispositions. As to why this relationship did not involve an early Plea Bargain Solicitor 1 felt that:

> They [fiscals] are back from court that day, and then they are going, "what am I doing tomorrow?"

Consequently, a complex range of social dynamics, not formal laws, determines Plea Bargaining. Importantly, this research found that, regarding the timing of the Guilty Plea, defence lawyers and fiscals tend to prioritise their immediate cases. While it is logical to prioritise immediate cases, this prevents early resolution and means that the courts incur additional costs. Ironically, despite expectations to the contrary, Plea Bargaining helps add to these costs by making early Guilty Pleas appear less viable (due to overcharging, etc).

C – Are Judges Part of the Social Dynamic of Plea Bargaining?

Before pleading guilty and seeking a Sentence Discount, defence lawyers often agree on the narrative of a case through Charge Bargaining and Fact Bargaining. These bargains are routinely relied on to manage what information a judge receives. However, while defence lawyers and prosecutors usually rely on bargains, it is always possible for a judge to undermine an agreed narrative by asking prying questions. Yet, this research found that judges do not typically ask such prying questions. What this chapter suggests is that the reason judges do not ask prying questions is because

of social dynamics. These social dynamics mean that defence lawyers and fiscals can assume that their Plea Bargain is a safe bet in practice.

In part, judges do not ask prying questions because they trust the defence and prosecution to act in accordance with court norms. However, asking prying questions can also be undesirable as it might deter defence lawyers from accepting future Plea Bargains. Indeed, sheriffs noted that they tried to be predictable in matters such as Sentence Discounting and court practices to better facilitate certainty and early Guilty Pleas. These considerations that sheriffs make in their routine practice bring attention to their subtle, but significant, role in Plea Bargaining.

In this critique of the formal law and Plea Bargaining, Lipsky's work on Street Level Bureaucrats (SLBs) is relevant.[332] Lipsky's work contributes to understandings of how legal practitioners operate in routine work. Lipsky highlights that all formal laws and policies have to be implemented by legal practitioners on the front-line (e.g. in summary cases). As a result, these actors become the "ultimate policymakers."[333] This ability to implement policy creates freedom when making decisions on the front-line. This freedom to effectively make policy runs contrary to the formalistic assumptions.

The subtle way sheriffs engage in Plea Bargaining makes them Street Level Bureaucrats (SLBs). Being SLBs means that judges face similar demands to other front-line decision makers like defence lawyers and prosecutors. Thinking of judges as SLBs engaged in informal Plea Bargaining challenges conventional assumptions of how judges operate. However, Biland and Steinmetz show that while judges have a high status, they may nonetheless operate as SLBs:

[332] Lipsky (2015).
[333] Portillo and Rudes (2014).

> Judge/litigant encounters are marked by some kind of distance. Judges can rely on other professionals—lawyers, court officials, social workers, and psychologists—as middlemen and women. They also belong to a professional group endowed with a higher status and more decision-making power than most bureaucrats.
>
> However… several factors can drive the judiciary closer to or further from the SLB model, with respect to the nature of their encounters with clients and of judicial discretion. [334]

Biland and Steinmetz reach their conclusions by comparing French and Canadian judges in family civil cases. The French judges hearing these cases have a lower status than their judicial colleagues. Biland and Steinmetz describe French judges as operating as "quasi-civil servants". By contrast, the Quebec judges enjoy more seniority that makes them less likely to operate as SLBs.

On the face of it, Scottish sheriffs would appear more in line with the Quebec judges with privileged status. However, in addition to status, whether a judge operates as an SLB also depends on the work they do:

> Judges' attitudes and uses of judicial discretion vary a great deal from one context to another, depending on group status, practical concerns, and legal culture.[335]

The 'mass of litigation' sheriffs face in summary work counters their privileged status. This mass of litigation serves to drive behaviours to an SLB model. Notably, dealing with a high volume of summary business can preclude sheriffs from exercising their discretion and force standardisation.[336]

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[334] Biland and Steinmetz (2017), p.320.
[335] Biland and Steinmetz (2017), p.320.
[336] Waegel (1981).

For example, Sheriff 4 and Sheriff 5 noted an element of routinisation was necessary for high volume work as there was simply no time to exercise greater discretion. Sheriff 2 noted that:

> I think Gemmell and the subsequent case law assisted in emphasising that the discount is not mechanistic and shouldn't be mechanistic...
>
> But, and yes, there is a rule of thumb that I apply, and I am sure my colleagues apply, in terms of looking at the overall panoply of cases.
>
> [The rule of thumb is that] at a pleading diet we will be looking at the possibility of X, at a first diet the possibility Y…
>
> The reason for that simply, in the Sheriff Court, is because of the volume of business. If you didn't have that sort of structure, you wouldn't get through the business.
>
> Now that is not to say that you apply it [the rule of thumb] rigidly to every case because you do not. But I think in so far as you are not applying what you might think to be the norm, you have to be able to analyse it to yourself and say, "why am I not applying it." And I will say in court, if I get a relatively early plea and they are not getting the discount that they might otherwise think, why [they are not getting it]. Because I think that is part of the function. I should explain how I arrive at the sentence.

This need for routine discounts in most cases mitigates against discretion being the norm and lends itself more towards a predictable routine in practice. In the case of Sentence Discounting, this results in predictable discounts that work almost as if on a sliding scale. As Sheriff 4 noted:

> You are broadly looking at, other things being equal, a third for a plea at the earliest practicable stage, and *a reducing sliding scale* up to the trial.

This routinisation occurs even though the formal law states there is no requirement for a sliding scale and that discounts are discretionary. However, while sheriffs may operate as SLBs and rely on routine, this does not mean they do not have agency. Judges, like other SLBs, can still exercise discretion when they feel it is merited:

> SLBs process the vast majority of cases—doing what they can with what they have, but also going out on a limb for those they deem morally worthy, using judgment based not on organizational factors, but rather on broader social understanding.[337]

In cases sheriffs deem worthy, they deviate from routine practice. In some cases, this deviation means keeping an eye on certain offenders or offering second chances. Where the deviation pays off, sheriffs express a significant degree of pride in the outcome.[338] However, not all cases receive such attention, and van Windergarden's work found that there are certain traits judges looked for before exercising their discretion to "go against the sanctioning trend."[339] In interviews, several sheriffs noted that changes in offenders' lives that may be important include "settling down." In cases such as this, the sheriff may be more likely to give a more substantial Sentence Discount or a lower headline sentence.

Consequently, analysing sheriffs as SLBs in summary work offers insights. SLBs engage with social dynamics to make their work manageable. Often these social dynamics mean that SLBs adopt routines that are not determined by the formal law - though these routines are perfectly compatible with the radically indeterminate demands of the formal law. In the case of sheriffs, being an SLB makes Plea Bargaining appear to be a necessary and routine part of the job. Thus, judges being SLBs contributes to the predictable nature of Sentence Discounting in practice. More broadly, conceiving of

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[337] Portillo and Rudes (2014), p. 322.
[338] Some Sheriffs speaking at public events have even invited success stories to attend.
[339] van Wingerden (2014), p.91.

sheriffs as SLBs challenges various assumptions about the role of sheriffs in summary cases.

2 – How do Social Dynamics Challenge Formalistic Conceptions?

The argument that social dynamics are crucial challenges formalistic assumptions about how the justice system should operate. Formalistic ideas suggest that the justice system:

> Operate[s] as [a] rationally structured [enterprise] … [adhering] to [a] formal hierarchy, written records, merit-based hiring, and standard operating procedures.[340]

This formalistic perception of the justice system's operation influences how policymakers understand the context in which front-line decision-makers apply rules and policies like Sentence Discounting. For example, Gilson found that:[341]

> Key among these assumptions were that policy goals were clear, knowable and operationalisable, and that policy is decided by politicians and simply implemented by public administrators.

Moreover, policymakers tend to assume that the criminal process makes conduct visible and that visibility makes in-court decision-makers accountable to management in a "formal hierarchy."[342] However, this research found that this formalistic understanding of the justice system's operation is problematic.

Firstly, summary work is less visible than policymakers assume. As Chapter 3 demonstrates, common assumptions that summary criminal work is 'public' are largely a misnomer in reality. Front-line decision-makers dispose of the bulk of a

[340] Portillo and Rudes (2012), p.322.
[341] Gilson (2015), p.1.
[342] Portillo and Rudes (2014), p.322.

summary court's cases via Plea Bargaining. Plea Bargaining predominately occurs 'behind closed doors' and is subject to minimal scrutiny and record keeping.

Secondly, in many ways, 'justice system' is a misleading term. 'System' implies that there is a coherent whole. Instead, the justice system operates closer to something "organic" in the Durkheimian sense.[343] In summary criminal work there is fragmentation and a variety of actors tending to their goals:

> The criminal court is a political agency… that faces conflicting demands from a multiplicity of publics and the organisational exigencies of its own personnel… it is fragmented in its organisation, its operations, and its goals. This is not an aberrational feature of the court… its flexibility must be accepted along with its lack of efficient organisation and coherence.[344]

Thus, the justice 'system' is "an acephalous system in which all are obedient subordinates tending to their particular tasks, and no one is responsible for the overall outcome."[345] As a result, legal practitioners operate within a context where there is an ever-present issue of "getting things done within a diffuse power structure."[346]

In terms of "getting things done,"[347] Lipsky's work on Street Level Bureaucrats is again relevant.[348] Lipsky's work demonstrates how formal rules alone do not determine the practice of front-line actors in summary criminal work (what Lipsky called "Street Level Bureaucrats"). For example, Lipsky would highlight that fiscals and defence lawyers face challenges triaging their heavy caseloads and that sheriffs must manage

[343] Durkheim (1997).
[344] Feeley (2013), p.6
[345] Pitkin (1973), p.xiv.
[346] Cronkhite (2008), P.449
[347] Cronkhite (2008), P.449
[348] Lipsky (2015).

the business of the court and clear their court list. These challenges result in decisions based on imperatives and social dynamics beyond the formal law. These wider imperatives mean that the justice system does not operate as cohesively as formalistic thinking assumes. Indeed, Feeley argues the appearance of any grand plan is coincidental. Instead, Feeley argues that the courts operate in line with "Adam Smith's notion of unplanned, unconscious coordination in the pursuit of self-interest."[349]

Consequently, considering formal laws in isolation is problematic. Legal practitioners do not perceive formal laws to be independent of the social dynamics that are vital to the summary process. Legal practitioners perceive giving effect to formal laws (such as section 196) to involve an interaction between the formal law and social processes.[350] Indeed, this chapter will now demonstrate the limits of formal rules and show how even in the most rule-bound area of Plea Bargaining, legal practitioners still perceived social dynamics to be crucial.

A – Perspectives on Hate Crimes and Plea Bargaining

This research found that defence lawyers and sheriffs lamented perceived attempts to curtail discretion with rigid rules. In particular, rules regarding Plea Bargaining and "hate crimes" were perceived to be highly restrictive. Defence lawyers' and sheriffs' concern about the ability of rules to curtail discretion could suggest that social dynamics are secondary to rules, manageable by rules, and only exist in the space left open by rules. However, this research finds that this is not the case. Even in hate crime cases (what legal practitioners perceived to be the must rule-bound area of Plea Bargaining), social dynamics were still crucial.

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[349] Feeley (2013), p.7.
[350] Chapter 9 will return to interrogate the perceived interaction between formal laws and social dynamics.

By way of context, at the time of this research, certain crimes are political priorities in Scotland. These priorities include what are generally known as "hate crimes" or crimes with a "hate aggravator." Hate crimes pertain to incidents against protected classes as defined in the Equality Act (2010).[351] There is also a similar political emphasis on intimate partner violence in Scotland (colloquially known as 'domestic abuse' or 'domestics').[352] There is a different policy concerning Plea Bargaining in hate crime cases.

Defence lawyers were extremely critical of rules regarding hate crime and Plea Bargaining. Several defence lawyers reported that they had experienced "ridiculous" (e.g. Solicitor 8 and Sheriff 4) cases the prosecution had classed as a hate crime. The effect of a charge having a hate crime classification was that it made Charge Bargaining more difficult. Some defence lawyers reported cases where the fiscal would not Plea Bargain, even though the fiscal agreed that the Crown should not be prosecuting the case. Defence lawyers' views were that a combination of the Crown's management policy and insecure employment curtailed fiscal discretion. Solicitor 3, noted that:

> I can't follow that logic. It is almost as if we have a government who don't trust… and an example is drink driving. You will get a minimum of one year, and they do that because they don't trust judges to give out proper sentences. They tell them [judges], "you must give them a year or more no matter what you are told." And that can only be because they don't trust the judgment of the bench in matters – that's why there are all these sentencing guidelines.
>
> And then secondly, we don't trust the fiscal service. So, we tell them they must prosecute all cases of A, B, and C irrespective of merit.

[351] Protected classes include race, gender, sexuality, etc.
[352] This thesis will use the term 'hate crime' to include domestic abuse.

> Rape is a good one. A lot of sexual offences but rape in particular. There is a very high acquittal rate in rape because there is a very high number of cases that shouldn't be in court. Not because of the difficulty… They go to a jury, and the jury acquits on the basis that this shouldn't be here in the first place.

Sheriffs were also critical of perceived attempts to curtail professional discretion. For example, Sheriff 5 felt that discretion should not be fettered, and Sheriff 4 noted that:

> Yes, I agree with that [defence lawyer comments on the lack of fiscal discretion]. COPFS gives procurator fiscal's guidelines. My experience over the years is that the more junior fiscals who are prosecuting in summary criminal work treat them as definitive three-line whips and not as guidelines. And [fiscals] therefore feel they have no discretion if it has a racial, sexual, or religious aggravator on it. And we can all tell stories of ridiculous cases, and you will probably have had a few from the agents. Where even the fiscal agrees it is ridiculous… everybody can quote you examples of these things.

Sheriff 6 noted a lack of fiscal discretion could lead to the prosecution "flogging a dead horse" and that:

> I think it is a huge issue. You have got some fiscals who are a bit more robust and will take a view.[353] But you've got the new boys and the new girls who have to justify their decision when they go back across the road, or they have to go back across the road for a decision to be made for them [sigh].
>
> It is a bit like us. I feel like saying to them, "you've appointed these people to do the job, trust them." Like with me, you've put me in a job so trust me. If you don't trust me, then you shouldn't have put

[353] A fiscal "taking a view" means they exercise discretion to drop or modify a charge.

> me in that poison. Don't fetter my discretion, don't issue guidelines as to how… obviously, there are guidelines and there is judicial independence, but you know. You put me in the position that I'm in. If I get it wrong too often, then something is going to be said, or the appeal court is going to say something, whatever.
>
> But you've got to trust us. You've got to trust your fiscals, you've got to trust your judiciary as well. Not all this, "you've got to do that, you've got to do this, you've got to take that into account, and you can't take that into account." Give us peace, let us do our job… Or replace us with a computer.

However, while legal practitioners were critical of attempts to curtail discretion, this research found radical indeterminacy with how these rules should be applied. The result was that even what legal practitioners perceived to be stringent rules did not amount to an iron cage that removed the role of social dynamics.

B - Fiscal Perspectives on Hate Crimes and Plea Bargaining

Fiscal interviews were helpful in scrutinising the rules on hate crimes and Plea Bargaining further. Regarding fiscal discretion to Plea Bargain over hate crimes (the most egregious limitation to fiscal discretion noted by defence lawyers) Fiscal 1 noted that:

> You have certain policies that you have to respect. Initiatives… for example, hate crime we take extremely seriously. Domestic abuse we take extremely seriously. It's unlikely, for example, that we are going to accept a plea that involves deleting a charge in a domestic abuse case of violence.
>
> So, they'll say, "oh he'll plead to the threatening behaviour, but he won't plead [guilty] to punching her in the face." It is unlikely that will be accepted. The other way around it might be accepted, but it's

> unlikely you would do it the other way around. Unless it was exceptional circumstances.

However, Fiscal 1 did not interpret this to mean that there was no discretion or that fiscals are reduced to automata who merely apply the rules. In this regard Fiscal 1 noted:

> I think there is a really unfair myth going around that you cannot challenge the guidelines [regarding hate crimes] via management.
>
> Management, in my experience, has always been very willing to listen to you. Now that's not to say they'll agree with you, far from it. But, they've always been receptive to listening to you and to you trying to explain:
>
> > "This is my experience; this is what I think of this case. I can understand why it was marked as a racial, but I really don't think it falls within the meaning of the legislation or the purpose of the legislation."
>
> Or, "I can see why this is a sectarian, but there are mitigating factors here."
>
> So, there's always an opportunity to go to management about that. It doesn't necessarily mean that they agree with you and if they don't agree with you, you have to go and prosecute the case – that's your job.
>
> And that can be a difficult part of the role. And sometimes you have to go back [to defence lawyers] and say, "I can't accept that" and you have to turn down the plea [offer]. So, the type of crime is very much a factor that enters into plea negotiation quite a lot.

Thus, Fiscal 1 portrays a less formalistic view of the rules on Plea Bargaining and hate crime. Even in this instance, of hate crimes, there is still room for social dynamics. In

deciding how to prosecute cases, "a difficult part" of a fiscal's role is managing their relationships with management and defence lawyers.[354]

Consequently, for Fiscal 1, the formal rules did have an effect, but this did not mean that formal rules were the only consideration. Fiscal 2 shared this view and argued that, while rules are essential, discretion still exists. Moreover, Fiscal 2 noted that there was a new dynamic concerning hate crimes because of guidelines and policies:

> It did make a difference as there were certain categories of cases where there were instructions from the Lord Advocate about how they were to be approached. A bit of a change, but there always were sensitive cases.
>
> But the instructions became a bit more explicit than previously so that certain aggravations could not be removed as long as there was a sufficiency of evidence….
>
> And that was a change in the approach that was taken. And it was taken partly to ensure greater consistency, but also to register the significance of certain classes of cases (domestic abuse, hate crime, etc).

Fiscal 2 points out that that the more explicit instructions made it less acceptable to drop specific charges but did not outrightly prevent fiscals dropping charges. Crucially, Fiscal 2 argues that the hate crime rules regarding Plea Bargaining are nothing new as "there always were sensitive cases." Indeed, what Fiscal 2 is highlighting is that social dynamics are still a critical factor in prosecutorial work (i.e. the sensitive nature of some cases). The change today is that hate crimes are now sensitive. Indeed, it is arguable that prosecutorial guidelines did not make hate

[354] The two fiscals I interviewed were experienced. Less experienced fiscals may be less “robust” (Sheriff 6). Less robust fiscals may view going to trial and ‘losing’ as safer than Plea Bargaining.

crimes sensitive, but that the guidelines themselves are a result of these crimes becoming sensitive: a way for policymakers to "register" their significance.

C – Is Plea Bargaining in Hate Crime Cases Rule-Bound?

The fiscal interviews provide a different perspective to that offered by defence lawyers. Defence lawyers felt that fiscal discretion to Plea Bargain was removed by a system of strict rules. The fiscals interviewed interpreted the hate crime rules on Plea Bargaining to operate more as general guidance rather than determinate instructions for cases marked with a hate crime aggravator. This interpretation is important as:

> The implementation of broad prosecution policies disseminated through guidance or internal hierarchies is experienced and understood differently from interventions or instructions in individual cases.[355]

Consequently, upon scrutiny, the 'strong' rules regarding Plea Bargaining transpired to be more indeterminate than defence lawyers perceived them to be. The rules on hate crimes are better characterised as evidencing (perhaps contributing to) a variation of the social dynamics of Plea Bargaining, rather than a new rule-bound paradigm. The critical implication of this finding is that even in hate crime cases, social dynamics remain essential and the formal rules are still limited in their ability to determine outcomes. These limitations of formal rules are what enable social dynamics:

> Rules SLBs implement are necessarily ambiguous—rules cannot describe every scenario SLBs face when interacting with people and cases (Brown 1981). In this regard, Sandfort (2000) argues that rules designed to rein in discretion miss organizational socialization.

[355] Hodgson (2017), p.3.

> Collective understandings and day-to-day individual actions within organizations, not formal rules or structures imposed from outside, influence discretion.[356]

Accordingly, even the allegedly strict rules on Plea Bargaining and hate crimes cannot (on their own) determine outcomes in practice. Drawing upon social dynamics, fiscals can distinguish the rules from the case in hand, or otherwise avoid the rules, in a variety of ways. Indeed, Fiscal 2 noted:

> But, there still existed a degree of discretion because you still had to be satisfied there was a sufficiency of evidence. And sometimes in these cases, when you dip a bit further into them, there were strong mitigating factors or even exculpatory factors, that were not immediately obvious when the police submitted their report….

'Dipping further into cases' shows there are a variety of ways a fiscal can Plea Bargain, even in cases where the rules might appear to prohibit this. What matters are the social dynamics and whether these are conducive to Plea Bargaining. For instance, in Fiscal 2's example, it is notable that mitigation is important. Mitigation is, in theory, more relevant to sentencing and only tenuously relevant to prosecution. The tenuous relevance of mitigation to prosecution makes it a good example of how social dynamics are still relevant (e.g. a sympathetic accused making a Plea Bargain more acceptable).

Knowing these social dynamics and being able to work with them is part of the artful skill of being a legal practitioner. As a result, legal practitioners are never just "executive automata or docile bodies entrapped in the 'iron cage' of an over-rationalized criminal justice system."[357] They are skilled agents that are versed in the social dynamics of their practice and adept at using this tactically. Thus, Guilty Pleas,

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[356] Portillo and Rudes (2014), p.325
[357] Cheliotis (2006).

Sentence Discounts, indeed the daily practices of criminal justice, are produced through social processes.

3 - Another Limitation of Formalistic Policymaking: National Initial Case Processing Hubs

Chapter 5 has already argued that formal rules (e.g. those regarding Plea Bargaining over hate crimes) may not curtail discretion as formalistic notions suggest. This section furthers this point to show how formalistic assumptions can even be counter-productive.

Formalistic understandings (see Chapter 5, Section 2) underlie innovations that are intended to increase 'efficiency' in Scotland. Policymakers assume that the system is based on formally rational assessments of caseload demands, not subjective notions of relationships and individually pragmatic (but potentially 'inefficient' in a macro sense) criteria.

Scotland has introduced "National Initial Case Processing Hubs" (hereinafter "Marking Hubs").[358] Marking Hubs aim to promote consistency and 'efficiency.' The expectation among policymakers is that that a division of labour and a centralised office dedicated to 'marking' cases will result in cases progressing to disposal more expediently. This thinking suggests that case disposal is an output similar to the production of widgets in a factory. It evidences policymakers' perceptions that if each fiscal carries out their sub-task mechanistically, then there will be an expedient disposal of the case.

[358] Legal practitioners use the term "Marking Hubs."

As a result of the belief that 'efficiency' can be achieved through a division of labour, the bulk of summary cases are now marked in two offices in Stirling and Paisley (likely by junior fiscals).[359] Practitioners felt the Marking Hubs to be detrimental to Plea Bargaining. The foremost limitation defence lawyers lamented was that Marking Hubs frustrate the social dynamics of case disposal. A centralised Marking Hub separates the fiscal who initially[360] marks a case from the defence lawyer representing the accused. This separation hinders communication between the fiscal and defence lawyer. It also reduces the how well (if at all) the defence lawyer and Marking Hub fiscal know one another.

Consequently, practitioners felt that Marking Hubs hindered early Guilty Pleas and the ability of Sentence Discounting to encourage early Guilty Pleas. Solicitor 5 summarised the view of the Marking Hubs:

> I don't think anyone likes it. I don't even think the fiscals like it.
>
> As regards the organisation and the cases that come through. The impression that we [defence lawyers] get is that – whether we are right or wrong I don't know – is that they are being marked by inexperienced people under a lot of pressure. So, the general feeling is a negative one I would say.

It is problematic that there is no research concerning how cases are marked in Scotland. This lack of research means that key questions are unanswered. What

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[359] Defence lawyers were of the view that junior fiscals staffed marking Hubs. While exact numbers are not published, it is known that "some [first year] trainees will be placed in the National Initial Case Processing units in Paisley and Stirling, where they will mark cases submitted to the Procurator Fiscal." http://www.copfs.gov.uk/component/content/category/9-footer [Accessed 9 May 2018].

[360] Plea Bargaining essentially requires the case to be re-marked. This is inefficient in that it results in a duplication of work.

drives decision-making in the Marking Hubs? What are the perceived imperatives of fiscals in the Marking Hubs? What is the culture in which fiscals make decisions in Marking Hubs?[361] COPFS does not even publish its case marking guidelines. Moreover, an effect of COPFS's internal organisation is to create a hierarchical structure that limits accountability and transparency. This hierarchical structure increases the number of gatekeepers (effectively bulwarks) research must pass through.[362]

COPFS's limited transparency means much is unknown about what happens inside Marking Hubs. Yet, regardless of transparency issues, if the justice system operated something like a bureaucracy, (roles being clearly defined, records being detailed, and personal relationships being irrelevant), then Marking Hubs should have been better received. The notion of a pre-marked case reaching a court for disposal makes sense in the abstract.[363] However, the Marking Hubs run into various issues resulting from the fact that the justice system does not simply operate as formalistic thinking suggests.

The fundamental issue Marking Hubs face is that criminal cases are primarily disposed of by Plea Bargaining. Plea Bargaining is a social process and is not necessarily compatible with formalistic logic. Plea Bargaining depends on personal relationships, trust, emotion, gamesmanship, etc. Indeed, the very perception practitioners have of the system as a social process is problematic as "the obligations

[361] For example, fiscal interviews suggest that overcharging may be used tactically when a fiscal is marking their own case. Might Marking Hubs also overcharge for similar reasons?

[362] An opaque prosecution service is not a uniquely Scottish phenomenon. For example, in England and Wales Gibbs (2016) was unable to secure "permission from the relevant bodies to interview CPS staff."

[363] *Assuming* cases are marked based on their merits and that Marking Hubs do not systemically overcharge.

of the bureaucratic office holder frequently run counter to our basic human instincts."[364]

Defence lawyers assume that the Marking Hub's charges constitute more than what COPFS is seeking. Likewise, there is an assumption amongst court fiscals that the defence lawyer's first counter-offer is less than what they will accept. This perception leads to haggling. While haggling seems intuitive, it means that much of the Marking Hub's efforts are wasted. Haggling means that a case is marked in the Marking Hub and then re-marked by the Local Court Unit as part of the Plea Bargain. Consequently, two fiscals must spend time doing broadly similar work. This redundancy can be frustrating for legal practitioners in court, even though their perceptions that they should Plea Bargaining perpetuate this cycle.

Thus, the Marking Hubs cannot encourage early Guilty Pleas as there is an expectation that Plea Bargaining will take place.[365] Moreover, while it may be desirable to abolish Plea Bargaining on principled grounds, it may be counterproductive not to Plea Bargain considering the expectation that this will occur. For example, an accused person may be ill-advised to plead guilty to an overcharged complaint.

A – Do Marking Hubs Interfere with Social Dynamics?

Marking hubs interfere with the social dynamics that are conducive to Plea Bargaining. Regarding case disposal being a social process, several defence lawyers commented that in the past there was an opportunity to contribute to the marking phase. Interestingly, Accused 12 (during a police complaint) reported that the police

[364] Sewell (2017).

[365] The research cannot say whether Marking Hubs intentionally take part in Plea Bargaining by overcharging. However, the research found that cases rarely plead Guilty to the charges libelled by the Marking Hubs. Normally, the Guilty Plea is to lesser charges.

advised them of the benefits of writing to the fiscal "before spending money on a lawyer" and that this was an overlooked "out of the box" option. Solicitor 8 noted that:

> Historically, we would intervene early. Say, for example, the client got done for something silly, but there is a reason/backstory there that the Crown wouldn't necessarily know, but it might affect the marking decision regarding whether to prosecute or not in the public interest.
>
> Historically, we would write to the Crown to say, "this is what's happened, are you going to take a view on it."[366]
>
> But, there is no point doing that now. The papers are at a Marking Hub and nobody, from my experience, is going to match up correspondence from an agent with a pending complaint.

Solicitor 2 shared a similar view. He reported that in the past he could proactively engage with the Crown, but now it was pointless: "you might as well throw your letters in the bin." Consequently, meaningful engagement often occurs far later in the criminal process (e.g. before trial). That meaningful engagement between the Crown and the defence often occurs late is unfortunate in terms of court costs.

Defence lawyers did note that today there can be some early communication from COPFS after marking. However, defence lawyers reported this contact was not meaningful engagement and was little more than a short token phone call (Solicitor 4). The belief was that fiscals made this call to 'tick a box' saying that they have spoken to defence lawyers about a plea.[367]

[366] "Taking a view" means exercising discretion to drop or modify the charge.
[367] Another example of the complexity regarding how SLBs implement policies.

Defence lawyers reported that in the rare cases where meaningful engagement does occur there can be swift progress. Solicitor 1 noted that they almost never plead guilty to the initial complaint, but:

> The only exception was a couple of weeks ago where [Fiscal X] was marking. So, we were in the remand court and [Fiscal X] was marking a case. And basically, when the case came through, and the police report came through, [Fiscal X] knew it was me who was acting. We sat through it, and both of us discussed the case. And both of us came up with a big section 38[368] as opposed to two section 38s and two resists.
>
> We just got it all into one big section 38. That was the only case in a while that I just pled guilty to as libelled. Because I was involved in the process of negotiation from the minute the Crown received their police report.

Solicitor 2 also noted this issue with effective Plea Bargaining and gave an excellent example of a recent case that could have been resolved far earlier:

> As far as negating a plea is concerned it is very, very difficult. It is very difficult because the crown office and the procurator fiscals service are severely underfunded. As a result, they are severely understaffed. And as a result of that, you can't get hold of anyone.
>
> A good example is a boy (it's not a good example of an early plea, but here it is). He appears for… resisting arrest. It's a curious case straight away because that is the only charge.
>
> Now to resist arrest you have to be being arrested for something. But there is no charge of what he has committed. The narration is

[368] An offence of threatening or abusive behaviour.

> that he phoned the police to say somebody had been shot, they arrive, they realise he is very unwell, and they "say we are taking you to the hospital." He says he is not going, so they handcuff him, and he struggles a bit. But he is not under arrest at that point. And he gets to the hospital.
>
> The hospital release him, the next day he is found wandering up the [motorway]. He is taken back to hospital and detained for 72 hours under the Mental Health Act and straight away detained for 28 days…
>
> So, I write to the crown straight away, and I say, "here is a report of his detention under the Mental Health Act." This is an example of how difficult it is to negotiate a plea.
>
> And I said there are two things. One, I don't think the charge is relevant without an initial offence. But, even if I lose that argument, where is the public interest in prosecuting a man who is clearly insane at that point. And I enclose his medical report, and I turn up at the Intermediate Diet, and the fiscal says, "I didn't get that letter."
>
> But they did. They just tell you they didn't get the letter because for some reason nobody looks at it or it doesn't go in the file. And I give [the fiscal] a copy of the letter and ten minutes letter they say, "that's fine we will not proceed any further."
>
> So, if that had been a case with five charges and I say he is guilty of two of them. To get that plea negotiated is very, very difficult. It is very difficult even to speak to somebody.

Thus, this research finds one problem to be that policymakers have neglected the importance of social dynamics in the implementation of the Marking Hubs. In

Solicitor 2's example, the belief was that early communication would have saved court time and expenditure on the case.

Likewise, Solicitor 7, noted that:

> Catching somebody to deal with a solemn case is difficult. It is even worse with National Units [Marking Hubs].
>
> The fiscals' and especially National Units culture is "admit nothing, concede nothing, keep contact with the defence to a minimum." And the only way to get round that is to build up personal contacts, so you know the people and can phone them directly.

Fiscal 1 shared a similar view. They noted that fiscals could also be proactive in engaging with defence lawyers at an early stage. However, Fiscal 1 felt that early engagement was less likely in cases received from Marking Hubs. In part, this decreased likelihood of early engagement was due to being less familiar with Marking Hub cases:

> At solemn level it involves… you are more intimately involved in the life of the case. So, you will get it from marking the cases, because you mark your own cases, right through to the trial sitting. In which case, you're phoning agents earlier.
>
> So, you can phone an agent right after you've marked the case and say:
>
> > "This is coming your way. You should be pleading to this. This should be a section 76 letter. This shouldn't even have to go on petition. You should be straight on to a section 76 letter and a section 76 indictment."

Fiscal 2 also noted that this did happen, but that certain types of cases were more likely to result in an early approach: such as those involving a "minor celebrity or

political figure." The Law Society of Scotland has also expressed a view that Marking Hubs hinder Plea Bargaining:

> Prior to centralisation of certain functions contact could be made via the local procurator fiscal office. Whereas centralisation of certain functions may have financial, efficiency and consistency benefits to the organisation itself, this requires to be balanced against the ability for defence practitioners to be able to engage effectively with those dealing with the casework within COPFS.[369]

In sum, communication is crucial to defence and prosecution social dynamics. Social dynamics enable the expedient disposal of cases through Plea Bargaining. The Marking Hubs hinder the social dynamics that are necessary for Plea Bargaining. Consequently, practitioners felt that the centralisation intended to promote 'efficiency' could be counter-productive.

Thus, while policymakers might assume that Marking Hubs mean that parties are readier to proceed, they are not. Disposing of a case expediently requires more than having a pre-marked case. The prosecution and defence require a moment to Plea Bargain. Innovations like Marking Hubs delay this moment. This need to account for social relationships underlines the criticism of defence lawyers that COPFS management is detached. The perception is that COPFS management neglect the realities of daily practice in favour of targets.

Indeed, without Marking Hubs, it may be possible for Plea Bargaining to occur earlier.[370] Enabling Plea Bargaining to begin sooner could allow it to run through its ritualistic elements (starting from an untenable first offer and then going through

[369] Law Society of Scotland (2016).
[370] The lack of Marking Hubs on its own would not necessarily mean that early Plea Bargaining will occur.

stages of offer and counteroffer) and complete at an earlier stage of the criminal process. Starting the Plea Bargaining process earlier might also allow time for the client to decide how to plead, or to come to terms with pleading guilty (likely encouraged by their defence lawyer and process costs).[371] This early Plea Bargaining could save the court time and allow defence and fiscals to build a more productive relationship.

Thus, the finding is that *if* policymakers want to encourage Plea Bargaining in summary cases, they could do this better. However, the 'if' in that finding is crucial. It should be borne in mind that Plea Bargaining is not as 'efficient' as policymakers assume and Plea Bargaining itself provides reasons to delay pleading guilty.

B – Diverting Cases Away from Court

It is worth briefly noting that, in terms of cost savings, Marking Hubs may have some benefit. While Marking Hubs frustrate Plea Bargaining in summary cases, they may be able to expediently divert cases away from courts. Solicitor 4 noted that:

> Lawyers complain, whether or not it is because it affects their business, but some of the ones that are diverted to fines, etc. are quite ridiculous.
>
> There are some quite serious issues that are diverted by way of a fine or a warning, which years ago people would be like "why is that not going to court?" Or the things that go to the JP court would always have gone to the Sheriff Court before.
>
> There is a contradiction there. Sentencing might have gone up; sheriffs might have gotten more powers. But a lot of the offences aren't going to court or are going to a lower court

[371] See Chapter 8.

Other Solicitors shared this view. For example, Solicitor 1 commented that Marking Hubs divert "everything, so it's not good for my business". Indeed, diversions have played a significant part in reducing Scotland's legal aid expenditure.[372] Consequently, diversions may mean that Marking Hubs may save resources by avoiding the court process entirely. Whether diverting cases justifies the Marking Hubs limitations with Plea Bargaining in summary cases is beyond the scope of this thesis.

Conclusion

This chapter has focused on the importance of social dynamics and culture in daily legal practice in Scotland. Part 1 notes that judges, defence lawyers, and prosecutors felt that social dynamics and culture were vitally important to practice. The perception is that the criminal system is a social process based on cultural understandings, working relationships, and trust. This description of the criminal process challenges formalistic notions, which suggests that cases are processed based on their facts and the formal law. Part 1 also argued that judges are a part of the social dynamics of case disposal and that in summary cases they operate as SLBs, like defence lawyers and prosecutors.

Part 2 demonstrated that the formal law does not prohibit social dynamics because it is radically indeterminate. Part 2 noted that even where there were strict rules social dynamics remain important. Part 2 also noted that this research found that the justice system is more fragmented than rhetoric would suggest. This is an important finding, and it has implications for future policymaking.

Part 3 demonstrated that legal practitioners believe that policymakers' attempts to promote 'efficiency,' based on formalistic notions of how the justice system operates,

[372] SLAB (2018).

have been counter-productive. Part 3 critiqued Marking Hubs as an example of a policy innovation that fails to account for the social dynamics that are responsible for the expedient disposal of cases via Plea Bargaining. As a consequence of failing to consider the operation of social dynamics, legal practitioners felt that Marking Hubs made the expedient disposal of cases via Plea Bargaining more difficult.

Chapter 6 – A Tale of Two Courts: Court Cultures

Introduction

This research found that Court 1 and Court 2 are similar in many ways. Court 1 and Court 2 are neighbouring courts, have a similar throughput of summary cases, a similar number of sheriffs, and are a comparable size. Interviews also demonstrated that legal practitioners (judges, prosecutors, and defence lawyers) perceive the case loadings to be the same in each court.[373] Consequently, it would have been reasonable to expect that cases in Court 1 and Court 2 would have similar trajectories. For example, it might have been expected that each court would have a similar number of Guilty Pleas at each stage in proceedings. However, this was not so. Court 1 had a consistent trend for *late* Guilty Pleas compared to the national average. Court 2 had a consistent trend for *early* Guilty Pleas compared to the national average.

There is nothing in the formal law to explain these differences between Court 1 and Court 2. The difference between the courts exists even though both courts apply the same law in the same jurisdiction, where policymakers might expect variation to be minimal. At the outset, this suggests something is interesting about the operation of Court 1 and Court 2. It also suggests that there are severe limitations to formalistic assumptions of Sentence Discounting and plea decision-making.

This chapter shows that legal practitioners perceive the differences between Court 1 and Court 2 to be the result of different court cultures. Legal practitioners believed that Court 1 has a "certain reputation for being difficult to deal with, and there is a different culture in [Court 1] that has grown up" (Solicitor 3). Legal practitioners felt

[373] A national audit of courts confirmed this.

that Court 1's culture made early Guilty Pleas more difficult. By contrast, legal practitioners felt that Court 2's culture was more collaborative and enabled the efficiency of the court. These subtle differences are not necessarily something that interviewees felt you could put a "finger on" in terms of cause and effect (Solicitor 4). However, they were felt to be significant.

While court cultures have not been thoroughly researched in Scotland, other research has found court culture to be important. For example, Eisenstein et al. (1988) argue that court cultures are crucial, and he has noted the key role that "court community" plays in daily practice. There is also recent work by Metcalfe (2016) who finds that intra-court relationships affect Plea Bargaining. Works such as these show the common understandings and the socially approved roles that exist within court communities.

Part 1 of this chapter scrutinises practitioners' perceptions that courts develop their own cultures. Part 1 also shows how practitioners feel cultures constitute a fundamental part of routine work. Part 2 explores legal practitioners' accounts of Court 1's culture, which is thought to contribute to later Guilty Pleas. Part 3 explores legal practitioners' detailed accounts of how Court 2's culture emerged. Part 4 interrogates legal practitioners' perceptions of the importance of judicial culture. Part 5 scrutinises how the incumbent sheriffs in Court 2 have sought to change Court 2's culture. Part 6 demonstrates the subtle, but significant, differences court cultures have on routine daily practice by analysing 'call overs.'

1 – Unique Court Cultures

This research found that legal practitioners perceive each court to have a unique culture. Legal practitioners perceived court cultures to explain the common habits and routine working practices within courts. Legal practitioners portrayed court

cultures as the coalescence of various elements. These elements included judicial culture, defence lawyer culture, etc. The result of court cultures was that:

> Each court has a different way of working.
>
> I think each court has developed their own little way of doing things to make it manageable for them. (Solicitor 8)

The link between these perceived court cultures and the formal law is important but complex. Friedman argues that law and society scholars:

> Have to figure out lines of influence that flow in two directions: from society into the legal system; and out of the legal system into society. They have to find out… how social forces get translated and transmuted into law; and also the impact of law, legal behavior, and legal institutions, that is, how these reverberate in the society that gave them birth.[374]

Local court cultures help address both these questions. Court cultures are social forces that reverberate into the law. While court cultures are not part of the formal law, court cultures influence what cases run to trial, what plea deals legal practitioners make, etc. In essence, given the radical indeterminacy of the formal law, at the level of its practical implementation, court cultures effectively are law.

One factor affecting court cultures is the number of legal practitioners in a court. The size of a court has a strong influence on the number of legal practitioners present. Within courts of a comparable size, the numbers of judges and prosecutors are usually relatively stable, but the number of defence lawyers can vary. In theory, a defence lawyer can represent a client in any summary court. In practice, defence lawyers typically cover a range of courts that are geographically convenient – though they may travel further afield for an existing client (Solicitor 3). Consequently, most

[374] Friedman (1994).

defence lawyers have a few 'home courts' in which they appear most frequently, and many will base their offices close to these. Courts that are geographically remote tend to rely more exclusively on a local bar as travel time and expense deter other defence lawyers from attending.

Interestingly, some courts had reputations for being difficult to work in. Defence lawyers and fiscals felt that the formidable reputation of some courts deterred new defence lawyers from choosing to practice there. Defence lawyers avoiding courts with difficult reputations meant that these had a more insular cohort of defence lawyers. By contrast, 'open' courts (such as Court 4)[375] will be attended more routinely by agents who have their home courts elsewhere (Fiscal 2). This difference in the perceived accessibility of courts is significant. The number of defence lawyers in a court can influence the working relationships that form. In turn, the nature of the working relationships in a court can affect the court's culture and overall case trajectories.

There was a perception that a greater number of legal practitioners in a court could reduce the familiar and congenial working relationships that interviewees stressed as important.[376] While a large number of legal practitioners did not necessarily prevent Plea Bargaining, it was thought to affect the nature of the relationships involved in Plea Bargaining. For example, Fiscal X noted that:

> [Court 3 (a large urban court)] is quite renowned for its agents and all the different personalities. And it is a massive court. So, the number of personalities that you have to get to know is a lot wider, and you don't get to know them as well. Now it is the same maybe 5

[375] A higher number of legal practitioners can also be present due to better transport links drawing in those who stay elsewhere. Court 4 had good transport links.
[376] See Chapter 5. For example, the discussion regarding "trust."

> or 6 lawyers that I deal with in [Court X] all the time – so it makes it easier.
>
> In [Court 3] the numbers are exponentially higher, and a lot of them are single solicitors that don't work as part of a firm, but as what you would refer to as "a one-man band." And so, it is difficult to gauge what they are like because sometimes you can work there for two years and never go to trial with a solicitor. They just happen to be one of those solicitors that pleads [guilty].

In a busy court, like Court 3, legal practitioners thought that the lack of familiarity hindered the development of the familiar working relationships seen in smaller courts. However, it is notable Fiscal X stressed the importance of putting in the work to get to know the various personalities. Indeed, defence lawyers and fiscals stressed the importance of working relationships to being effective in their roles. This finding suggests that legal practitioners require different interpersonal skill sets in different courts.

By contrast to Court 3's many personalities, Court 2 was more insular. Legal practitioners partly attributed the efficiency of Court 2 to the familiar working relationships between the fiscals and defence lawyers. As Solicitor 7 noted:

> We are quite lucky it's a settled fiscals office in Court 2. So, a lot of them have been there for a while. So, you can pick up the phone and say to somebody, "can you dig out the case for Joe Smith and have a look at it and see if we can get something sorted." You've got more of a chance.

Consequently, this research suggests that working relationships in large courts may be different from smaller courts. This suggestion accords with other research that has found that "if workgroup members come together only episodically, relationships will

be formal, rule-bound, and often adversarial."[377] The effects of size on culture may explain Court 3's reputation for having defence lawyers and fiscals with more antagonistic working relationships. This finding has potential implications for the optimum size of Sheriff Courts. For example, in Scotland, policymakers have worked to close several court buildings. The business of the closed courts has been diverted to the remaining courts. Policymakers' intention in closing courts has been to save costs. However, in calculating cost savings, it may be prudent to consider that larger courts may pose different challenges to early Guilty Pleas. Moreover, larger courts offer more opportunity for 'Sheriff Shopping.'[378]

This perception that there are unique court cultures contradicts policymakers' formalistic notions. Formalistic notions would suggest that the law operates independently of local court cultures. Accordingly, one implication of this research is that local court cultures should be a key consideration for policymakers. However, unfortunately, there is little information on court cultures in Scotland that policymakers can rely on. The information on court cultures is so limited that, if it ended here, this thesis would still be the most extensive written compendium of perceptions on court cultures in Scotland.[379] Given this dearth of knowledge on court cultures, the rest of this chapter will further interrogate the cultures of Court 1 and Court 2.

2 - Court 1's Culture

The origin of Court 1's culture is nebulous. Legal practitioners did not definitively attribute it to a formative period. Court 1 does not have the same detailed narrative as Court 2 to explain its culture. Indeed, the history of Court 1 is less in the collective memory of those in the court. For those in Court 1, the present culture is simply the

[377] Adamany (1979), p.170.
[378] Gillam (2013), section 3(b).
[379] Legal practitioners' knowledge of court cultures is inaccessible to policymakers.

way it is - with some contributing factors that this chapter will discuss below. In terms of these contributing factors, they are also imprecise. As Sheriff 4 noted, “these are not necessarily provable things in terms of cause and effect.” Likewise, Solicitor 4 noted they are not things you can put a “finger on.”

Legal practitioners characterised Court 1 as having "a reputation" (Fiscal 1) for being a difficult court to Plea Bargain in. The perception was that legal practitioners in Court 1 had had antagonistic working relationships with each other (sheriffs, defence lawyers, and fiscals). The perception is that these working relationships mean that those in Court 1 adhere to what can be characterised as a more zealously adversarial model of litigating criminal cases. This zealous model favours putting the Crown to proof and delaying pleading guilty to increase the odds of acquittal if the case collapses (see Chapter 7). Legal practitioners thought that antagonistic and adversarial methods of practice could hinder the expedient disposal of cases. Indeed, this research found that a zealously adversarial approach to defence work can be incompatible with policymakers’ attempts to promote ‘efficiency.’[380]

For example, Solicitor 8 was the most zealously adversarial defence lawyer interviewed. Solicitor 8 felt that “cost-cutting” meant that the Crown regularly made mistakes and that these mistakes made Not Guilty Pleas more viable. Solicitor 8 also noted their "jurisprudential" issues about judicial case management[381] on the basis that it undermines the presumption of innocence, the right to silence, and generally undermines the accused’s position as it favours the state. Solicitor 8 was also unhappy with “putting the Crown on notice” and typically wanted to concede nothing they did not have to.[382]

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[380] See Chapter 7.

[381] For example, Solicitor 8 did not approve of the bench asking what issues the defence was going to take with the Crown’s case when pleading Not Guilty. Solicitor 8 preferred not to ‘tip-off’ the Crown until trial.

[382] The case of *Ashraf v HMA* highlights that Solicitor 8 is not the only one opposed to case management.

Regarding the difference between Court 1 and Court 2, Sheriff X summed up the view:

> There was in my view, in [Court 1] a bit of them and us culture. And the agent's view was that they were going to do what they thought was correct, *not necessarily what was best for the court. But, certainly, the best for their client as they saw it…*
>
> [In Court 1] as a sheriff you would come into court, and you would say "Mr X are you ready?" And it was almost as if it was a challenge; as though I was challenging them. And they would find that difficult.
>
> So, the agents, in my view, were much more aggressive and they take the view that they just appeal everything. So, they just appeal everything, and I think that's with a view to affecting how the sheriff deals with certain individuals. They should've learned that it doesn't work, but I think what I noticed was the number of appeals.

Thus, legal practitioners perceive Court 1 to operate based on a more zealously adversarial model of practice. Yet, interviewees did not portray these antagonistic relationships in Court 1 as being solely due to defence lawyers. The antagonistic relationships in Court 1 were thought to be perpetuated by both sides. For example, Solicitor 4 noted that "it takes two to Plea Bargain." Thus, the perception was that neither the prosecution or the defence wanted to "blink first" (Sheriff 1) in terms of conceding their position (something that is necessary for Plea Bargaining).

However, while Guilty Pleas were later in Court 1, going to trial is detrimental to both the prosecution and the defence. Indeed, Fiscal 2 noted always going to trial would be "mutually assured destruction." This perceived infeasibility of trials means that there is still usually a Guilty Plea in Court 1. The difference with Court 1 is that the defence and prosecution maintain their initial bargaining positions as long as possible

in an effort to exact the best outcome. Maintaining bargaining positions longer means later Guilty Pleas.

In Court 1 this practice of holding out before settling has engrained legal practitioners' expectations that cases will plead guilty later. This expectation is self-perpetuating (see Chapter 7). Thus, Plea Bargaining cultivates more demand for Plea Bargaining. In this sense, Plea Bargaining is like other areas where criminal justice cultivates its own demand. For example, there are similarities to "the self-defeating ways in which the over-selling of public protection ratchets up consumer demand for even more controlling and incapacitative measures."[383]

A - The Locale of Court 2

While Court 1 and Court 2 are similar sizes, sheriffs and defence lawyers distinguished Court 1 as a satellite of a large urban court (Court 3). As such, there is often a literal fine line between whether a case falls under Court 1's jurisdiction or Court 3's jurisdiction. Moreover, clients with lawyers in Court 1 may frequently appear in Court 3. This fine line results in a high degree of cross-pollination between Court 1 and Court 3.

As noted above, legal practitioners characterised Court 3 as having a reduced level of familiarity between legal actors (e.g. Fiscal 1, Fiscal 2, Solicitor 3, Solicitor 4, Solicitor 6, Solicitor 8). Sheriff 1 noted that, in their view, the tactics of defence lawyers in Court 1 paralleled those of Court 3. Court 1 practitioners, to a greater extent than Court 2, shared the view that delaying a Guilty Plea is a viable tactic. The mantra was, "witnesses may not turn up. And if they do turn up, they might not speak up." Sheriff 4 also made this comparison between Court 1 and Court 3:

[383] McAra (2008), p.499

> There is an awful lot more churn in Court 1 than there is in Court 2. Down here in [Court 2] if a case gets to trial, our expectation is that the trial takes place. There are areas like Court 1 where half the trials at least, more than half the trials, don't go ahead at the first time.
>
> And in Court 3, I think, if you look at the figures, they are even worse than that. The number of cases that are actually resolved at the first time of asking is relatively low. So those are big differences.

Another difference was that Court 1 clients were thought to have different attitudes towards pleading guilty early. Moreover, a history of drug-related crime was prevalent in the minds of Court 1 legal practitioners. Several legal practitioners felt that this drug-related history differentiated Court 1's culture from Court 2's culture.[384]

Indeed, there was a feeling that Court 2 may deal with drug offences more harshly than Court 1 or Court 3. The perception was that Court 2 is not as "desensitised" to these crimes (Solicitor 5). While it is not possible to quantify these notions of local character, Court 1 is in a more deprived area than Court 2 according to the Scottish Index of Multiple Deprivation. Court 1 also has a reputation for being in an area with a heavy drinking culture, etc.

Regarding its local bar, Court 1 has less isolation due to its proximity to a large urban court. Court 2 was further from a large city, which made it less accessible for competition. Moreover, legal practitioners felt that Court 2's formidable reputation made it less desirable to work in, which was thought to reduce competition further.

As a result, sheriffs believed that Court 1 defence lawyers had more competition for their business (e.g. Sheriff 2 and Sheriff 4). The actual level of competition for

[384] Though official figures do not suggest any significant variation in the types of crime currently processed in Court 1 and Court 2.

business is hard to gauge. While there is more potential for competition in Court 1, local defence lawyers represent a considerable proportion of the business. The volume of business dealt with by local law firms may provide more security for the local defence lawyers.

However, there were also perceptions of a high level of inter-firm competition in Court 1. Legal practitioners feel that this inter-firm competition affects the culture in Court 1 as local firms compete for clients by offering the most zealous defence. Solicitor 6 noted that this competition could be intense:

> Every court has got its own wee foibles. In Court 1 they fight with each other, physically. Punch-ups on nights out are commonplace in Court 1. They used to have a [games table] in the agents' room in the court. Not anymore.

Thus, there was a strong belief that professional relationships in Court 1 could be more antagonistic than those in Court 2. Solicitor 7, based in Court 2 but who also worked in Court 1, felt that:

> The big problem [with late Guilty Pleas in Court 1] is… firstly you've got a clientele that are ingrained in to, "you don't plead."
>
> You've also got a criminal bar that are of that attitude that you don't plead Guilty at the first opportunity or until a trial diet…
>
> [The lawyers] know that there is a better than even chance that the case is going to get adjourned… and witnesses can disappear, productions can go missing.

Likewise, Sheriff 2 from Court 1 noted that:

> We have to set down nine or ten trials for a summary trial court simply to ensure that I am gainfully employed all day. But, if all ten run, I'll never get through ten. And they know that.

> So, everyone pleads not guilty in the hope that they won't get dealt with today. So, there is still a bit of that culture going on.

The research asked Sheriff 2 whether Court 1's culture was a recent development or longstanding. The research also asked Sheriff 2 whether there were any salient factors contributing to the origin of Court 1's culture. Sheriff 2 noted that:

> My understanding is that [this culture] predates me coming here. So yes, it goes back some considerable time.
>
> Here there has, historically, been quite rigorous competition between defence firms. And they are loathed, that is my perception, loathed to lose a client. Or to not be seen to be doing what the client wants them to do...
>
> *The culture I think does vary, which is why in the Sheriffdom we've had more outstanding trials than the other courts*. [It is] not simply because of the volume of business...
>
> Now we are driving that down… and I think the [Sentence] Discount does help with that. And there is more judicial time being given. We've got some [extra resources]. And they [defence lawyers] know [due to more resources] there is more chance of their case being taken.
>
> If there is more chance of their case being taken, you might as well try and get the discount. If your case isn't going to be taken, then there is no incentive.

Indeed, court observations revealed the advantages the defence could gain due to witnesses being absent or claiming to have no recollection of recent events. For example, in one case, the first witness claimed drugs hampered their recollection of a relatively recent event. The second witness did the same and stated they could not

remember as "it was too long ago." The fiscal, despite some exasperation,[385] could do nothing more and the case collapsed. In this case, the defence lawyer's gambit of going to trial paid off: the witnesses had not 'spoken up.' This occurrence of witnesses' selective amnesia is a common issue in summary trials. This issue is so common that witnesses avoiding answering questions in this way is colloquially known as the 'jakey jive.'[386]

B – Is Court 1's Culture Client Driven?

Chapter 8 notes that accused persons internalise the views of their defence lawyers. Consequently, more zealous defence lawyers in Court 1 may create more client expectations for a zealous defence. If a client's expectations for a zealous defence are unmet, they may seek different representation. Thus, regardless of where it started, Court 1's culture is now likely self-perpetuating. Defence lawyers will try to secure clients by competing based on the zealousness of the defence. Clients will internalise the perceived value of a zealous defence and seek this out.[387] New accused persons will be socialised into this view by defence lawyers and more experienced peers.

Defence lawyers' competition to be zealous has various practical consequences. For example, court observations revealed that when Court 1 defence lawyers questioned the police, the style of questioning was often more antagonistic than in Court 2. Anecdotal evidence from police officers who have testified in Court 1 supports this finding that the Court 1 bar's style of questioning is more likely to be antagonistic.

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[385] The prosecutor had successfully managed to get the witness to admit to remembering minor details of their birthday, which occurred long before the alleged incident. However, despite this, the witness claimed they did not remember the alleged incident at all.

[386] "Jakey" is a term used to denote someone who is socio-economically deprived, especially someone with addiction issues.

[387] While this seems likely, the research cannot conclusively state clients in Court 1 expect a zealous defence more than those in Court 2.

An antagonistic line of questioning for prosecution witnesses is what some accused persons (e.g. Accused 1) expect a competent defence lawyer to do. Thus, defence lawyers may prefer this tactic (in part) to secure client satisfaction. However, while this is a significant finding, it should be stressed that this is not a criticism of Court 1 defence lawyers. Antagonistic questions are a legitimate technique that is expected to be in all lawyers' repertoire. The point raised here is that Court 1 defence lawyers seem to opt for this technique more often than Court 2.

This desire to offer a zealous defence differed from Court 2. In Court 2 defence lawyers valued a perception of forthrightness to retain client loyalty. As Solicitor 7 from Court 2 noted:

> Most people [in Court 2] take your advice. That's what they pay you for. And you try and… If you are going to be in this game for a long time, you have to be fair and straightforward. If you promise someone, you'll get them found not guilty, well that works once until they get found guilty.
>
> Whereas if I say, "listen, mate you are done for Charge 1, but I think I can get a plea for it on this basis, and if you plead this way then you won't get the jail." And then you know they will say, "well that's ok, he told me what's going to happen, and that is what happened."
>
> You get a reputation for dealing with them more straightforward, so they are more likely to listen.
>
> With the exception of the duty scheme, nobody refers clients to us. Clients come to me either because I've been recommended, or I have dealt with them before, and they liked what happened. So, if you've got a high rate of loyalty and returning clients, then you must be doing something right.

Crucially, Court 2's method offers clients certainty. Indeed, as Chapter 8 shows, accused persons strongly desire certainty. This certainty can be achieved through early Guilty Pleas. Even *if* the outcome is a higher sentence, accused persons may still benefit more from this certainty in some instances.[388]

In terms of the judiciary, this research found that Court 2 sheriffs are perceived to be less accepting of the client-led culture thesis. Sheriffs in Court 2 had a different expectation of how their local bar would manage clients. As Sheriff 6 noted:

> That [Court 1's culture] is driven by the agents. Absolutely driven by the agents. Agents' first duty is to the court. And that is all there is to it. And you have a duty in terms of the act to agree on evidence, full stop. If you have got a client who is leading you by the nose, then it is the wrong way around.
>
> So, that whole argument that [Court 1] is driven by the accused or the clientele is rubbish. They are because they have been allowed to do that.
>
> The clients here are told by the lawyers, "this is what the evidence is, this is what is going to happen." They spell it out for them. And [the clients] respect that. The Court 1 agents have made a rod for their own back. I don't know why they did it. But it is not client led.

In sum, there is a significant cultural difference between Court 1 and Court 2. There is a perception that this culture may relate to the defence lawyers in the court (Chapter 7 will examine this) or accused persons (Chapter 8 will examine this). However, it is worth noting that there is some indication that the culture in Court 1 is changing. Sheriff 5 noted that the delays in summary cases were now largely resolved, and cases would proceed more promptly. Moreover, despite the

[388] This research did not evaluate sentencing outcomes.

widespread reputation of the Court 1 bar for being 'difficult' several of those interviewed had not found this to be the case (e.g. Fiscal X). Some also suggested that Court 1's antagonistic culture was "more prevalent in the past" (Solicitor 4). Consequently, policymakers may wish to monitor Court 1 to see if and how the culture is changing. Understanding how court cultures change, what drives change, and the effects of change would provide a better basis for future policymaking.

3 - The Emergence of Court 2's Culture

Court 2 was an ideal candidate for exploring court culture. While Court 1 had a unique culture, legal practitioners in Court 2 articulated a shared understanding of the emergence of their court's culture, which was fascinating. As a result, this research paid special attention to the concept of court culture in Court 2.

Regarding the distinct cultures, Sheriff 6 from Court 2 noted that:

> There will be a contrast [between Court 1 and Court 2]. I think a significant one... I am not sure how much they do case management like we do... they have a call over, they have a bar that pleads guilty to nothing. They appeal everything as well. A very different mindset in the bar in Court 1…
>
> We've got a very efficient bar, we've got a very cooperative bar. They know their stuff, and they don't muck about and plead not guilty and take everything to trial. And there are certain practitioners from Court 1 or Court 3, and they come down, and you know, "here we go, they are going to plead Not Guilty and whatever." So, there is a different culture. Definitely.

While many elements contribute to court culture, those in Court 2 attributed it in large part to the institutional history of the court. This history was thought to have

embedded Court 2's culture. For example, Sheriff 4 explained the efficiency of the Court 2 bar in relation to this history:

> I think agents in the past had to engage in very good practice or face significant consequences. And we are still dealing with many of those same agents. I think the older ones teach the younger ones. And so, we are very well served by the local bar. And perhaps there is a different culture amongst the bar in that sense, compared to some other areas.

This history of Court 2 is, by all accounts, exceptional. Whether one views this important period in Court 2's history as good or bad (there were conflicting views), it is perceived to have forged the fundamentals of Court 2's culture. As Sheriff X noted:

> In [Court 2] I think they still have the hangover from the makeup of the bench that used to exist in Court 2. Which was well known throughout the country (should we put it that way). It was certainly towards the higher end of all the competent disposals, and I think they managed to instil that there was an advantage in not running cases unnecessarily. We are working on that, but we haven't got there yet.

As Solicitor 6 noted when asked if Court 2's culture was related to the past:

> Of course, it is! See when you learn a profession where you are ruled over with a rod of steel. Come the day when they are no longer there, you've moulded yourself to work in such a way professionally that you look at it from the old days and this is how we would do it. And that is how you do it.

This historical period that is perceived to have forged the fundamentals of Court 2's culture occurred decades ago. Indeed, all members of the bench from that period (hereinafter 'the old bench') are now deceased. That a period from so long ago is still in the consciousness of Court 2 is a remarkable finding.

What is also remarkable is that this monumental period in Court 2's history is perceived to have been brought about by the bench unilaterally. While all benches are distinctive, some are regarded as being stronger than others. The old bench in Court 2 was viewed as exceptionally strong.

A – How did the Old Bench Affect Practice?

The demands made of the old bench had significant effects on routine practice in Court 2. One way the old bench altered practice was through strict demands concerning working practices. Sheriff X commentated that:

> They were hard. But, they were hard on everyone [defence lawyers and fiscals].

These demands on working practices had several effects. The strength of the old bench, and its determination to do things its way, worked to create a break from the past.[389] The old bench discarded previous cultural norms in Court 2 and operated without regard to these. With this break from the previous culture, Court 2 entered a new epoch with a clean slate. This clean slate allowed the old bench to forge new cultural norms in Court 2. While the new patterns of routine practice that emerged were not necessarily intentional,[390] the effect of this new dynamic in Court 2 was that it came to favour a more expedient resolution of cases.

Interestingly for this research, the old bench was known for offering Sentence Discounts in more explicit terms than any other court at the time. Indeed, this link between the old bench and Sentence Discounting is part of the reason this research

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[389] Akin to "transformative change." See McAra (2004), p.27.
[390] The old bench cannot be interviewed. However, some interviewees who knew the old bench note that they took pride in the practices they established.

chose to scrutinise Court 2. While legal practitioners perceived all courts to have a system of Sentence Discounting, at the time of the old bench (before section 196), this was "disguised" (Sheriff X).[391] In this regard, the old bench's methods for encouraging early Guilty Pleas were ahead of their time. Indeed, the old bench reportedly noted that they were later proven right in this regard.

Another notable effect of the old bench's practice was that adjournments became extremely difficult to obtain.[392] Not only were adjournments likely to be rejected, but the old bench would also berate a defence lawyer or prosecutor for being unprepared. Thus, an expectation arose among defence lawyers and prosecutors that cases would proceed as scheduled and that the bench would not tolerate delay. If either side were unprepared, the consequence was that they would likely lose and suffer embarrassment. Solicitor 3 noted this:

> [Regarding the efficiency of Court 2] This is a historical thing. There used to be… sheriffs in [Court 2]… who were the most difficult sheriffs in the world to appear before. And neither the Crown nor the defence would routinely get an adjournment. It was very difficult to get a case adjourned; it was a very high bar….
>
> You didn't get away with anything. One of the sheriffs used to tell you the way you pronounced your name wasn't right:
>
> [Defence lawyer] "But that's my name."
>
> [Sheriff] "No, no. That's not how you pronounce it!"
>
> And you would have these arguments on the bench about how a lawyer pronounced his name.

[391] This is from a quote by this Sheriff X in Chapter 2, Section 6.
[392] There is no available statistical data on this, but there seems little reason to doubt the accuracy of the perception.

> And all the way up, you got away with nothing. So that's why I think Court 2 is still among the most efficiently run courts. Because each of the sheriffs has come along and been influenced by the ones that were there.
>
> And even now that they are all away, the ones who are left are influenced by the ones who were before them. And even the staff in the court, I would say, are expected to be more efficient.

Solicitor 6 agreed and contrasted this with Court 1:

> In Court 1 you walk up, and you know. [Hypothetical Court 1 defence lawyer] "I've got brown shoes on this morning, and I want to wear black shoes for this trial." And you get it put it off.

Sheriff 4 noted that agents from other courts:

> Struggle at times. Not with a trial. Once you start a trial, a trial is a trial no matter what court you are in. But, in the trajectory of the case, the procedural hearings and the likelihood of the case proceeding at first calling of the trial. I think that sometimes comes as a bit of a culture shock to agents [from other courts].
>
> I get the impression that there is so much churn… that perhaps there are agents who live in that culture and expect it everywhere. And [they] are surprised when they come down, hear motions being opposed, and cases going ahead regardless of whether every "t" has been crossed and every "i" has been dotted.
>
> There is an expectation here [in Court 2] that the thing just goes ahead in the scheduled lots. I think some of them find that a bit of a… 'surprise' shall we say.

These complex cultural dynamics provide insight into the reality in which the formal law of Sentence Discounting operates. The formal law does not exist in a vacuum. In

routine summary work, there is much more to consider. As a consequence of this rich context, the formal law regarding Sentence Discounting does not work as policymakers' formalistic thinking assumes. Indeed, Sentence Discounting existed before section 196 and did so more explicitly in Court 2 than elsewhere.[393] Thus, patterned case trajectories are dependent on court cultures rather than just the formal law. This key role played by culture underlines legal practitioners' comments that Sentence Discounting is only a small part of the equation when deciding how to plead.

4 – Perceptions of Judicial Culture

From the above, it is clear that legal practitioners perceive judicial culture to be important. There has long been anecdotal evidence of the importance of judicial 'culture' in daily legal practice. However, judicial culture in Scotland has not been subject to extensive research. The main exception to this in Scotland is Jamieson (2013). Jamieson has shown the importance of understanding the complex nature of judicial culture, which is not "monolithic." This thesis advances Jamieson's work by showing how judicial culture is vital to Plea Bargaining, Sentence Discounting, and unique court cultures.

Legal practitioners perceive that judicial culture affects daily court practice in a variety of ways. The importance of judicial culture may be even more important in summary cases due to the SLB traits summary work entails (see Chapter 5). For example, Fiscal 2 noted that the bench played a large part in the unique cultures of Court 1 and Court 2:

> I think that [the differences in early Guilty Pleas] is more to do with the culture in Court 2 and Court 1.

[393] See Chapter 2 (and Chapter 3 for a caveat to this perception).

> Court 2 had a culture for the early resolution of cases. That was down largely to the culture that the sheriffs [the old bench] there were able to produce… The culture that is promoted from the bench is that cases should be disposed of efficiently, you shouldn't have numerous adjournments. And that was very much the culture in Court 2.
>
> And everyone who was involved in the court process had to be aware of that [culture]. Otherwise, your life would be quite uncomfortable, and cases would be dismissed by the sheriffs… adjournments would be refused. The expectation was that cases would start on time and conclude at a reasonable time.
>
> Whereas Court 1 was a different culture. A more laissez-faire type culture. Where the first calling of the trial would be seen as being just a preliminary matter. Whereas in Court 2, if the case called for trial, everybody had to be ready to go to trial. And if you were looking to have a case adjourned you had to have a very good reason.
>
> The differences were really quite marked for courts with similar loadings (because Court 1 and Court 2 are similar sorts of case loadings).[394]
>
> Court 2 is a bit out on its own [in terms of a high number of early Guilty Pleas], and I think that is to do with the local culture, which can be produced from various factors. But the shrieval influence is very strong, particularly when it comes to summary matters.

Solicitor 5 also noted that the bench played a key role in differentiating courts:

[394] This perception of similar cases between Court 1 and Court 2 is important. A national audit of courts found cases to be similar, but there are limitations to official data (see Chapter 3).

> There are well-known courts. I did something in [Court 2]… and I got a warning… It's always been mad down in [Court 2]. Since I was [a young lawyer]. I don't know why.
>
> I went down for a case, and I listened to the case before me. And I could not believe what the bench was saying to this lawyer. And I thought, "it's all true what I've heard." So, big differences between the courts. [Court 2] is not a favourite of anyone to go to.
>
> I've found in [Court 3]… I sometimes feel the sentencing there is lighter. Dealing with the volumes and such serious crimes in [Court 3] that someone having a bit of cocaine is no big deal to them. But, if you get it out in somewhere smaller, like [Court 2] or somewhere else, it is a big deal.

Even accused persons took note of the sheriffs in court. During court observations experienced accused persons discussed various sheriffs and their perceptions of their dispositions (sometimes joined by defence lawyers who would share anecdotes). Accused persons' awareness suggests that, though not "repeat players" in Galanter's sense, some accused persons may be more familiar with courts than is normally assumed.[395]

Accordingly, this research supports the argument of Jamieson (2013) that judicial culture is important and diverse. Judicial culture is perceived to have been essential in shaping the different operations of Court 1 and Court 2 (see Chapter 6). Indeed, Fiscal 2 noted that efficient courts were often due to a strong bench and its influence on daily practice.

[395] Interviews show significant diversity among accused persons. There is a highly experienced cadre of accused persons who possess local knowledge. Others are bewildered.

A – Communicating Judicial Culture

Defence lawyers and prosecutors learn about judicial culture from experience. However, defence lawyers and prosecutors also communicate their perceptions of judicial culture. Indeed, several defence lawyers and prosecutors noted that when attending a court for the first time they will seek advice on what that court is like. However, this research also found that sheriffs discuss court operations amongst themselves to assess what standard practices they may wish to adopt. In doing so, sheriffs may agree to common standards such as being strict regarding adjournments. Once a judicial stance is agreed, sheriffs can work consciously communicate this culture to others.

Sheriff 3, from Court 2 noted that they offered advice to new lawyers. Their advice to young lawyers was to learn the judicial culture of the Court 2:

> Know your sheriff! Know what they are going to demand of you and then try and abide by it because if you do that, your cases will progress very quickly.

In advising others in court, sheriffs can communicate their culture. In the case of Court 2, this culture is thought to be one that encourages Plea Bargaining and early Guilty Pleas. In the case of Sentence Discounting, culture is where much of the predictability arises. The formal law is radically indeterminate, and sheriffs are free to allow or deny Sentence Discounts at their discretion. However, court observations show that sheriffs give regular and predictable discounts. Interviews show sheriffs do this, in part, to ensure a consistent message: that pleading guilty early is beneficial. This message forms part of a system of judicial communication that defence lawyers can understand and relay to accused persons.

The advantage of sheriffs communicating their dispositions is that defence lawyers and fiscals take this in to account in their work. For example, defence lawyers advise clients of the likelihood of a Sentence Discount in more certain, less caveated, terms

than this thesis does (see Chapter 2). Legal practitioners' knowledge of judicial culture gives them the confidence to predict what the stated Sentence Discount is likely to be.

Communicating judicial culture also allows sheriffs to influence broader court cultures. Influencing culture is important as once cultural dynamics are established, they can be robust and difficult to change: "since relations between groups become institutionalized when they are continuous, conflict, as well as cooperation, can be institutionalized."[396] Thus, judges communicating their culture can *help* to prevent conflict becoming institutionalised.

Communicating judicial culture is also an example of how sheriffs indirectly engage in Plea Bargaining. For example, Solicitor 3 noted the displeasure the bench expressed regarding late Guilty Pleas:

> [Sheriff X] recently said of somebody. Now it was a woman who was a care worker, and one of her patients had Alzheimer's, and she stole her life savings. It wasn't a huge amount of money, but it was her life savings.
>
> And she pled guilty at the Intermediate Diet and [Sheriff X] went off on one about the whole question of pleading at an early stage – "you knew you were guilty, you've taken it this far, witnesses have been cited!"

This impassioned chastisement of the late Guilty Plea reinforces messages regarding the court's culture vis-à-vis early Guilty Pleas. This reinforcement is crucial to maintaining the culture of a court which, even if engrained, is not inevitable:

[396] Atleson (1973), p.753.

> It seems important to stress the fact that a doxa acquires its standing as doxa ['rules of the game' such as local cultures]... only through reiteration, through repeated restatements and reinstatements, which means that there is a substantial measure of performativity at work... [Doxa and structure] are incessantly-reiterated norms which produce, retroactively, as an effect of their incessant repetition and rearticulation by masters and disciples alike, what is in effect a hegemonic form of power (which, arguably, exposes its frailty through its need for reassertion).[397]

The result of cultural displays, such as the example above, is that defence lawyers will communicate a sheriff's disposition to future clients. Thus, communications of judicial culture in Court 2 send a clear message that it is better to plead guilty early. Indeed, Solicitor 3 elaborated on the shared cultural understanding that prompted Sheriff X's disdain for the late Guilty Plea:

> Witnesses have an expectation when they get cited that they will have to go to court. So, this Alzheimer's victim gets a citation and a number of other people (maybe relatives or care workers) and will have the anxiety of a court case. Plus, there is a cost in that as the citation of witnesses is expensive.

This role of sheriffs in Plea Bargaining may be contentious to some. In part, the contention relates to formalistic notions that suggest (though do not require) judges are not part of Plea Bargaining. There is also contention due to the generally negative connotations Plea Bargaining has acquired. Indeed, this research found that sheriffs had mixed views regarding how they could influence others. Some sheriffs thought judicial communication was more limited than in the past. For example, Sheriff 6 noted:

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[397] Legrand (2008), p.128.

> I think in the olden days there were things said, either via your bar officer[398] or "by the way, early pleas will be acceptable today." I can say categorically I've never done that, and we would not do that. I think that is a thing of the past.
>
> I know things happened in the past where sheriffs wanted to get away for the cricket or whatever. And there was word sent back "plead guilty today, and you will be looked upon favourably." I can't believe that happens now… I think we would get our knuckles fairly firmly wrapped and quite rightly so.

However, in this case, judicial communication was understood to be made for reasons other than the benefit of the court. As such, this objection does not preclude other forms of communication from the bench, such communications of judicial culture (what sheriffs may refer to as good working practices). Indeed, some sheriffs said they intentionally communicated their dispositions in the knowledge that this would filter down to others in court. For example, Sheriff X noted:

> Sometimes I will send someone to custody for a relatively short period of time (short being anything up to six months I presume). But I'm only doing it because they've breached an order maybe once or twice and there's no other options available.
>
> Plus, to use the French pour l'instruction des autres la cour [for the instruction of others in court]. So that anybody outside knows, and the people supervising, the [bar] officers, can say to offenders:
>
> > "If you don't do it, you might get a wee second chance, but you might get the jail. And look here's Willie McGinty who got the jail for not doing his unpaid work."

[398] A bar officer is a member staff who assists with the operation of the court by showing the accused where to sit, etc.

Thus, the research shows that judicial communication of culture is perceived to be essential. Judges, by laying down their general dispositions in court, can subtly take part in the Plea Bargaining process. Knowledge of judges' dispositions (i.e. judicial culture) enables defence lawyers to advise their clients and to have greater certainty than the formal law alone could provide. Indeed, the sheriffs in Court 2 noted that they have worked communicate their differences from the old bench and to alter the culture of Court 2 (discussed in Section 5 below).

5 – How has Court 2's Judicial Culture Changed?

The old bench in Court 2 successfully dispensed with old norms and forged a new culture in Court 2. Going forward, as the old bench retired, new sheriffs have inherited Court 2's mantle of an efficient court with a strong bench. Today, no members of the old bench remain. However, all incumbent sheriffs in Court 2 know of the old bench. Several sheriffs interviewed even appeared before the old bench earlier in their career. As such, the challenge Court 2 sheriffs have taken on is advancing the efficiency of Court 2.

The old bench faced resistance in going against the existing culture of Court 2. Interviewees noted the strength of the old bench was what enabled them to endure this. Enduring cultural resistance is no mean feat, and it is doubtful whether any bench could unilaterally alter court cultures today as the old bench did.[399] However, today, the bench in Court 2 does not seek to operate unilaterally and have worked to develop a variation of Court 2's historic culture.

The current practitioners in Court 2 have internalised various elements of the practice of the old bench regarding 'efficiency.' For example, the bench in Court 2 is still strict

[399] It is not necessarily that no contemporary bench is as strong as the old bench. However, current conceptions of what is appropriate would mitigate against a contemporary bench operating like the old bench.

concerning adjournments and delay. This strictness applies to both defence lawyers and fiscals. Indeed, as Sheriff 3 noted:

> If the fiscal cannot get the bodies here for trial, then you will take the view that we are refusing adjournments. And it's a matter for the Crown if they wish to bring the matter back later. So, it's deserted at the time, usually not simplicitar, but it is deserted. So it's gone.

In part, Sheriff 3 attributed this practice to the old bench:

> There is a culture of you didn't get a continued Intermediate Diet here. You didn't get things like notional diets. You didn't get that. That's the [old bench's] version - "you come in, you plead, or you don't, and you go to trial." And that was how they set it up.

However, while carrying on the mantle of the old bench in various regards, the new bench has sought to make changes:

> I think we are a very efficient court. I'd like to say that [the old bench] put that in place, and I think they probably did. But we've worked hard to continue that, and the staff have too. So, I think there is a culture that has carried on. (Sheriff 6).

Sheriff 4 felt the changes to Court 2 since the old bench had been significant and that they had improved its efficiency. Indeed, the perception was that Court 2 now dealt with more work in an even more efficient way:

> There have been changes. Our predecessors would hardly recognise the way things go now. They didn't have to call for as many reports… they had a lot more freedom of movement.

Sheriff 3 also agreed the Court was more efficient now:

> [The old bench] processed a third of the business we processed. … Certainly, they set up a regime of fear, and that meant that agents

> were well prepared. There would be none of this, "well I don't really know." And that, the present incumbents have benefited from because the agent is very well prepared.
>
> They [defence lawyers] will come in, and they will advise you what they've got. And if they think they need something else, they will ask for time to get something else. In the past, they may not have got that time, but now they will if they've got a good reason.
>
> So, I think the historical aspect shaped how the agents acted in the beginning. And that probably assisted. But things have moved on.

The modifications that the incumbent sheriffs have made were felt to improve the efficiency of the court beyond what it was during the rein of the old bench. However, a key point raised by all Court 2 legal practitioners is that the culture around how Court 2 achieves its efficiency has fundamentally changed. Legal practitioners felt that this cultural change to how efficiency is achieved was beneficial. There was a perception that the old bench could be too harsh or too bold:[400]

> [They were] very difficult people in my view and I'm not sure they served justice well… because they had very firm views.
>
> They wanted a court to be very efficient, which it is. But I think the current incumbents have maintained that efficiency with a better access to justice. (Sheriff 3)

As a result of the perceived limitations of the old bench, the incumbent bench strives to be more balanced. The incumbent bench aims to be as strong as the old bench in managing the culture of the court. For example, the incumbent bench places demanding expectations on defence lawyers to manage their clients and operate in a way that is beneficial for the court and the administration of justice (see Chapter

[400] It should be noted that many of the practices the old bench boldly advocated for came to be adopted.

7). However, the incumbent bench seeks to do this in a fundamentally "more humane" way than the old bench:

> A lot of people would argue [that in the past Court 2] was a very inhumane place. We like to think it is a lot more humane now and that people perhaps feel able to express their position.
>
> But we have always tried to maintain the efficiency of it. And I think Court 2 does run with less churn than perhaps any other Sheriff Court, but in a slightly more humane way than it did in the past.

Consequently, the initial break from the established culture created by the old bench fostered a sense of solidarity in Court 2. The old bench also tempered defence lawyers and fiscals in Court 2 to a highly efficient method of practice. Defence lawyers were proud to have endured working under the old bench. Several defence lawyers noted this solidarity and their "baptism of fire" (Solicitor 6). Yet, those in Court 2 were happy to now have a more "humane" bench. Certainly, no interviewee expressed any desire to return to the old days. Thus, the old bench separated Court 2 and made it distinct. This distinction provided the beginning of an opportunity for Court 2 to develop its current culture:

> The greater its autonomy, the more the field is produced by and produces agents who master and possesses an area of specific competence. The more it functions in accordance with the interests inherent in the type of activity that characterises it, the greater the separation from the laity.[401]

However, while the effects of the old bench are still felt, Court 2 is now perceived to be different in fundamental ways. In contrast to the old bench, the incumbent bench in Court 2 aims to foster a strong element of respect between those working in the

[401] Hilgers et al. (2014). P.7.

court. This mutual respect is quite distinct from the old bench who were viewed as operating through "terror" and "fear."[402]

Thus, the incumbent bench is fundamentally different to the old bench in this "humane" regard. However, key elements forged by the old bench are still present. Solicitor 6 summed up the change by highlighting that the court is still efficient, but now more civil in going about this:

> The difference now being that we are refused things politely, rather than shouting and swearing.

A – Bringing New Sheriffs into the Fold

The previous section examined how new Sheriffs in Court 2 carried on the culture of the old bench (albeit in their own way). The research asked Sheriff 6 about their experience of joining the court. Sheriff 6 noted that they adhere to Court 2's cultural norms because this suited them well:

> I came in… and that culture was continuing to be fostered. I just slotted into that. And my nature is to be efficient and organised. So it just fitted my personality beautifully. I can't stand wasting time. Also when you've got witnesses, and you've got jurors, you've got to factor them in as well. And I think the justice system doesn't factor them in enough…
>
> And I think Court 2 is often held up in Edinburgh as the example court, the model court. We do run things efficiently, and we have a good relationship between the [X] of us here. So, we cooperate with

[402] Multiple defence lawyers and sheriffs said this.

> each other and we get things done. If somebody is not able to do things, we slot in. I mean, it is a good working regime.

The research also asked Sheriff 6 whether they passed this culture on to new sheriffs in the court. This question aimed to find out what conscious efforts were made to mould Court 2's culture. The question focused specifically on the newly introduced "Summary Sheriffs" that have been introduced in Scotland. Conveniently, there was a new Summary Sheriff in Court 2. Sheriff 6 noted that:

> Certainly [the new sheriff] knows how we do things. No call overs,[403] no nothing like that, you just go straight into the trial. We also [do various unique practices for] case management.

Sheriff 7 was also asked how new sheriffs are "brought into the fold as it were." Sheriff 7's answer was illuminating. In the first instance Sheriff 7 was clear to establish the importance of judicial independence:

> Judicial independence is paramount. In all of the conversations that we might have among ourselves, it is always predicated on the basis that each will do what, individually, we feel is the correct thing to do.
>
> So, I guess, if I choose to take a different approach… if I choose to be slacker about some things, then there is nothing anybody could do.

First, it is worth noting that a deviation from Court 2's norms is considered as 'slack.' This view of deviation is informative concerning how legal practitioners in Court 2 regard its culture. This is a court that is strict and takes pride in its efficiency. In the context of Court 2's culture, "slack" is undesirable.[404] Importantly, this is an attitude

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[403] This subtle example pertaining to call overs is discussed more below as it demonstrates the subtle but significant difference that culture can make to the operation of courts in Scotland.

[404] In the context of another court's culture 'slack' might be seen as a virtue and perhaps be termed 'flexibility.'

that defence lawyers shared in Court 2. By contrast, through the lens of another court's culture, legal practitioners might interpret 'slack' as a virtue and perhaps term it 'flexibility.'[405]

Secondly, it worth noting the importance attached to judicial independence. Jamieson termed judicial independence the "master narrative" and characterised it as the universal aspect of judicial culture.[406] Scottish sheriffs place great ideological value on independence. Judicial independence frames how sheriffs view a wide variety of issues, including how they view their discretion regarding Sentence Discounting.

Broadly speaking, there are two competing notions of judicial independence. A strong version of judicial independence advocates independence from all influences. This version of judicial independence stresses limited accountability. The competing concept of judicial independence is limited to independence from undue influence. This research found that sheriffs are proponents of a strong version of judicial independence. As such, the methods by which sheriffs feel they may be legitimately 'brought in to the fold' are limited. Sheriff 3 and Sheriff 4 did suggest judges are more accountable now than in the past (it is possible for them to get their "knuckles firmly rapped"). However, this is a soft version of accountability in that it does not involve any formal sanction. Consequently, regarding bringing new Sheriffs into the court's fold:

> I think it is perhaps just hoping, as I'm sure those before me hoped with me, that I would come in and I would see the benefits of the pretty efficient system that exists here and that I would buy into that. Which I do.

[405] See the discussion of call overs below.
[406] Jamieson (2013).

> We will share thoughts with the clerks, they will share thoughts with us, and see where it goes. (Sheriff 7)

From this point, and the overall tone, it is clear that Sheriff 7 feels there is little way to force a particular culture. However, the aim of the question was not to show how cultures may be forced. That the question was taken to inquire about force is a misunderstanding that may have prompted the exposition of judicial independence. Instead, the aim was to see if Court 2's unique culture is actively curated. The question was rephrased appropriately to explore informal mechanisms that allow court culture to exist. The reformulated question asked how (without undermining judicial independence), Court 2's judicial culture is maintained.

Sheriff 7 noted that "these things develop informally." For example, Sheriff 7 gave the example of a "crib sheet" that had been designed by Sheriff X to assist sheriffs and clerks with complicated bail conditions. The use of this crib sheet was agreed and felt to be beneficial. That the sheriffs in Court 2 were meeting to agree to certain practices is a significant finding. While these agreements have no formal force, they allow for a level of coordination and impact the culture of the court. Sheriff 3 also noted this meeting of the minds, and that Court 2's culture was in everyones' interests:

> People are… in my opinion, professional people, are keen to get in to do the job and do the best job they can. So, it is an issue of buying into good practice when it exists. And discussing things, and perhaps developing other ways of improving or expediting, which we will do.

The importance of maintaining Court 2's efficient culture was noted as one advantage of the sheriffs collaborating. Indeed, Sheriff 7 noted that to entirely attribute the efficiency of Court 2 to its history "would do a disservice to the court and the clerks" who currently work there. Other sheriffs noted that while they "did inherit a fairly efficient court" (Sheriff 4), it has changed significantly over the years. Thus, there is

an element of history in explaining Court 2's culture. However, there is also an element of legal actors working consciously to promote desired outcomes over time.

Thus, it seems clear that court cultures cannot be formally forced. However, sheriffs can work collectively to curate practices that they feel are beneficial. In particular, the sheriffs in Court 2 expressed a sense of common purpose in developing and maintaining an effective court culture, especially in the face of recent challenges such as more complicated trials. Indeed, the research found that there was a clear perception that Court 2 was now more efficient than in the past. Sheriff 3 noted:

> It is my view things have changed absolutely dramatically… If you look at the statistics, the number of summary cases hasn't changed… what has happened is more cases are going to trial.
>
> We process the business much quicker. In my view that is due to communication. We have regular meetings with fiscals, agents, court consultative committee meetings. We have meetings with the fiscals if there are any issues, meetings with the social work department. Really, just to make the whole thing work as smoothly as possible. We need so many people to come together for me to sentence… and if it doesn't happen you get the dreaded word 'churn.'

The local bar in Court 2 shared this sense of purpose. Regarding mutual respect and the efficiency ethos of Court 2, Solicitor 6 noted that:

> Court 2, out of all of these [referring to a list of courts and statistics] is a very busy court. Court 1 is busy as well. Court 2, we have lived with a regime down there for many years where efficiency has always been something that has been battered into us…
>
> They pride themselves on efficiency down there [Court 2]. And I wouldn't personally say anything different. And I wouldn't allow

> anybody else to say anything different. And I don't think any of my colleagues would say that they are anything but efficient.
>
> You will not get away with it, but if you've got a good reason for an adjournment or something to be continued you will get it. If it is crap, you will not get it.
>
> Sheriff X is a Sheriff down there and will give you a kicking if you are shit or if you are ill-prepared. You will get a kicking off [him/her]. But you will only get a kicking because you deserve it. [He/she] will not do it for sport.

That the solicitor would not allow someone to "say anything different" is indicative of a keen sense of respect and a belief in the operation of Court 2. Other defence lawyers also shared this positive sentiment regarding Court 2. It is also a sentiment that appeared cuts both ways between the local bar and the bench. Sheriffs place a great deal of weight upon the views of local defence lawyers whom they have come to trust will act in accordance with the shared cultural values of Court 2 (see Chapter 7).

Thus, it appears Court 2 Sheriffs have been successful in fostering a "humane" culture that emphasises mutual respect among legal professionals. Given that Plea Bargaining is the prevalent method of case disposal, and that it benefits from cooperation, this may help to explain the higher proportion of early Guilty Pleas in Court 2.

6 - A Subtle Example of Court Culture: Call Overs

Typically, courts begin at about ten o'clock in Scotland. Formalistic thinking would suggest that most work occurs once the court begins. However, this is not so. Most of the work undertaken in Scotland to dispose of a case concerns Plea Bargaining. A

key finding of this research is just how much Plea Bargaining in summary cases takes place around ten o'clock:

> Most discussion takes place between 9:45 and 10:05 on the morning the case is calling. Where there is a queue of lawyers trying to talk to a stressed out fiscal, who probably hasn't looked at the case and who probably feels they are being bullied just by the very nature of it - you [the defence lawyer] are standing saying [to the stressed court fiscal] "look this is rubbish."
>
> And I know the case inside out, but they [court fiscals] don't. They've just picked it up that morning or maybe the night before. (Solicitor 2)

When a fiscal enters court, they face an "execution line" of solicitors wanting to speak to them (Solicitor 8). To facilitate Plea Bargaining, it is the *custom* of *some* courts to do a 'call over.' During a call over each case will be called to establish who is present, whether cases are ready to proceed, whether cases require to be put off, or whether a Guilty Plea will be tendered. After the call over, the sheriff will usually leave the bench for a period of about twenty minutes.[407] The objective of the judge leaving the bench is to allow the defence and prosecution an opportunity to resolve cases by Plea Bargaining. Whether the call over is advantageous or not is a matter of contention. This research finds that the usefulness of a call over depends on the culture of the court.

I – Views Against Call Overs

Court 2 sheriffs have agreed that they do not do call overs. Indeed, the sheriffs in Court 2 made sure that the new summary sheriff in Court 2 was aware of this practice.

[407] For present purposes leaving the bench is considered as part of the call over.

Court 2's culture leads to the view that call overs are inefficient. Sheriff 6 summed this view up well:

> What is the point of a call over? Really, what is the point? If he pleads Not Guilty he will go to trial later. It achieves absolutely nothing. Just wastes time.
>
> The fiscals know not to say those words [‘call over’] here. I remember one said it one time and I said, "sorry?" They [the fiscal] said, “why are we calling this case when it is just a call over?” I said, “No, no, no. Call your first witness.” The fiscal was surprised.

Through the lens of Court 2's culture, a call over requires the court to delay the commencement of proceedings by about twenty minutes. This period of twenty minutes is a time that a sheriff could spend getting through their business. Likewise, a Court 2 defence lawyer who is ready to proceed would resent the delay as it requires them to spend more time in court and prevents them from attending to other business. Indeed, Court 2 defence lawyers noted that, in contrast to many of their colleagues from other courts, they entered court ready to begin and get cases resolved.[408]

Policymakers have also taken note of the time that call overs *may* waste. However, in reviewing call overs, policymakers have not considered unique court cultures. Consequently, policymakers tend to make wide-ranging recommendations and rules. For example, a review on summary justice recommended against the practice of call overs without noting whether these might be beneficial in some courts:

> We recommend that there should be no call-over of trials (i.e. to determine whether the accused and witnesses are present and whether the trial will proceed) after the time when the first trial is

[408] The joke was that this is how you can always spot a Court 2 defence lawyer.

> due to start and that there should be no adjournments after that time to discuss pleas in cases in which the trial has not commenced.[409]

Formal rules like this are unlikely to be the most effective way to tackle the perceived inefficiencies caused by call overs. Considering unique court cultures, more rules and procedures may have the unintended effect of decreasing efficiency: "the creation of an additional layer of legal institutions [or procedures] may increase conflict and cost, not the expected decrease."[410] Indeed, there are views in favour of call overs.

II – Views in Favour of Call Overs

Despite arguments against call overs, some found them valuable. Solicitor 1 was of this view. Solicitor 1 felt that call overs could provide an opportunity to resolve cases:

> Some of the summary deputes [fiscals] will not have a clue what their case is until they get to court that day. And it can be difficult if you have a sheriff who… most sheriffs do call overs.
>
> We call over all the cases. So, anything that's bumping on or warrants or anything like that. And then the sheriff usually goes off the bench for about twenty minutes and when they come back on the fiscal will know exactly what is running and what is resolving. And that will give them time to resolve all of their cases.

Thus, for Solicitor 1 the call over provides the local court fiscal with an opportunity to evaluate the cases before them. Crucially, this evaluation also allows an opportunity (perhaps the first real opportunity) to evaluate any Plea Bargains. As such Solicitor 1 was unhappy with those who did not allow call overs:

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[409] Scottish Executive (2004).
[410] Feeley (2013), p.71.

> But there's a couple of sheriffs that don't like that and will walk on, not wanting to do a call over. Any pleas that have been negotiated before him coming on the bench, they get dealt with and then its right into a trial. And he doesn't give them any time. I don't think that's right.
>
> I know that the Sheriff Principal have given instructions not to do call overs. The Sheriff Principal has given instructions that these need to be done, basically to make the courts more efficient. So, they just start straight into trials. But other sheriffs are a bit more old-school and go off [the bench] because they see the benefit of giving a depute twenty minutes. And if you have a good depute… if you have a good depute up the road, these should be getting resolved.
>
> Then it's only leaving maybe one or two trials to run for people who don't accept anything, which obviously you get. But there only should be one or two summary trials running. The rest of them should be resolvable.

For Solicitor 1, a call over was an effective way to manage court business. Without a call over Solicitor 1's view was that too many summary cases would needlessly carry on. Other defence lawyers had similar views. Solicitor 4 felt that while some wanted to abolish call overs, this was impractical:

> Some sheriffs want things to start at ten o'clock and all the rest of it. Certain sheriffs want every agent in the court waiting for their case to call. The commercial reality of that is nonsense.
>
> For example, at [Court 3] on a Diet Court (Intermediate Diets or Pleading Diets) you could have 160 cases to call in the morning and another 160 in the afternoon. 160 lawyers are not going to be waiting to get called. They are going to be bouncing around the courts like a ping-pong ball taking care of their other business.

> But some sheriffs, who have perhaps come to the bench without that small firm criminal defence background, don't recognise the reality of the situation. If they've only been walking into court with one file, or if they were at the bar coming in to do one case at a time. So yeah, there is a big difference there.

Other defence lawyers, not from Court 2, preferred call overs. However, interestingly, Solicitor 8 took a nuanced view regarding call overs. Solicitor 8 felt that call overs could be useful for disposing of cases, but that call overs could be used counterproductively. In particular, Solicitor 8 felt that call overs could be a source of delay and inconvenience if sheriffs use them tactically to manage their schedules.

III – Should Call Over Work Take Place Earlier?

In theory, the work undertaken during a call over would be best undertaken by defence lawyers and fiscals before court begins. However, in practice, some busy fiscals work on a triage model:

> The first ten minutes in trials court is you triaging the business of the court, which involves plea negotiation. At summary level that usually happens on the day of trial because that's usually the first time, other than the night before, you'll have seen your cases. (Fiscal 1).

Triage "conjures images of a MASH unit and the sorting of the sick and injured."[411] This triage approach means, that in prioritising certain matters, others fall through the cracks and quality can be reduced. Indeed, as Fiscal 2 noted, one consequence can be that summary justice is often "not so summary." Thus, for the fiscal in court, resolving matters at the last moment may not be viewed as a free choice, but as a necessity. Unfortunately, this is a necessity that is out with court fiscals' control as

[411] Law (2010), P.4.

charges are set elsewhere. There is also a self-perpetuating expectation of Plea Bargaining.

This triage model means that fiscals are only dealing with the most urgent cases. The problem with dealing with urgent cases is that cases may not be dealt with until they reach court and the urgency is imminent. Problematically, this research found that, in practice, fiscals can be unfamiliar with their cases. In part, COPFS encourages this culture by failing to provide court fiscals with enough time to review cases in advance. Where fiscals are unfamiliar with cases, a call over may provide extra time to Plea Bargain. Moreover, cases that plead guilty can help to conceal how unfamiliar fiscals are with cases.

For example, where there is a Not Guilty Plea, the research observed cases where fiscals request special bail conditions.[412] This decision to request special bail conditions is often not made by the local court fiscal. Instead, COPFS will provide the court fiscal with written instructions to request special bail conditions. However, in several instances, the reasons for special bail conditions were not included in the court fiscal's instructions. Where COPFS did not include reasons, the court fiscal (a legal professional) was unable to provide a reason for the restriction to an accused's liberty *that they had just requested*.

Court fiscals being unaware why they are making requests is embarrassing for both the fiscal and the court. The unfamiliarity demonstrates a lack of preparedness and, some accused persons even took it as an indication the justice process did not care about them (see Chapter 8).[413] In one instance of an unprepared fiscal requesting special bail conditions, the sheriff reprimanded the fiscal:

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[412] Special Bail conditions often include staying away from a location, address, or person.

[413] An accused wanting a more prepared fiscal is interesting given that this would not seem to be in their interest.

> You are the one requesting it! You have to justify it…. [in a dismissive tone] If you can't explain it, then we will just put a line through that then. (Sheriff X in Court 1).

Call overs, Plea Bargains, and Guilty Pleas help to avoid such embarrassments. If a call over leads to a Guilty Plea, then the limitations to the fiscal's preparedness do not come to light. While this still leaves systemic issues, it provides a practical option for those in court. Indeed, this may be one reason why defence lawyers feel they can negotiate a better Plea Bargain at the last minute.

Consequently, whether call overs are beneficial ultimately depends on the culture of the court. For those working in Court 2, where a call over is unlikely, they have adapted to do the call over work at another stage. However, where a court's culture relies on call overs, not doing call overs can be inefficient. If a defence lawyer and fiscal are expecting to resolve a case during a call over, the absence of one will result in inefficiency (at least in the short term). In the longer term, there may still be limitations due to broader systemic issues such as fiscals' availability to defence lawyers (see Chapter 9).

Conclusion

The formal law in Scotland does not differentiate between courts. No statutory provision or precedent differentiates between Court 1 and Court 2. However, despite this, there are subtle but significant differences in the operations of courts in Scotland. Legal practitioners explained the differences between the courts as being attributable to different court cultures.

Legal practitioners found describing the cultural differences between courts a challenge. The view was that the culture of a court is a difficult thing to put your "finger on" (Solicitor 4) and that "these are not necessarily provable things in terms of cause and effect" (Sheriff 4). However, legal practitioners were clear that court

culture had significant implications for practice. Court cultures could encourage, sometimes require, certain practices over others. Legal practitioners believed that the culture of Court 1 has encouraged later Guilty Pleas. By contrast, legal practitioners believed that the culture of Court 2 has encouraged earlier Guilty Pleas.

Part 1 of this chapter analysed the general belief that every court has its unique culture. Part 2 scrutinised the perceptions of Court 1's culture. Part 3 scrutinised the detailed accounts of how Court 2's unique culture emerged. Part 4 interrogated the perceived importance of judicial culture in courts. Part 5 examined how incumbent sheriffs have tried to manage Court 2's culture. Finally, Part 6 explored how subtle differences in court cultures can have significant implications for policymaking and reforms to routine practice.

The importance of court cultures challenges policymakers' formalistic conceptions. In terms of the formal law concerning Sentence Discounting, culture can mean that Sentence Discounting fails to encourage early Guilty Pleas as policymakers might assume. For example, this research found evidence that Court 1's culture was changing. This cultural change may have had greater effects on early Guilty Pleas than Sentence Discounting. While policymakers established the formal law on Sentence Discounting over a decade ago, it is only recently Court 1 is seeing more early Guilty Pleas:

> It would be wrong to say the discount on its own works... section 196 has been in place for a number of years and it's only latterly we have seen more early guilty pleas [in Court 1]. (Sheriff 2)

In conclusion, policymakers conceive of Sentence Discounting as a means to promote the expedient disposal of cases. The premise of this is that it provides an incentive for rational persons to plead guilty. However, court cultures have critical policy implications when trying to predict how legal changes will impact the expedient

disposal of cases. Court cultures are replete with complex (and sometimes competing) dynamics that policymakers ought to consider.[414]

[414] Unfortunately, the difficulty policymakers face is that there is almost no research regarding these court cultures.

Chapter 7: How do Defence Lawyer Cultures Influence Early Guilty Pleas?

Introduction

Chapter 6 demonstrated that each court is thought to possess a unique culture: different ways of 'doing things' and ascribing meaning. Unique court cultures help to explain the differences between the number of early Guilty Pleas in otherwise similar courts such as Court 1 and Court 2. Chapter 6 demonstrated that the judicial culture within a court plays a significant part in the court's overall culture. However, judicial culture alone does not constitute court culture. This research found that legal practitioners (judges, prosecutors, and defence lawyers) also perceived the culture of defence lawyers within Court 1 and Court 2 to be significant.

The research revealed that there are competing functions that defence lawyers are expected to perform in summary criminal work. The radical indeterminacy of the formal law means that defence lawyers can justify a variety of different approaches regarding pleading based on how they reconcile their competing functions. Crucially, the research found that different cultures between Court 1 and Court 2 lead defence lawyers to reconcile these functions differently.

Part 1 of this chapter shows that the cultures of defence lawyers can conflict with judicial culture. For a *relatively* 'settled' court culture, such as in Court 2, it is necessary for a degree of cultural homogeneity between defence lawyers, prosecutors, and judges. Part 1 also interrogates the importance of defence lawyer cultures in encouraging or discouraging early Guilty Pleas. Formalistic assumptions suggest that accused persons decide how to plead and that the defence lawyer acts as a 'mouthpiece.' However, defence lawyers considerable influence on plea decision-making challenges these formalistic assumptions. Moreover, defence

lawyers' ability to influence plea decision-making allows them to facilitate or hinder the policy intentions behind Sentence Discounting.

Part 2 scrutinises the tension between the competing roles that policymakers expect defence lawyers to perform. The first role policymakers expect defence lawyers to perform requires them to be a zealous advocate for their client's interests. The second role defence lawyers are expected to perform requires them to consider demands made by a *contemporary*[415] interpretation of their obligations as officers of the court.

Part 3 interrogates zealous defence cultures and how this is perceived to affect the expedient disposal of cases. How defence lawyers reconcile their zealous role has a great deal of influence on Guilty Plea trends and the effectiveness of Sentence Discounting. Part 4 scrutinises the unspoken role lawyers must play as self-interested business people. This self-interest is something policymakers have tacitly attempted to manipulate with changes to Legal Aid.

Finally, Part 5 probes the culture of defence lawyers acting as contemporary officers of the court. Part 5 argues that in some contexts the lack of a zealous defence could work against the interest of clients. However, Part 5 also shows that those in Court 2 do not believe their method of practice to be detrimental to the accused persons' interests. Rather, those in Court 2 perceive their practices to be beneficial to accused persons.

[415] All lawyers are 'officers of the court.' However, policymakers have a contemporary interpretation of the obligations being an officer of the court entails.

1 – What is the Defence Lawyers' Role in early Guilty Pleas?

A –Culture Clash: Defence Lawyers and the Judiciary

This research found a perception that judicial culture differed between Court 1 and Court 2 (see Chapter 6). This difference made for an interesting point in interviews where Court 2's judicial culture clashed with the expectations of defence lawyers from other courts. Where a culture clash occurs, the research found that both sides perceived the law to be in their favour and argued for their preferred 'way of doing things.'

For example, Solicitor 8 was not primarily based in Court 2. Solicitor 8 spent most of his time practising in Court 1 and Court 3. Court 1 and Court 3 are perceived to have a culture that better tolerates adjournments, etc. (see Chapter 6). Solicitor 8 found that the culture in Court 2 clashed with the culture of his 'home courts.' As such Solicitor 8 was critical of the culture in Court 2:

> Down in [Court 2]… they are riding roughshod through the Criminal Procedure Scotland Act.
>
> For example, it is not common – in fact, it is extremely uncommon – for cases not to proceed at the trial diet, in which case it gets adjourned to a new date. That can happen for a number of reasons: witnesses don't turn up, the Crown hasn't given disclosure to the defence, it doesn't suit the defence for whatever reason (whether they've got business elsewhere at a superior court or various bits and bobs).
>
> And put it this way, trying to get a case adjourned in [Court 2] even if it is the first Trial Diet, and the case might've only been in the court for six weeks – from the Pleading Diet to Trial Diet - it will run. Even though the law says that if both parties agree (the Crown and the

> defence), there can be an adjournment. And these guys are getting appealed all the time because of it.

Solicitor 8 felt that he was correct and that his method of practising was in accordance with the formal law and the interests of justice. However, sheriffs in Court 2 also felt that their practice was what the law and justice required.[416] Sheriff 4's formal narrative of the law regarding Court 2's practice was that:

> We are not expecting anyone to do anything that isn't set out in the Criminal Procedure [(Scotland)] Act 1995. We are just following what has been set out by Parliament.
>
> I would argue there are courts… where perhaps for reasons of volume of caseload and other similar matters, that they find it hard to stick to the regime that was envisaged by the 1995 Act.

Again, this research shows that, while all courts apply the same formal law, the formal law itself is radically indeterminate. The formal law provides little certainty or direction as to how cases ought to progress (what can be called the 'trajectory' of a case). What determines how courts operate is the interaction of formal law and culturally-embedded narratives within courts (see Chapter 9).

This culture clash again shows that *part* of what enables a court's unique way of operating is its judicial culture: such as Court 2 being 'strict' regarding adjournments. However, while established court cultures may be thought to be robust, due to the transient presence of defence lawyers from other courts they are not entirely "settled."[417] This competition between cultures is why Chapter 6 noted that it is essential that the judiciary in Court 2 communicates and enforces their vision of how cases ought to progress.

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[416] Chapter 9 interrogates how legal practitioners reconcile 'culture' with the formal law.

[417] See Chapter 4 and Swidler (1986).

However, judicial culture is not the only component of court culture. As the culture clash shows, compatible defence cultures are also important. If judicial culture was all that was necessary, then it is likely that policymakers would have had more success replicating Court 2's culture throughout Scotland. Those in Court 2 certainly felt that there was a desire to replicate Court 2's working practices, but that this was complicated:

> I think the Scottish Court service would be quite happy to replicate Court 2 across the county if they could. But nobody knows how to do that. It is a particular culture that has grown up over a number of years for different reasons. (Solicitor 7)

The importance of defence lawyer cultures is why Chapter 6 noted that it is remarkable that the 'old bench' is perceived to have unilaterally changed Court 2's culture. Such cultural change does not occur without resistance as many attempts at policymaking have discovered.[418] Thus, Chapter 7 argues that defence lawyer cultures and their level of compatibility with judicial culture are vital.

B – Defence Lawyers Influence on Plea Decision-Making

Accused persons reported that they relied on their lawyer's advice in deciding how to plead. In part, accused persons regarded their lawyers as experts whose advice it was prudent to take. However, accused persons also expressed a view that they followed their lawyer's advice because they had little viable alternative.

Accused 3, when asked why they plead not guilty, attributed it entirely due to the advice of her lawyer:

[418] Feeley (2013).

> I just did what my lawyer told me. I don't really know much about it, but they do. They're the expert.

As a result of pleading not guilty, Accused 3's case had been postponed several times. Accused 3 perceived this postponement to work in her interests:

> Every time it is delayed the Crown loses evidence. So that's good.

Whether the prosecution really lost evidence each time the case was postponed is irrelevant here.[419] Accused 3 admitted she did not know the details of her case and relied on her lawyer's advice. Accused 3 was also aware that she had no way of independently assessing her lawyer's advice, but she still followed it. Adding to Accused 3's reliance on her defence lawyer was that she already had a "bad experience" trying to resolve the case herself. This experience had damaged her confidence.

Accused 3 reported that she had agreed to a voluntary interview under caution without legal representation. Accused 3 reported that she agreed to the interview as the "benefits office" presented it as a means to remedy her situation and told her a lawyer was unnecessary. Accused 3 regretted this interview and noted, "that's [the interview] what they had against me. My own interview. My lawyer told me that it was a mistake."

Other accused persons, while still relying on their defence lawyer, were wary. Accused 1 commented that:

> The lawyers don't really seem to know what's going on a lot of the time. I think they just tell you what you want to hear. They are also very vague when you ask what you will get.

[419] There is a common perception among legal practitioners that, if pleading not guilty, it is not uncommon for productions to go missing.

Likewise, Accused 12 noted that:

> I spoke to three lawyers, and they all told me different things. One told me I have no chance of getting off. The other told me I had an excellent chance. And the other one told me it was fifty-fifty. So, it's hard to know who to believe and trust.

Similarly, Accused 9 (an experienced accused) noted that:

> You get a guesstimate. But, that's just a… you know you might get 18 months for something. But, some lawyers will say you'll get 18 when you'll only get 6 so that you're like, "result!"
>
> But, everybody knows who they use and who they don't use. So, they [defence lawyers] say you'll get one thing that's more extreme than what you'll actually get; so, you're like, "I'll get you a bottle of vodka for that."

To this end Accused 9 looked elsewhere for answers and certainty:

> I've noticed this, see the screw that writes stuff down, the copper. You see him writing down the date they're up or whatever. They seem to know a fucking lot, and they're not part of the loop. I've heard them say, "you're getting out," when my lawyer says to me, "they're opposing the bail." And you're like, "how the fuck does he know that?"

Unusually, Accused 6 received a worse sentence than had been indicated by their lawyer. This worse sentence led Accused 6 to ask questions about the certainty of the criminal process:

> My lawyer seems to think that if there were more trials on, we would have gotten a better deal. But you don't know because you're not privy to the conversation [between the defence lawyer and the prosecutor]. So, you just have to take it on trust.

Consequently, this research found that the pressures the criminal process places upon accused persons can engender trust in (or at least reliance on) defence lawyers.[420] However, one question this research sought to address was whether there might be something of a 'you get what you pay for' mentality with regards to a 'free' (i.e. legally aided) defence.[421] Certainly, there have been some questions raised about the role of defence lawyers and remuneration:

> The pressures of bureaucratic case management and the financial disincentives to take cases to trial make effective legal representation problematic even in adversarial-type procedures, and researchers have been critical of defense counsel's role in pressing accused persons to accept a plea deal… This is significant, as the courts assume defense counsel is a kind of guarantor of the voluntarinesses of the defendant's plea.[422]

In this research, accused persons did not appear to be wary of legally aided defence lawyers. One reason for this is that there appears to be a perception among accused persons that defence lawyers profited more the longer a case carried on.[423] This incorrect perception that defence lawyers are on a time-and-line basis may improve trust. Indeed, by contrast, sheriffs felt that the front-loaded nature of defence lawyers fixed fees helped to encourage earlier Guilty Pleas:

> I think changes to the Legal Aid system have made it more beneficial for agents to plead at an earlier stage. So, they will look at [cases] and investigate more quickly (Sheriff 4).

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[420] For example, Accused 5 had little knowledge of the system. However, his default position was to trust his lawyer (whom he found online).
[421] Casper (1978), p.17.
[422] Hodgson (2013), p.229.
[423] Accused 1, Accused 3, and Accused 11 suggested this belief (e.g. Accused 1 noted that lawyers "line their pockets" with trials).

Sheriff X was of the same view and even wondered if the front-loading had gone too far:

> That's why the agents are interested [in Guilty Pleas]. Because they want to get paid. So, they want to get the case in, and they want to get the case out…. I think now the difficulty is it's all very front loaded… [But] really the front-loading has helped things [early Guilty Pleas].

Thus, sheriffs perceive that Legal Aid has helped to promote early Guilty Pleas. However, accused persons do not seem to perceive the system of remuneration as having a significant impact. The main point noted by accused persons was that defence lawyers might attempt to manipulate expectations to make outcomes seem better. The reason accused persons thought this occurred was to promote customer satisfaction and repeat business.

I – Defence Lawyers' Tact

Helping with lawyer-client trust is that, in practice, defence lawyers approach the issue of pleading guilty and Sentence Discounting with tact. Solicitor 2 noted that "you frame it in different ways for different people (as you would all things)." Likewise, Solicitor 5 approached the discount as, "I am not saying you are guilty, but I am obliged to inform you."

This tactful approach makes the accused aware of the Sentence Discount and discharges the defence lawyer's duty. However, these tactful approaches do not necessarily commit the defence lawyer concerning their recommendation of how to plead. Likewise, while Solicitor 1 was blunt, they still used diplomacy:

> No. I don't find it awkward or tricky. I just let them know this is what I've been able to do [regarding a plea deal]. This is my advice on it, but it is a matter that is entirely for you.

> I think you just have to be honest and upfront with them or you'd be doing them a disservice otherwise.

Indeed, the research found that defence lawyers felt a need to be careful with how they justify advice to clients. Solicitor 4 noted that "you need to cover yourself." For example, Tata has noted the embarrassment caused by "Innocent Guilty Pleas."[424] An innocent Guilty Plea occurs where an accused claims innocence while formally pleading guilty. Beyond embarrassment, there are difficulties for defence lawyers with innocent Guilty Pleas. Solicitor 1 noted that:

> It puts you in an awkward position as well because you've tendered a plea, you've taken instructions, and you've done that [guilty] plea.
>
> And say you've then got a report that's very contradictory to the terms of what you've pleaded to. You then have to clarify from your client whether or not that is his actual position or was it what he told you when the plea was tendered.
>
> If it is then, at a later stage, "no its what's in my report." Then I have to withdraw from acting.

Interestingly, the research found that one advantage defence lawyers found in a Guilty Plea is that in some cases it may avoid the need for a report. Avoiding reports can be beneficial for both the defence lawyer and the client. For defence lawyers, avoiding reports can save the difficult issues noted above. For accused persons, in some cases, the lack of a report means that a lower sentence may be likely. In other cases, avoiding a problematic report is useful as it:

> Just prolongs the whole process again. And then at that point, because of this, it's trundling on. And in the back of a sheriff's mind, he will think your discount is going to get less and less. (Solicitor 1)

[424] Tata (2007a)

Solicitor 2 also noted the risk of an accused changing their mind, or even turning on their solicitor. The concern is that in some instances the client may attempt to "scapegoat" the lawyer. Solicitor 2 noted that in an instance where it seems possible the client may turn on the solicitor then "written instructions" will be taken. These written instructions serve to prove what transpired and protect the lawyer.

Thus, Guilty Pleas are not as client-driven as formalistic notions suggest. For a variety of reasons, such as a lack of confidence (Chapter 8 investigates this), accused persons can be likely to plead in line with the defence lawyer's advice. That accused persons generally plead in line with defence lawyer advice means that defence lawyers largely determine pleas. Accordingly, defence lawyer cultures can affect overall pleading trends within a court.

This research found that some defence lawyers will choose to 'plead out' cases and rarely go to trial. For those who plead out cases, Sentence Discounting is a convenient justification on top of the other reasons for pleading guilty (e.g. to minimise risk). However, the research also found that some defence lawyers will take cases to trial as a matter of routine. For defence lawyers who are inclined towards going to trial, the Sentence Discount has less of an effect. Thus, an essential question concerning Sentence Discounting's effects is, what defence lawyers do within the criminal process?

2 – The Role of Defence Lawyers?

The research found that defence lawyers in Court 1 and Court 2 interpret their roles in subtly different ways. While there is a nuance to this, at its most basic, there are two divergent roles that policymakers expect defence lawyers to serve in the criminal process. The first role is that of a zealous advocate for the interests of the accused.

The second role is based on a contemporary conceptualisation of defence lawyers as an officer of the court.[425]

These roles constitute 'ideal types.' While a defence lawyer may lean more towards one type than the other, they will not perfectly adhere to either. Indeed, the research found that there is a demand for defence lawyers to comply with multiple roles that would make adherence to only one role problematic.

A – The Zealous Advocate Role for Defence Lawyers

One role policymakers expect defence lawyers to perform can be characterised as zealously adversarial and focused firmly on the interests of the client.[426] This role means that defence lawyers ought to defend clients with little consideration for 'justice' in the broader sense. In practice, performing this zealous role can mean that defence lawyers are perceived as uncooperative, unconcerned with the efficient administration of justice, continually putting the prosecution's case to the test, and prone to lodging appeals.

In its early conception by Lord Brougham, the zealous role required the lawyer to protect the client "by all expedient means" and despite "hazards and costs to all others."[427] While Nicholson and Webb note that political issues were motivating Lord Brougham's statement, they also argue that contemporary "judicial dicta sing the same tune with a libretto hardly less florid" and that rhetoric urges lawyers to defend clients "to the end."[428] This zealousness is what defence lawyers in Court 1 were felt to exhibit to a greater extent than Court 2:

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[425] Additionally, as is noted below, there is a third role that defence lawyers must perform: that of self-interested business people.
[426] Smith (2013).
[427] Nicolson and Webb (2000), p.162, para 2.2.
[428] Nicolson and Webb (2000), p.162, para 2.2.

> The agent's view [in Court 1] was that they were going to do what they thought was correct, not necessarily what was the best for the court. But certainly, the best for their client as they saw it (Sheriff X).

Guidelines from the Law Society of Scotland (the regulatory authority for defence lawyers) can be interpreted as supporting the zealous role for defence lawyers. For example, section 14.3 notes that:

> You must at all times do, and be seen to do, your best for your client and must be fearless in defending your client's interests, regardless of the consequences to yourself (including, if necessary, incurring the displeasure of the bench).[429]

This type of zealous defence work is what is most conducive to an adversarial notion of a justice system. However, as noted, the Scottish justice system, while notionally adversarial, is not always such in practice. Indeed, Plea Bargaining as a method of case disposal often reduces adversarial traits. While rhetoric may 'sing the tune' of a zealous defence, this is subject to so many caveats that the role of the defence lawyer becomes formally indeterminate. For example, the final sentence of section 14.3 caveats the duty to do "your best for your client" with the traditional, "but:"

> But you must also remember… that your duty to your client is only one of several duties which you must strive to reconcile.[430]

This caveat to paragraph 1.4.3 does not state what other duties a defence lawyer must reconcile. Other sources, such as judicial dicta, share this radical indeterminacy. As such, what these other duties might be is not definitively discernible from the formal law alone. However, this research found that a key duty imagined for defence lawyers encompasses a potentially conflicting role that requires them to aid the court

[429] Law Society of Scotland (2011), Rule B.1.4.
[430] Law Society of Scotland (2011), Rule B.1.4.

and promote 'efficiency.' Interviewees described this role by emphasising defence lawyer's duties as an 'officer of the court.'

B – The Contemporary Officer of the Court Role

The *contemporary* officer of the court role is one whereby the lawyer should help ensure the 'efficient administration of justice.' This role leads to conflict as 'efficiency' is not a concern that would necessarily be shared by a zealous advocate. Indeed, 'efficiency' can be at odds with a zealous defence in many cases.[431] Moreover, other traditional concepts such as the principle of neutrality, "insulate lawyers from considerations of morality, justice or politics."[432]

Sheriffs in Court 2 stressed this contemporary conceptualisation of defence lawyers as officers of the court:

> An agents' first duty is to the court. And that is all there is to it. (Sheriff 6)

The '*contemporary*' interpretation of the officer of the court role is worth stressing. All lawyers in Scotland are officers of the court in the traditional sense. This traditional notion of an officer of the court is what underlines the prohibition against misleading the court, etc. Yet, the contemporary conception of the defence lawyer's role as an officer of the court is significantly, but subtly, different. Traditionally, Smith argued that being an officer of the court was a secondary role that came after being a zealous advocate:

[431] Inefficiency, such as postponements, increases the chance of a case collapsing and may work to an accused's favour.
[432] Nicolson and Webb (2000), p.163, para 2.2.

> The duty to the client is paramount; the duty to the court is essential but secondary, whilst the duty to the public – a contentious obligation in itself – is the least prominent and robust.[433]

However, Smith argues that this zealous role has been declining in recent years as a result of:

> Subtle and gradual change, with little explicit acknowledgement by the primary architects – successive Governments and the Judiciary.[434]

Within Scotland, Sheriff Principles[435] already have a statutory duty to promote the efficient administration of justice. This duty is imposed by section 27 of the Courts Reform (Scotland) Act 2014. To give effect to this duty, the Sheriff Principal must, among other things, instruct sheriffs who will, in turn, encourage defence lawyers to operate in a manner more congenial to efficiency. Thus, it is unsurprising that more recently "lawyers are said to owe an allegiance to the 'higher cause' or truth, justice, and the public interest."[436] However, while advocated by policymakers, the specific obligations imposed by the contemporary conception an officer of the court are still being decided and revised by policymakers.

The importance of the distinction between these defence lawyer roles has increased. Policymakers are attempting to cement the proper role of defence lawyers as contemporary officers of the court. The zealous aspects of defence lawyer culture are resistant to these attempts. Indeed, much of the controversy regarding Sentence Discounting relates to this tension: should defence lawyers be used to improve 'efficiency' by advocating Sentence Discounts, etc?

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[433] Smith (2013), p.113.
[434] Smith (2013), p.111-112.
[435] A management role within a Sheriffdom.
[436] Nicolson and Webb (2000), p.164.

The contemporary notion of defence lawyers as officers of the court (conducive to promoting Sentence Discounting and early Guilty Pleas) is a feature of a “Liberal Bureaucratic”[437] model of justice. To call the contemporary officer of the court a Liberal Bureaucratic trend is to place it somewhere between Crime Control and Due Process on Packer's spectrum.[438] This placement acknowledges that the contemporary officer of the court has crime control tendencies (promoting Sentence Discounts and early Guilty Pleas), but that ideologically due process remains paramount. However, Bottoms and McClean argue that, ultimately, Liberal Bureaucratic trends encourage "sanctions to deter those who might use their ‘Due Process' rights frivolously."[439] These sanctions are “quintessential to the crime control model.”[440]

The significance of the contest over the role of defence lawyers is not only supposition or a normative argument. This research found that legal practitioners perceive that the role defence lawyers perform is vital in both practical and normative terms. Moreover, the Criminal Procedure Rules 2011 in England and Wales demonstrate the importance of how policymakers conceptualise defence lawyers' role. While the 2011 Rules passed with little fanfare, the effect of these changes has been dramatic.

The 2011 Rules have fundamentally caveated the rhetoric of adversarialism and zealous advocacy.[441] The 2011 Rules impose an “overriding objective” of “justice.” Among other things, the 2011 Rules require "convicting the guilty." This duty to convict the guilty applies to defence lawyers. In creating this duty, the 2011 Rules

[437] Bottoms and McClean (2013), p.228
[438] Bottoms and McClean (2013), p.228
[439] Bottoms and McClean (2013), p.228
[440] Sanders, Young, and Burton (2010) p.516
[441] E.g. *DPP v Malcolm* [2007].

expand defence lawyers' duties from negative ones (for example, the duty not to knowingly mislead the court) to a more expansive positive duty: "justice" is yet another indeterminate term.

In practice, the 2011 Rules have been interpreted to mean that the defence (accused persons and their lawyers) are not able to rely on tactics such "technical points,"[442] ambush at trial, mistakes on the part of the prosecution, etc.[443] This is an interpretation of the interests of justice that seems to work against the interests of the accused.

In sum, this section has argued that policymakers are leaning increasingly towards defence lawyers having a duty to aid the efficient administration of justice. Policymakers are promoting the view that the role of defence lawyers is to act in accordance with a contemporary notion of what it means to be an officer of the court. This contemporary notion challenges the traditional role of defence lawyers as zealous advocates. This challenge is contentious as it represents a potential problem for due process values.

3 - The Culture of the Zealous Defence

The research found that Court 1's defence lawyers were perceived to be more zealous. Zealous defence lawyers pose a number of challenges to 'efficiency' and to Sentence Discounting's ability to induce early Guilty Pleas. For policymakers, a key challenge is that zealous defence lawyers are perceived to be less concerned with efficiency. Moreover, policymakers feel that some traits of zealous defence lawyers can hinder 'efficiency.'

[442] "Technical points" appears to be a euphemism for the formal law.
[443] For example, see R (DPP) v Chorley Justices [2006], and DPP v Stephens [2006].

Part A explores how zealous notions delay Guilty Pleas by compelling gamesmanship. Part B explores how conflicting roles require defence lawyers to limit how much information the accused provides: delaying the point at which a defence lawyer can safely advise a Guilty Plea. Part C explores the highly inefficient practice of Sheriff Shopping, which arises because of zealous defence notions.

A - Plea Bargaining and Overcharging

Defence lawyers and accused persons thought that Sentence Discounting offered *some* incentive for an early Guilty Plea (or a disincentive to pleading not guilty). However, counter-intuitively, defence lawyers and accused persons felt that Charge Bargaining and Fact Bargaining provided reasons to avoid pleading guilty early.

The research found a clear perception that "overcharging"[444] occurs and that this is detrimental to early Guilty Pleas. Overcharging is thought to negate the benefit of the Sentence Discount in many cases, and thus prevent the Sentence Discount encouraging a Guilty Plea. Indeed, Accused 10 (who pled guilty at the Trial Diet) noted that he would have liked a Sentence Discount, but pleading guilty early would have made "no sense" in light of other forms of Plea Bargaining that were on-going during his case.

Consequently, while policymakers assume Plea Bargaining is a mechanism for early Guilty Pleas, Solicitor 4 noted defence lawyers almost never plead guilty to a complaint "stock and lock." Instead, defence lawyers normally delay a Guilty Plea until they have Plea Bargained. Solicitor 2 shared a similar sentiment:

> It is very rare, *very rare*, that I will plead guilty as libelled to anything.

[444] Alschuler (1968), p.85.

Solicitor 2 described the process as almost always requiring work to "whittle it [the complaint] down to the nuts and bolts." Their view was that the remote prosecution Marking Hubs[445] "tack on" charges, and that the fiscal is generally only interested in part of the complaint. Why Marking Hubs might overcharge is unclear as the lack of research on Scotland's prosecution services mean that the perceived operational imperatives are unclear (see Chapter 3 and Chapter 5). However, it is possible that overcharging in Scotland is systemic as it is in other jurisdictions:

> [Overcharging] is built into the process; when advising the police on what to charge, Crown Prosecutors will note on the file from the outset the charges to which they are prepared to accept a plea of guilty. This, of course, runs the risk of even unconscious overcharging in order to build in space for later negotiations.[446]

For example, Solicitor 1 noted a recent case in which they believed that the Marking Hub had overcharged. As a consequence of perception of overcharging, the defence lawyer did not feel they could advise the client to plead Guilty at the outset:

> [Fiscal X is] very reasonable in [her/his] pleas whereas as you get some… For example, there I've had a client walk through the door, and he was charged and offered a Fixed Penalty Notice: 3 points and £100 fine for a section 3.[447] He had forgotten to pay it and has now received a citation for a Section 2, which is a horrific Section 2.[448]

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[445] National Initial Case Processing units (known as Marking Hubs) are where most summary cases are "marked." Marking is the process where a fiscal decides what charges to libel against an accused following the receipt of a police report. See Chapter 5.
[446] Hodgson (2013), p.228.
[447] 'Careless and inconsiderate driving,' which carries the lowest fine and point penalty possible.
[448] 'Causing serious injury by dangerous driving.'

> Obviously, the police officers didn't think it was that horrific a Section 2 if they offered a fixed penalty notice.
>
> So that's when you go to somebody in the marking hub and they just… I don't know if there is tunnel vision to say, "we need to mark this as serious to justify going to the Sheriff Court." Whereas realistically I know, well I'm pretty confident, that I'll get that back down to a Section 3.
>
> And then I'll say to a Sheriff I was offered an FPN [Fixed Penalty Notice], so I know it'll be at the lower end of the scale in terms of points. But right now, we are looking at 12 months disqualification and a large fine, or a CPO [Community Payback Order].
>
> I think they add stuff on because they know it's going to get negotiated down. I feel like they will absolutely fling on everything, knowing in the background that if the lawyer negotiates that they'll only get found guilty of what they might've actually done.

This is a representative example. The defence lawyer felt the charges had increased in severity as a result of the accused not accepting their guilt. This perceived increase challenges assumptions that different charges are the result of an accused not benefiting from a discount (with implications for the presumption of innocence). The defence lawyer also noted that they believe that the inflated charge might have been thought necessary to justify taking the case to court, or to encourage the accused to accept their guilt. This point again highlights the problems with COPFS's opacity and the lack of research on prosecutorial decision-making in Scotland.

The problem with a perception of overcharging is that the initial complaint is not usually one that defence lawyers feel they can plead guilty to. Instead, defence lawyers feel they must work with the court fiscal to address the perceived

overcharging or go to trial. To this end, the overcharging has accomplished little regarding the expedient disposal of the case.[449]

Interestingly, Court 2 was not immune to overcharging, but Court 2 defence lawyers did not suggest fiscals intentionally overcharged as some other defence lawyers did. Solicitor 3 noted that:

> I don't think that [overcharging] happens at the level of the fiscals. I think it happens the level of the police. And I think the problem is that the fiscal service because of [resource] restraints, they tend to replicate what the police have put down (assuming that they've ticked the boxes for requirements of evidence)….

This view that fiscals do not overcharge reflects the more congenial working relationships between Court 2 defence lawyers and fiscals. This culture allows Court 2 to more quickly 'whittle down' complaints to a point where a Guilty Plea is justifiable.

However, as with call overs, the effects of overcharging may vary based on local cultures. For example, the research did find a perception among fiscals that "adding things on to take them out later" can be an effective strategy for Plea Bargaining (Fiscal 1). Solicitor interviews also suggested that they like to be able to demonstrate what they have done for clients and that clients like to know what benefit a Guilty Plea has for them. Thus, overcharging is one factor of "the dreaded word churn" (Sheriff 3), but overcharging may have advantages depending on the court culture.

[449] Bar making it likely the accused will gleefully accept the initial offer should it made again.

B - The need for Plausible Deniability - "You never ask a client if they did it"

Defence lawyers have long had to manage competing notions of their proper function. While they have not always been able to reconcile these tensions, they have at least developed some techniques to avoid them. One of these techniques poses challenges for Sentence Discounting's ability to encourage Guilty Pleas.

Policymakers assume that accused persons will learn of Sentence Discounting from their lawyer. Moreover, policymakers also assume that the Sentence Discount provides a rational reason for defence lawyers to advise a Guilty Plea. Yet, to advise a Guilty Plea, a defence lawyer must be able to justify their belief that the client is genuinely guilty. One, seemingly simple, way to do this is to ask the client if they are guilty. As Sheriff 6 noted with late Guilty Pleas:

> I often say to [solicitors] at the Intermediate Diet or Trial Diet, "so why is this a plea now?" And they say, "oh, we only got disclosure last week." But the client knew. The client knows perfectly well that they were driving while disqualified or whatever.

While this is perfectly sensible, in some cases practitioners noted that clients' knowledge is limited. Solicitor 7 noted that with regard to assuming clients know their guilt:

> You can't say that. Guilty of what? They've not got a law degree…. I don't like Gemmell for that reason as it's too simplistic.

Defence lawyers also noted that, usually, they should not ask a client whether they are guilty. For example, Solicitor 4 noted:

> "Did you do that?" is not usually a question you'll ask…it is the last question you ask. You tend to ask things like, "here's what the Crown is saying, what is your memory of this particular night?"

> "Can you tell me your version of events?" is usually a safer way of approaching it because it gives them an opportunity to give you what their version of events is. And then you give them advice.

At first, this seems a strange position. One might think that to mount the best defence possible a defence lawyer should seek as much information as possible. Indeed, the research found that clients, in general, do not plead guilty until their solicitor advises it. Clients waiting to be advised to plead guilty is problematic as the interviews show that solicitors may not feel safe to advise a client to plead guilty until they have enough information to justify this advice. Not asking clients if they are guilty means that defence lawyers must wait longer (e.g. for disclosure) before they have this information.

The reason why defence lawyers do not try to extract as much information as possible from the accused is due to the way they manage the contradiction between their roles as zealous advocates and *traditional* officers of the court. The practical issue is that a client admitting guilt puts severe limitations on what the defence lawyer can safely put to a court. Indeed, these limitations can be so significant that the defence lawyer may turn away business as they cannot reconcile these competing obligations. As Solicitor 2 noted:

> If a client comes in and says, "I did it," then I need to tell them to find another lawyer. I can't represent you.

Turning away business is how defence lawyers have adapted to conflicts between the conflicting requirements of the zealous advocate model and the traditional officer of the court model. The bounds of their professional ethics do not allow any apparent resolution other than avoidance, which has collateral effects concerning defence lawyers' (and Sentence Discounting's) effect on early Guilty Pleas. Solicitor 5 noted how they approach the matter and how the Sentence Discount is just part of the equation:

> [Clients] always ask "what do you think?" And I say, "well if you didn't do it you can't plead guilty, I can't plead guilty for you. But if you did do it, *or if you want me to explore something with the Procurator Fiscal?*" And quite often they will say, "yeah, we will see what you can do."
>
> And if they say, "take the deal," I always make sure. I say that "now that you are doing this, I can't say that you didn't do it. You told me that you didn't do it, but now I am going to have to say that you did do what we now agreed."

Consequently, a defence lawyer knowing too much is an unenviable and challenging position that may require them to withdraw from acting and not get paid. This risk means that defence lawyers avoid asking the crucial factual questions outright. Instead, they approach the matter indirectly, and carefully, so as not to reveal too much. They ask questions such as, whether the client was in the locus or has an alibi, etc. These closed questions (or limited open questions) prevent the client from divulging something which the lawyer does not want to know.

C - Sheriff Shopping – The Trait of a Zealous Advocate

The research found a perception that "Sheriff Shopping" is a widespread practice that defence lawyers participate in. Sheriff Shopping is the practice of trying to avoid an unfavourable judge by, for example, pleading not guilty. This desire to get a new sheriff will frustrate the ability of Sentence Discounting to encourage early Guilty Pleas. Sheriff Shopping also results in cases taking longer to be disposed of and extra expense.

Solicitor 2 noted that, for several reasons, certain sheriffs might look harshly upon certain offences and that defence lawyers will try to avoid them when a client is

accused of that offence.[450] Solicitor 4 rattled off various sheriffs they knew to provide their opinion on whether they were desirable to appear before. In part, this opinion went beyond the sheriff's stance on various offences and went to the defence lawyer/judge relationship. As Solicitor 8 noted:

> You get to know them [sheriffs], and they get to know you. Personality goes a long way. There is a very small number of sheriffs who just clash with the lawyers in open court. And that doesn't get you anywhere… These sheriffs are notorious…

When asked if they would Sheriff Shop, Solicitor 8 noted:

> Absolutely. Done it hundreds of times, trying to come up with a reason to get it out of their court.

How zealous the defence lawyer is may influence how often they Sheriff Shop. For example, Solicitor 6 noted that they did not Sheriff Shop in Court 2 and out with Court 2 they did so rarely:

> [Not] unless you get somebody who is high end hard on that kind of stuff [the present case]… We [in Court 2] are not waiting [to plead Guilty] because the sentence is higher, generally.[451] There are one or two [exceptions not from Court 2], but I'm not going to name names, who can be a bit unreasonable.

What makes Sheriff Shopping one of the most interesting phenomena in the courts is why defence lawyers bother to engage in the practice. The answer goes back to the competing roles that defence lawyers play. The contemporary notion that a defence lawyer's obligations are in line with acting as an officer of the court does not explain

[450] For example, Solicitor 2 noted that a sheriff who was recently burgled may not be thought desirable for an offence involving housebreaking.
[451] Again, note the perception that not pleading guilty results in a higher sentence.

Sheriff Shopping. Even if there is a disparity between judges, for the contemporary officer of the court, this is not an issue as long as it is within the permissible range of sentencing outcomes.[452]

So, why do defence lawyers feel the need to get their clients the lowest sentence within this the legally permissible range? Within this range, the defence lawyers have done their duty. The reason is that defence lawyers, to varying extents, feel the need to advocate the interests of their clients zealously. The more defence lawyers feel this need to be zealous, the more likely they are to engage in 'inefficient' practices like Sheriff Shopping. This finding that defence lawyers' culture can influence Sheriff Shopping and early Guilty Pleas is a key finding. The finding challenges formalistic thinking, which fails to consider the social dynamics that operate in courts.

4 - Defence lawyers as Self-Interested Actors

Interviews with sheriffs, defence lawyers, and accused persons, revealed an additional role defence lawyers play - that of self-interested business people. A strong view expressed by all defence lawyers was the criticism of Legal Aid. Legal Aid has long been a challenging question. Legal Aid is also a sensitive topic due to the challenging economy and the fact that many law firms in Scotland have struggled. Since 2008 even large and historical firms have restructured, merged, or collapsed. Some firms have moved away from criminal business or significantly changed how they manage legally aided criminal business: spending less time on cases and taking on more cases. Moreover, expenditure on legal aid in Scotland has been declining in recent years, with commensurate effects on legal firms' income from criminal business.[453]

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[452] If not, the remedy is an appeal, not Sheriff Shopping.
[453] SLAB (2018).

Within the sample of defence lawyers interviewed, the consensus is that criminal defence work is undervalued.[454] Indeed, several solicitors interviewed noted the increasing importance of private clients. For example, Solicitor 8 diverted their primary focus to private clients and outrightly refused to take on JP Legal Aid work. Others switched to specialise in offences that are less likely to be funded by Legal Aid and where the client is more likely to be able to pay (e.g. Road Traffic Offences):

> I used to have Legal Aid signs in all the windows, but not anymore… And I refuse to do JP Legal Aid work. I refuse to work at a rate that was set so long ago. Nobody else in the world works for a rate that hasn't changed. (Solicitor 8)

This reluctance to take on Legal Aid work signals another problem with the Legal Aid system. As Abel notes, it is insufficient to have Legal Aid and assume it will work.[455] Policymakers need to take account of the willingness of defence lawyers to undertake Legal Aid work.[456] Indeed, there is a perception in Scotland that Legal Aid makes criminal work subordinate to other legal work. This issue has been noted as problematic by the Scottish Legal Aid Board: "interest in conducting work under Legal Aid is lower among assistant solicitors than among trainees due to perceptions of low remuneration."[457] This perception risks creating an unmet need for Legal Aid defence work as lawyers avoid practising criminal law.

There have been other tensions that emerged during interviews regarding remuneration. Some of these tensions mean that defence lawyers may be less likely to plead guilty early. Solicitor 4 noted that:

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[454] See also, Law Society of Scotland (2015).
[455] Abel (1984).
[456] For example, there has been a reluctance from defence lawyers to participate in the new duty solicitor scheme. Currently in nine out of forty areas private defence lawyers are boycotting this work. SLAB (2018).
[457] SLAB (2009).

> I know there is a great rumbling because basically you are getting JP business by a sheriff and there is at least £200 difference in the fixed fee.
>
> And I've heard it said to a sheriff: "this has called in your court and I want it adjourned because I am not going to get the money if I plead in front of you today. I am losing £200, so I want it adjourned."
>
> I've heard the sheriff say, "it's not a problem for me." And they say, "well it is going to be a problem for you because I am going to withdraw from acting unless you adjourn it because I'm not working for nothing."

That some defence lawyers are unwilling to appear before a sheriff when being paid to appear before a JP undermines the efficacy of Sentence Discounting as an incentive to plead guilty early. Other solicitors also noted that they avoided some Legal Aid work as it is not thought to be financially viable, and that to be a profitable criminal firm must take on many cases (Solicitor 5). There were also accounts from defence lawyers about colleagues who were facing financial ruin.

This self-interest is not quite the same as being a zealous advocate. However, self-interest is not necessarily incompatible with being a strong, zealous advocate. It is possible in many cases for a defence lawyer to advocate their remuneration interests without detriment to the client's interests. For example, in the JP example above, the research found a perception that a JP will typically sentence lower than a sheriff. While sheriffs hearing JP cases have JP sentencing powers, the belief is that what is a high sentence for a JP is a low sentence for a sheriff.

Thus, the defence lawyer refusing to appear before a sheriff in a JP case may have been able to justify this as also benefiting the client. Indeed, no defence lawyer indicated that the pursuit of their interests would be to the detriment of the client.

Moreover, other research suggests that defence lawyers only pursue their interests when it is not detrimental to their clients.[458]

However, it may be that defence lawyers who subscribe to a zealous model are more likely to apply zeal in representing their interests. This cultural difference seems significant as there is a different attitude in Court 2 from that noted by Solicitor 4. Solicitor 6 noted:

> We [in Court 2] don't get away with some of the spurious reasons for adjourning things. I mean yesterday in [Court 1] I watched a case get adjourned because they didn't have Legal Aid. You wouldn't get that in [Court 2]. You'd be told to get on with it… for the interests of justice, it doesn't matter whether you are getting paid.
>
> *The interests of justice are related to both witnesses and to a lesser extent, but not a massively lesser extent, the rights of accused.* And the fact the solicitor isn't getting paid is immaterial according to them down there [the sheriffs in Court 2].
>
> To a degree, I accept that because you should be ahead of the game enough to know how you're going to get paid for something. And you shouldn't be turning up to a trial diet saying "oh by the way I don't have Legal Aid I'm not going to get paid" [mocking whining voice]. Hard luck.

This quote from Solicitor 6 is enlightening. Crucially, the rights of the accused are not the primary factor in the interests of justice (see the emphasised section). Moreover, the defence lawyer's interests are thought to be irrelevant. This is a significant feature of the contemporary officer of the court notion (Section 5 discusses this further. This view contrasts with the more zealous adversarial model.

[458] Tata (2007a).

However, this is not to say that Court 2 defence lawyers were uncritical of the current system. They shared the criticisms of other defence lawyers. Solicitor 3, from Court 2, was critical that the structure of Legal Aid influenced decision-making. For example, Solicitor 3 noted that before the current front-loaded scheme, *"*you would find that solicitors would tend to look for a reason to say to somebody 'don't plead guilty at this stage.'*"* This was perceived to be the opposite of the current system, which provides an:

> Incentive which I think sometimes goes against proper legal principles… which may in certain circumstances encourage solicitors to encourage people to plead guilty where they might not otherwise do so.
>
> It should be a level playing field, and I don't think it is. I think there is an incentive now for solicitors because you can get your money right away, the file is open and closed in a day, and it's the business from heaven if your interest is purely financial or is motivated more by finance, rather than by the rights of the accused.

Thus, all solicitors were critical of Legal Aid. Moreover, all solicitors prioritised their clients' interests. The main difference was that some interpreted their duty as a contemporary officer of the court to require more self-sacrifice for the administration of justice. For example, Solicitor 6 noted that:

> I do work for nothing. And it annoys me, but I do it. I know that if I go down there and say [in a pathetic mocking voice], "excuse me, I don't have Legal Aid can I get it put off please?" I'll get told to fuck off.[459] There is no way. It's not happening.

[459] This is hyperbole. Earlier in the interview (discussing the old bench and relations between Court 2 legal actors and mutual respect) it was noted that there is now no swearing. See Chapter 6.

This hard-line approach to their own interests is part of the efficient culture of Court 2. This culture belongs to the bench (who would not regard solicitor's payment as a reason for delay), and the defence culture that acquiesces with this view. Both these elements are essential as, if only the bench held this view, then the resistance from the defence bar would likely be significant (e.g. withdrawing from acting, etc).

In sum, there is a view that "everything is boiled down to Legal Aid at the moment" (Solicitor 4). Given that defence lawyers advise clients, Legal Aid can affect how clients plead. Legal Aid itself is conducive to Guilty Pleas before a trial diet, though not necessarily at the first opportunity. This effect of Legal Aid was something several defence lawyers suggested was a factor in not pleading guilty at the first opportunity: "there are ways to make sure you get Legal Aid" (Solicitor X).

5 – The Culture of the Contemporary Officer of the Court

A – Is the Contemporary Officer of the Court notion more prevalent in Court 2?

This research found that the contemporary notion of defence lawyers as an officer of the court is more prominent in Court 2's culture. Those in Court 2 had a sense of common purpose that allowed them to avoid antagonistic methods of practice that a strong zealous approach requires. This notion of Court 2 defence lawyers operating as contemporary officers of the court was thought to have significant efficiency benefits regarding early Guilty Pleas:

> It was my view [that Court 2] worked well because the agents were prepared, and they wanted to be prepared. And they liked the sheriffs and wanted to get the case through. In Court 1 there was to my view… a bit of "them and us" attitude. (Sheriff X)

As Chapter 6 demonstrated, legal practitioners in Court 2 have a strong sense of their court's culture. Part of this culture is due to the judicial culture in Court 2 which, for example, makes adjournments less likely. This judicial culture in Court 2 also makes

some aspects of zealous advocacy (such as Sheriff Shopping) less feasible. However, this thesis argues that defence lawyers are not passive recipients of judicial culture. Quite contrarily, defence lawyers can accept or resist judicial culture in meaningful ways. Thus, Court 2's culture is not solely due to the judicial culture.

What enables Court 2's culture is that Court 2 defence lawyers have a similar culture to other legal practitioners in the court. Like the sheriffs in Court 2, the defence lawyers take pride in their 'efficiency:'

> You can always tell a [Court 2] Solicitor at any court. They are the ones who turn up on time and are ready to go. (Solicitor 7)

There was a sense of pride among Court 2 solicitors that they are acclimatised to (what they view as) the most challenging court to work in. Court 2 defence lawyers had a perception that other defence lawyers would struggle to acclimate to Court 2, while they could readily work in any other court as these are 'slacker.' Indeed, the overall perception was that everyone in Court 2 worked to an exceptionally high standard as a result of the culture of Court 2. For example, Solicitor 6 noted that:

> *If you watch the practitioners here… There is nobody you would say is rubbish… and nobody that can't take a punch and keep standing with it.*
>
> *So, you will get punched from the bench, but you're back quick, and you can react on your feet.*
>
> *Every person down there is skilled at acting on their feet, and it's all brought about because of that old school... You were just battered senseless by them...*

Sheriffs also noted the perceived exacting standards of Court 2 defence lawyers. For example, Sheriff 3 noted that:

> They [Court 2 defence lawyers] are well prepared. There would be none of this, "well I don't really know." And that [a well-prepared bar], the present incumbents have benefited from because the agent is very well prepared. They will come in, and they will advise you what they've got.

This defence lawyer ethos is compatible with that of sheriffs in that Court 2. Consequently, there is a general level of agreement over how cases ought to proceed. Indeed, Court 2's culture would be impossible without these similar cultural views between the bench and the bar. Moreover, several defence lawyers from out with Court 2 noted the JP Court in Court 2 operates strictly like the Sheriff Court. This similar operation of the JP Court strongly suggests that Court 2's efficient culture is, in large part, because of the culture of Court 2's defence lawyers.

In this way, Court 2's culture is the confluence of different legal cultures. This shared sense of purpose and a common identity has implications for day-to-day operations and the protection of perceived interests by reinforcing cultural working practices:

> In-group conformity pressures will lead people both to selectively perceive greater within-group homogeneity on critical characteristics than actually exists and to generate greater actual homogeneity and group conformity in situations where perceived threats to the culture are great.[460]

Without this conformity between the bench and the bar in Court 2, the present culture would not be feasible. The key policy implication of this is that transplanting the judicial culture of Court 2 to Court 1 would be problematic. Court 2's judicial culture would be problematic in Court 1 because defence lawyers in Court 1 do not regard efficiency as highly as a source of their capital as legal professionals. Instead, this research found that Court 1 defence lawyers perceived zealousness as a higher

[460] Lichbach and Zuckerman (2009), p.155.

form of capital. Indeed, the perception was that much of Court 1's late Guilty Pleas were due to defence lawyers competing based on zealousness. Sheriff 2 summed this up nicely:

> They [Court 1 defence lawyers] want to keep their own clients [by being zealous], which is understandable…
>
> They should be an advocate for their clients' interests, but they have a duty to the court, and all the agents here recognise that duty to the court. But they will push it as far as they legitimately can. And it is my perception that this is because of the culture that lies behind it… But there is a very thin line between doing that properly and still acting as an officer of the court.

B – Is the Contemporary Officer of the Court Notion Disadvantageous for Accused Persons?

An advantage of the contemporary officer of the court notion is that it aids the expedient disposal of cases. Indeed, this research suggests that defence lawyers acting as contemporary officers of the court has a more significant effect on early Guilty Pleas than the formal law on Sentence Discounting. However, one might wonder whether the contemporary officer of the court notion works against the interests of accused persons. In some cases, might an accused person fare better with a more zealous defence?

For various reasons it could be assumed by accused persons that the zealous defence lawyer would, all else being equal (e.g. skill), mount the better defence. Indeed, some defence lawyers noted they had enormous success for clients through being zealously adversarial. For example, Solicitor 8 noted that:

> I can't tell you how many trials I've won because the Crown messed up… it's in the hundreds.

Likewise, Goriely et al. (2001)[461] noted that PDSO cases, which typically pled guilty earlier, tended to fair worse than those that pled guilty later. From this, if one had to choose a defence lawyer themselves, they might be inclined to choose a zealous one. By contesting the case as far as possible, the likelihood of being convicted decreases. Indeed, some legal practitioners were of the view that contesting cases was increasingly beneficial given that COPFS is under-resourced. The view of these legal practitioners was that resource problems were leading the prosecution to make an increasing number of errors.

Errors in the prosecution case mean that the Crown may fail to convict the guilty at trial. Failing to convict the guilty is not in the interests of justice. However, for the zealous advocate, their role is to capitalise on any weaknesses in the prosecution's case. If the prosecution is making too many errors, this is not something the zealous advocate should seek to remedy. The solution to this problem lies with policymakers. By contrast, a hypothetically perfect contemporary officer of the court[462] may be more inclined to ensure the right result overall, even if this increases the likelihood of conviction.

A hypothetically perfect contemporary officer of the court may also approve Sentence Discounting. For example, Chapter 2 demonstrates that *Gemmell v HMA* is detrimental to accused persons in various ways, including the lack of legal certainty. One effect of this lack of legal certainty is that it makes appeals less likely. A perfect contemporary officer of the court may find this an advantage in saving costs.

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[461] Discussed in Chapter 3.
[462] Operating on a "Liberal Bureaucratic Model."

However, in this regard, it should be noted that defence lawyers in Court 2 are *not* hypothetically perfect contemporary officers of the court. Defence lawyers in Court 2 do have zealous and adversarial characteristics. While those in Court 2 may reconcile their conflicting roles differently from those in Court 1, they consider both roles vital. Consequently, defence lawyers in Court 2 critiqued the limited legal certainty formally espoused by *Gemmell v HMA*, rather than lauding the 'efficiency' gains. Solicitor 6 from Court 2 noted that regarding justice, Sentence Discounting and other legal changes were problematic:

> It is shifting more I would have to say, towards you having to prove your innocence and the Crown having to do less and less and less to prove somebody's guilt.

Likewise, Solicitor 7 from Court 2 noted that:

> It [*Gemmell v HMA*] is another case of the High Court trying to shaft the defence. That's how we always view the High Court. It's another extension of the Prevention of Acquittals Act. The High Court seems to do everything it can to reign in the defence. If the defence finds a loophole, the High Court will close it.

Thus, it is wrong to argue that those in Court 2 do not display zealous and adversarial characteristics. Absolute and straightforward categorisations of defence lawyer cultures in Court 1 and Court 2 are not possible. Indeed, there is social capital in defence lawyers having both a zealous streak (in a notionally adversarial justice system) and in being a contemporary officer of the court. Instead, what this thesis argues is that defence lawyers in Court 1 and Court 2 have subtly different ways of managing these roles based upon their culture.

Notably, the culture of the Court 2 means that defence lawyers feel that this zealous streak does not need to be brought to bear as often. For example, while Solicitor 7 demonstrated zealous traits, Solicitor 7's "them and us" view did not extend to the

sheriffs in Court 2. There is an attitude of zealousness with regard to the High Court, but not Court 2. Court 2 is regarded as separate, and there is mutual respect. This partition in the perceptions of Court 2 defence lawyers isolates it from the more antagonistic elements of defence work.

Consequently, on the one hand, the contemporary officer of the court notion may help to ensure the guilty are convicted. Convicting the guilty means that the contemporary officer of the court notion is not necessarily detrimental to justice. Moreover, judges in the High Court of Criminal Appeal may take the view may take the view that capitalising on the Crown's errors is not in the interests of justice. On the other hand, the contemporary officer of the court notion can work against the interests of the accused. At the hypothetical extremes, the contemporary officer of the court notion poses challenges for the presumption of innocence and cherished legal values. However, in practice, defence lawyers in Court 2 do *not* act as contemporary officers of the court to these extremes. For those in Court 2, the extent to which they act as a contemporary officer of the court is primarily seen as not being detrimental to accused persons, or even as working in the accused's interests.

However, it is notable that one factor influencing how defence lawyers (in both courts) defend clients is their view of the client and the case. Clients who were thought likely to be guilty were different from those who may be innocent. Those who were thought to be guilty in Court 2 were described as the 'stand-up, say there is no hope, and sit down cases.' For these no hope cases, the limited zealousness was part of the 'practicalities of the thing.' As long defence lawyers undertake this assessment adequately, it is less problematic. However, if the contemporary officer of the court notions and Legal Aid leads to a presumption of guilt,[463] then problems for due process may emerge in the future. These future risks for due process ideals

[463] Perhaps in the future given the demands on defence lawyers to remain profitable within a tightening Legal Aid budget.

may be less likely to occur if defence lawyers operate more as zealous advocates and contest cases as a matter of routine.

C – Accused Persons' Interests and the Contemporary Officer of the Court

I – The Officer of the Court Model is Not Detrimental: Sentence Discounting

Court 2 defence lawyers did not view their culture as problematic with regard to clients' interests. Indeed, they expressed a passionate sense of obligation towards their clients and sympathy for the plight of many accused persons, which is a trait that might be expected of the zealous advocate. For example, Solicitor 6 reflected upon the socio-economic disadvantage and limited life choices many of his clients faced.:

> Most of them have difficulties. Whether it is addiction issues or mental health issues. Ninety-five percent of my criminal clients (not speaking about Road traffic), ninety-five percent of my criminal clients have an issue whether it's an addiction to alcohol, drugs, both. Or mental health difficulties.
>
> And there are very, very few - I mean I open 400 files a year, and I would reckon that twenty don't have… they are what you would describe as "normal people."
>
> [Solicitor 6 began to flick through the client files on the desk beside him, listing off what was involved. Road traffic cases were considered different but were part of the files on the desk][464]
>
> Road traffic case, mental health issues, PHEW just nuts! Road traffic, road traffic, alcohol and drugs, alcohol, alcohol and drugs, alcohol

[464] Road Traffic Offences typically yield wealthier clients due to a selection bias resulting from the fact they can afford a car.

> and drugs, alcohol and drugs, mental health, mental health, sexual, sexual, mental health, drugs, drugs, alcohol, normal, sexual, alcohol.
>
> So, there you go! Out of all of them, one normal… And that's what we are dealing with. That's why it's all very well sitting writing stuff saying, "this is how this will work, and this is how that will work," in a world where everybody is normal. Which is why it boils down to the practicalities of the thing.

Regarding perceived outcomes, the higher rate of early Guilty Pleas in Court 2 was not thought to be detrimental. The advantages of pleading guilty were thought to outweigh the small chance of the case failing to prove. Solicitor 6 gave the example of a recent case:

> I had a client today who went through Custody [Court] this afternoon. He pled at the first opportunity, and part of my advice was… at that stage, I'm not looking at the evidence really. The case was… he is a shoplifter because he is a heroin addict. And ok some of them might not prove everyone now and then. But he did it.
>
> And he is a guy who if he had gone to an Intermediate Diet with that, he would almost certainly got the jail. He pled at the first opportunity, the sheriff has given him the benefit of the doubt and asked for a report with a view to putting him on a Drug Treatment and Testing order.

In this case, there is perceived to be a small chance that zealous advocacy (pleading not guilty and testing the prosecution's evidence) would have gained an acquittal. However, in this case, the early Guilty Plea was justified as it was believed to have spared the client a custodial sentence in the likely event of conviction. Solicitor 6 also considered it advantageous that the Guilty Plea increased the likelihood that their client will be able to access drug treatment.

To make assessments about the advantages of pleading guilty, defence lawyers rely on their knowledge of the social dynamics of the court. In light of the radical indeterminacy of the formal law, it is these court cultures that enable a sense of certainty. For example, in further discussion, Solicitor 6 noted that their client avoided jail:

> Only because he plead guilty today, and because it was Sheriff £346 down to £259.

"Sheriff £346 down to £259" (a 25% reduction) was a reference to an earlier point regarding the local knowledge solicitors have of Court 2. In this case, the reference was to a sheriff who stuck rigidly to known patterns of Sentence Discounting. This rigid pattern led to what were considered amusingly unusual headline sentences (i.e. not round numbers). These unusual headline sentences were thought to be used to allow a more precise discount of the typical amount (a third, quarter, tenth).

Consequently, early Guilty Pleas are part of Court 2's culture, but the defence lawyers do not doubt that the early Guilty Pleas are best for their clients. Viewed through the lens of Court 2's culture, it is not worth risking a trial where the odds of acquittal are low, and a Guilty Plea can result in a better outcome due to Sentence Discounting. Thus, by perceiving their court to be predictable (sheriffs also noted they aimed to be predictable to enhance early Guilty Pleas) Court 2 agents operated in a way that they did not perceive to conflict with the client's interest - even though more zealous solicitors may give effect to clients' interests in a different manner.

II – Does the Officer of the Court Model makes Defence Lawyers More Credible?

Defence lawyers come to form views of the sheriffs in their court. In some cases, this can lead to "Sheriff Shopping" where defence lawyers attempt to avoid sheriffs they believe will err on the high end of competent disposals in a case. However, this research also found that sheriffs expressed familiarity with their local bar. This is a key finding.

In the case of Court 2, sheriffs' relationship with Court 2 defence lawyers could work to the accused's advantage. For example, the research found that one tactic that is associated with a zealous defence is what some sheriffs described, in a derisive manner, as 'throwing everything at the fridge and seeing what sticks.' Sheriff 3 noted:

> I think there is more focus on a plea in mitigation [in Court 2]… agents will stand up and say, "there is no hope for this man" and sit down. So, they save their powder.
>
> Again, it is *know your agent*. So, when they stand up, and they're doing a plea in mitigation, I think, "well, there is obviously something in this. There is something that he sees in this man, or there is some factor that I should be paying attention to."
>
> So not everyone has the confidence to do that. It tends to be the older agents [the criminal bar in Court 2 is older agents]. The younger agents, however, will go through the various factors and try and highlight the positives… The ones that ignore the negatives and only pitch the positives don't necessarily, I think, do their clients justice.

Consequently, sheriffs know their defence lawyers in Court 2. An advantage of defence lawyers being a contemporary officer of the court is that sheriffs may trust them more. This trust makes the criminal process in Court 2 more collaborative than formalistic notions would suggest. By contrast, sheriffs expressed the view that zealous advocates typically go through the motions as a matter of routine, even where there is little substance to what they are saying. As Sheriff 6 noted:

> They are very much more pragmatic here. They will say [to clients], "here is the evidence against you, you are done out of the park. Plead Guilty.

> So, they don’t waste time, they don't waste court time, and they don't waste witnesses time. And that adds a bit of credibility to the people who are appearing in front of you. You know that the stuff that they are pleading Not Guilty to is worthy of trial. You know that there is a real issue with something. But, in places like [Court 1], I don't know. I think it is just a case of [solicitors saying to the Crown] "prove your case," and that's it.

This view accords with other in Court 2. Solicitor 7 even noted that they had advised a client that, "you're done out the park here this is all on CCTV, you should be pleading." Solicitor 7's view is justifiable in that a guilty verdict seems likely and a Sentence Discount may reduce the sentence. As a result, while early Guilty Pleas serves the court's interests, it was also believed to support client interests (just as a zealous approach would also do).

Thus, the distinction between the zealous defence lawyer and the contemporary officer of the court is nuanced. The distinction is more complicated than merely saying ‘Court 1 will always delay pleading and or Court 2 will always plead as early as possible.’ Defence lawyers, while culturally patterned in their understandings of how to give an effective defence, are constrained by the need to manage their zealous advocacy obligations, their obligations as an officer of the court, and their obligations as self-interested business people.

Conclusion

The role of defence lawyers is in dispute. This dispute relates to the contested nature of what appropriate defence work should be, and what the ‘interests of justice’ require. There is a contest over whether defence lawyers ought to be zealous advocates or embody a contemporary notion of their duties as officers of the court. There is also a third competing notion of defence lawyers as self-interest actors that came across in the interviews. This role of defence lawyers as self-interested is only

tacitly acknowledged by policymakers.[465] These competing dynamics affect how defence lawyers conduct their practice and, in doing so, affect Sentence Discounting's ability to encourage early Guilty Pleas.

Part 1 of this chapter examined the importance of defence lawyers supporting judicial culture to enable court culture. For a *relatively* 'settled' court culture, such as in Court 2, it is necessary for a degree of cultural homogeneity between defence lawyers, prosecutors, and judges. Part 1 also investigated the role of defence lawyers in encouraging or discouraging early Guilty Pleas. Defence lawyers considerable influence on plea decision-making challenges formalistic assumptions that the decision lies with the accused. Consequently, the research found that defence lawyers' culture may affect pleading trends in courts.

Part 2 scrutinised the tension between the competing roles policymakers expect defence lawyers to perform. The first role defence lawyers are expected to perform requires them to be a zealous advocate for their client's interests. The second role defence lawyers are expected to perform requires them to consider demands made by a contemporary interpretation of their role as officers of the court.

Part 3 examined the challenges zealous defence lawyers pose for policymakers. The research found that the challenges posed by zealous defence lawyers are perceived to be more prominent in Court 1. How defence lawyers reconcile their zealous role has a great deal of influence on Guilty Plea trends and the effectiveness of Sentence Discounting.

Part 4 explored the unspoken role lawyers must play: that of self-interested business people. This self-interested role may influence Guilty Pleas in complex ways.

[465] The front-loading of Legal Aid to promote 'efficiency' suggests policymakers consider defences lawyers to be self-interested.

However, the research suggested that defence lawyers' professional ethics mollified the effect of self-interest.

Finally, Part 5 examined the challenges of defence lawyers acting as contemporary officers of the court. Part 5 argues that in some contexts the lack of a zealous defence could work against the interest of clients. However, Part 5 also shows that those in Court 2 do not believe their method of practice to be detrimental to accused persons' interests. Rather, those in Court 2 perceive their practices to be beneficial to accused persons.

Chapter 8: Accused Persons' Perspectives

Introduction

What relevance do accused persons' perspectives have to the nature and extent of Sentence Discounting? What can accused persons' accounts contribute to this research that the many legal practitioners (judges, prosecutors, and defence lawyers) interviewed cannot? How do accused persons' perspectives relate to court cultures?

This chapter demonstrates that accused persons' perspectives provide unique insights into the practical realities of Sentence Discounting. Research cannot obtain accused persons' perspectives simply by asking legal practitioners for their views of what accused persons think. This contribution alone makes accused perspectives relevant to this thesis. Furthermore, accused persons' perspectives are important because there was a view amongst some legal practitioners that differences between accused persons contributed to different pleading trends between Court 1 and Court 2. Moreover, interviews with accused persons are vital to interrogating the influence of Sentence Discounting on plea-decision making. Crucially, accused persons' perspectives reveal that the pressures they face can pre-dispose them to pleading guilty, regardless of Sentence Discounting. Accused persons' perspectives also reveal that, counter-intuitively, Plea Bargaining can serve to delay Guilty Pleas.

Part 1 of this chapter critiques the limited research that has been carried out on how accused persons perceive the pre-conviction stages of the criminal process. Part 1 notes that while a small amount of excellent research does exist, far more is needed. Moreover, Part 1 argues that there is a pressing need for research that links case observations to interviews with accused persons.

Part 2 of this chapter advances the work of Ewick and Silbey (1998) to set out three general types of legal consciousness that accused persons expressed: "before the law," "with the law," and "against the law." Part 2 argues that accused persons compartmentalise the criminal process in ways that, while not immediately apparent, are intuitive to them. There is a perceptual chasm between accused persons' understandings of their experience in the criminal process and their ideas of the formal law. Part 2 also investigates how, counter-intuitively, Plea Bargaining practices can serve to delay Guilty Pleas as accused persons feel a need to also 'play the game.'

Part 3 scrutinises the 'pains' of being an accused. "Pains" alludes to the work of Sykes (1958), who argued that the mental "pains of imprisonment" may be less visible than physical affliction, but "no less fearful." Legal practitioners may underestimate these pains due to a belief that persons with experience of being accused are inured to them. Part 3 also demonstrates these pains are significant even for seasoned offenders.

Part 4 analyses the distress accused persons experience by virtue of being caught in the criminal process and existing as liminal entities. During the criminal process accused persons are trapped between guilt and innocence. This liminal state places severe burdens on accused persons. Crucially, this thesis finds that the pressures accused persons face can pre-dispose them to pleading guilty, regardless of Sentence Discounting.

Part 5 examines accused persons' perspectives on sentencing and Sentence Discounting. It shows that while accused persons talk of 'discounts,' they feel that Sentence Discounting punishes them for going to trial. This finding has implications for the presumption of innocence.

Part 6 shows the importance of perceived fairness to accused persons. Accused persons perceive practices related to Plea Bargaining and Sentence Discounting as

unfair. In some cases, this unfairness can delay Guilty Pleas as accused persons seek to assert their rights.

Part 7 examines whether some accused persons want a custodial sentence. Accused persons wanting a more severe sentence challenges the basic assumptions underlying Sentence Discounting: that accused persons will plead guilty for a lower sentence. While these accused are not the majority, they are not a rarity.

1 – Research on Accused Persons' Perspectives

In practice, legal practitioners play a crucial role in the plea decision-making process (see Chapter 7). However, notionally, the right to choose how to plead still formally resides with the accused. Indeed, it is technically possible for an accused person to forgo a defence lawyer altogether and represent themselves in court during a summary criminal matter.[466] The accused is also the person that due process notions such as the presumption of innocence are theoretically geared towards protecting. As a result, the perspectives of accused persons carry a great deal of significance for both the symbolic and instrumental impact of the presumption of innocence.

Presently, the views and experiences of accused persons on the pre-conviction stages are severely under-researched in Anglo-American jurisdictions. It seems that some research assumes that accused persons' views will be less informed than those of legal experts. Research may also overlook accused persons' views because legal experts often claim to speak on their behalf.

[466] Self-represented accused are uncommon in Sheriff Court summary cases, and there are several disadvantages to this. See Gibbs (2016).

This neglect of accused persons' views is also seen in the post-conviction stages. For example, McNeil notes that in the context of the post-conviction process one criticism is that:

> Over-confidence in the prospects for effecting change through treatment had permitted its advocates both to coerce offenders into interventions (because the treatment provider was an expert who knew best) and to ignore offenders' views of their own situations (because offenders were victims of their own lack of insight).[467]

While, *perhaps* less of an issue today post-conviction, accused persons' views of the pre-conviction stages are still poorly understood. Much of the current research on issues faced by accused persons pre-conviction does not interview the accused persons whose experiences it seeks to explore. For example, Gibbs (2016) explored the issues faced by unrepresented accused persons. In this exploration Gibbs (2016) did not interview unrepresented accused persons. Rather, the Gibbs (2016) interviewed prosecutors, etc. who spoke to the experience of accused persons.[468]

While there is some valuable research that has explored the perspectives of accused persons directly, far more research is required.[469] Moreover, the existing research does not link interviews to observed cases. In my research, I was able to interview some accused persons after observing parts of their case in court. This link between observations and interviews was extremely beneficial.[470]

Research on legal consciousness and user perspectives highlights that the views of lay persons should not be assumed to be inconsequential. Moreover, as Casper notes:

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[467] McNeil (2006) p.41.
[468] Why Gibbs (2016) was unable to interview accused persons is unclear. However, the research did suggest that this would have been desirable.
[469] See Jacobson et al. (2016); McConville et al. (1994); and Swaner et al. (2018).
[470] As such, this is something future research should prioritise. See Chapter 4.

> It is the defendant who must most directly live with the consequences of the administration of criminal justice; moreover, given the current concern with crime, it is the defendant's past and future behaviour that is of concern not only to him but also to society at large. Thus, to examine what the defendant thinks is happening to him, the roots of his behaviour, and the lessons he learns from his encounter with criminal justice is of importance in understanding the operation and impact of one set of institutions of government.[471]

Whether the aim is to understand potential normative issues or explore new ways to promote 'efficiency,' research directly asking accused persons about their experience has significant potential. As Accused 9 noted of my comment on his extensive knowledge of the criminal process:[472]

> And this is a recovering heroin addict here boy.
>
> People think because you're on smack. Or [because you are on] this, that, and the next thing, and that you've been to jail that you're stupid.
>
> We can hold a sentence together… well some of us [laughs]. But people just see what they want to see.

Accordingly, this research undertook interviews with persons who had been accused of a criminal offence in Scotland (see Chapter 4). The aim was to learn about their perspectives and the effect, if any, of Sentence Discounting on their pleading decision.

The interviews also sought to draw out accused person's perceptions regarding whether a Guilty Plea resulted in a shorter sentence (i.e. a discount), or whether a

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[471] Casper (1978), p.XI.

[472] Accused 9 rhymed off facts and figures on the theoretical and current capacity of HMP Barlinnie, the average length of life sentences over time, etc.

going to trial resulted in a longer sentence (i.e. a trial penalty). While some may consider this an issue of semantics, it is not. Accused persons' distinction between a discount and a trial tax cuts to the heart of the nature of Sentence Discounting and its implications for the presumption of innocence.

To scrutinise accused persons' perspectives, the questions were designed to be more general than those used for legal professionals. The aim was to avoid biasing the results by forcing a legal-centric perspective upon interviewees (see Chapter 4). This approach proved prudent as even the term 'Sentence Discount' was found to be normatively loaded and capable of suppressing alternative conceptualisations more in line with 'trial tax.'

2 - Conflicting Perspectives of Law

A significant finding of this research is that accused persons do not express a single view of 'the law.' Instead, accused persons express multiple views that they compartmentalise in various ways. As a result, it is not the case that, 'Accused X respects the law and authority while Accused Y views it with disdain.' Instead, Accused X may respect the law in certain regards, but be against it in others. In some ways these multiple perspectives are fitting given that policymakers have multiple conceptions of offenders: "as both 'evil' and penitent, as consumer and commodity, as incorrigible and as treatable, as responsible and irresponsible."[473]

Thus, accused persons can accept the legitimacy of the formal law while also expressing disdain for what they feel are illegitimate practices that occur in their cases.[474] This conclusion that accused persons have multiple forms of legal

[473] McAra and McVie (2012a), p.349.
[474] Accused persons criticised Plea Bargaining and gamesmanship.

consciousness differs from that reached in some other research, which attempts to reconcile these views cohesively.[475]

This chapter draws Ewick and Silbey's three broad characterisations of legal consciousness to analyse accused persons' perspectives: "*before the law*," "*with the law,"* and "*against the law*."[476] These categorisations emerged from an exploration of whether there might be an issue of racial disparity in the New Jersey courts. The concern raised by the New Jersey Supreme Court Task Force on Minority Concerns was that minority groups were not engaging with the civil legal process in the same way as majority groups.

To understand minority engagement, Ewick and Silbey analysed the taken for granted assumptions court users possessed and how this affected their use of the civil legal process. Ewick and Silbey did not assume that lay persons possess common legal notions and definitions. To avoid making these assumptions Ewick and Silbey kept their interview questions generic in the initial stages. These generic questions allowed lay persons to articulate their perspectives free from the legal formalistic template that legal practitioners are socialised into. By analysing lay persons' responses, Ewick and Silbey were able to derive three broad characterisations of legal consciousness: "*before the law*," "*with the law*," and "*against the law*."

The application of Ewick and Silbey's characterisations of legal consciousness to accused persons is a novel element of this research. This chapter shows that these characterisations are useful in capturing various attitudes and assumptions that accused persons have regarding Sentence Discounting, the law, and the criminal process.

[475] E.g. Casper (1978).
[476] Ewick and Silbey (1998).

A – "Before the Law"

Being before the law suggests something akin to being in awe of the majesty of the law. Those who are before the law view it as:

> A separate sphere from ordinary social life: discontinuous, distinctive, yet authoritative and predictable... In a sense, respondents tell the law's story of its own awesome grandeur…. Law is understood to be a serious and hallowed place.[477]

This characterisation of legal consciousness is useful regarding accused persons views of macro issues and abstract conceptualises. In the abstract accused perceived the law to have an air of determinacy and legitimacy that set it apart from the "dirtier" (Accused 2) or "underhanded" (Accused 9) aspects of the criminal process in practice.

In being before the law in some regards, accused persons were deferential to the idea of the formal law. This deference existed even though, in their experience, the law's ideals were not always met in practice. For example, Accused 2 felt that, "Scottish law was the best in the world" and that being a judge was a noble profession:

> Senior council are the only ones that will make sheriff. And it's a long, long process. He's [the sheriff] got to demonstrate that he is not on one side of the fence. To be a sheriff you have to be purely for justice and demonstrate that you are not on the side of the defence or the prosecution.

Likewise, Accused 8 (Accused 7 agreeing)[478] noted the legitimacy of the process in theory:

[477] Ewick and Silbey (1998), p.47.
[478] Accused 7 and Accused 8 were co-accused and were interviewed together.

> If people want to break the law, then they have to pay the consequences.

This links with work by Casper which found that accused persons generally, "believe that the laws they violated were good laws and that the acts they performed are deserving of punishment."[479] Yet, despite holding these views, accused persons also displayed other forms of legal consciousness when they moved away from the abstract: that of being *with the law* and *against the law*.

B – "With the Law"

To be with the law was to perceive it as a tool to reach various ends. Those who are with the law consider it more instrumentally and pragmatically for how it can be used to achieve their goals or the goals of others:

> "With the law" offers a view of law as a ground for strategic engagements orchestrated to win in competitive struggles for social position, wealth, and power. "With the law" offers, in contrast to the self-proclaimed idealism of "before the law," a pragmatic, perhaps vulgar, account of the routine practices of biased, differentially endowed, and fallible action.[480]

Accused persons conceiving of the law in this way viewed it as an arena for contests of power. The perceived power plays mean that accused persons do not think of the law as majestic in this context. Instead, accused persons view the law as a tactical engagement to exert influence and achieve desired goals. Crucially, this tactical perception means that accused persons feel that if they do not play the game (i.e. if they do not Plea Bargain), then others who play (e.g. prosecutors) will take advantage of them.

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[479] Casper (1978), p.18.
[480] Ewick and Silbey (1998), p.227.

Interestingly, defence lawyers and prosecutors expressed similar sentiments to accused persons regarding the need to 'play the game.' On the one hand, defence lawyers and prosecutors displayed a sense of being before the law.[481] On the other hand, legal actors viewed the law as a contest and thought that Plea Bargaining was necessary (discussed more in Chapter 9). Indeed, there is a remarkable similarity between the views of accused persons and those of defence lawyers and prosecutors. These similarities suggest that the issues defence lawyers and prosecutors identify in practice are communicated to accused persons in some form.

Yet, while views shared by accused persons, defence lawyers, and prosecutors are remarkable, perhaps this should not be surprising. Why would accused persons' views differ from those of defence lawyers and prosecutors who are also in regular contact with the criminal process? Why wouldn't accused persons internalise views from defence lawyers and prosecutors? Moreover, if defence lawyers and prosecutors view the legal process as involving gamesmanship (e.g. Plea Bargaining), why would accused persons not share a similar view and attempt to play the game?

I – Is the Justice Process Perceived as a Game?

For accused interviewees, the Plea Bargaining process was thought to rely on ignoble features. Accused persons differentiated Plea Bargaining from the majesty of the formal law. Accused 1 characterised the criminal process as a game of chance and noted that their decision to plead Not Guilty was based upon the notion that, "he who dares wins."[482] In this way, Accused 1 compartmentalised the nobility of the law. While Accused 1 thought "law" was noble in the abstract, he thought that the reality of his case was that it was a game devoid of nobility.

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[481] The belief in the formal narrative of law (with its notions of legitimacy and determinacy) is one such display.

[482] Accused 1 had been to court accused of an offence on two previous occasions but had never been convicted.

For Accused 2 the reality of the process was characterised as not being apart from daily life where tactics, manipulations, and games were commonplace. Accused 2 thought overcharging was one consequence of this attitude of gamesmanship that legal practitioners (judges, defence lawyers, and prosecutors) possessed. This perception delayed Guilty Pleas as accused persons (likely influenced by their lawyers) felt that it was necessary to delay pleading guilty to ensure parity by playing the game:

> They'll [the prosecution] put down things like breach of the peace, assault, drunk and disorderly, reckless behaviour in the street. Out of those charges, the PF [the prosecutor] will say, "the breach of the peace is nothing, reckless conduct is nothing. It is the assault that I'm after."
>
> So, he will base his evidence on the assault and run for the assault. And he will bring the rest of the charges in, like "shouting and bawling," in the hope that it will enhance the guilty verdict for the assault. It's all to back up the assault.
>
> You might have a situation where you have an attempted murder, and somebody stabs somebody. There're charges of breach of the peace, reckless conduct in the street, reckless behaviour in the street. And then further down the road, there's another breach of the peace, concealed weapons, all they sort of things. I mean a multitude of charges can come in.
>
> [Interviewer: Do you feel that adds pressure when deciding how to plead?]
>
> Of course, that's why they do it! That's what the Procurator Fiscal's job is. To put the accused under duress. You will hear them saying that:

> "Put him under duress. He's got to crumble before you. And you cannot crumble before the accused. If you crumble your days as a PF are over."

(Accused 2)

Accused 9 noted that:

> I've done it myself many times [Plea Bargained and pled guilty]. I've been through the system all ways. Pled guilty, so you get charges dropped. Or, "right, you'll get remanded. But if you plead guilty, you'll get bail." You know, one of those ones.
>
> That shite, it's a game of cards. It's a game of cards, but they're playing with people's liberty. And that's what they forget.

Even Accused 3, an inexperienced accused, felt that delaying pleading guilty was worth it as it allowed her to 'play the game' and better her chances.[483] This game was how she justified not pleading guilty. Crucially, Accused 3, like others, was pre-disposed to pleading guilty. Thus, she explained why she did not plead *guilty* rather than why she plead *not guilty* (i.e. a Guilty Plea was the default, and she explained what prevented a Guilty Plea).[484] Accused 5, another inexperienced accused shared this view. Accused 5 justified not pleading guilty on the basis that the prosecution was playing games by embellishing the incident.

Accused 11 felt that not Plea Bargaining was a mistake made by inexperienced accused persons. Accused 11 thought that experience and wisdom demonstrated that it was prudent to delay pleading guilty and play the game of Plea Bargaining. Indeed, Accused 11 felt that it was important not to be conned into skipping Plea Bargaining:

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[483] Accused 3's lawyer profoundly influenced her perspective.
[484] This seemingly small distinction is significant.

> You've got people with a multitude of experiences in court. You'll not be able to pressurise them. Other people, who have only had one or two experiences, they're the gullible ones, and they can be pressurised. It is very easy for them to be pressurised or intimidated by a court [into pleading guilty].

Accused persons' views that criminal cases are games strongly influenced their accounts of the plea decision-making process. Moreover, it is worth reiterating that this view of law as a game is like that expressed by legal practitioners. For example, overcharging has already been noted, and several solicitors made comments such as:

> [The prosecution's] job to use what tricks they can and our job to counter those tricks. (Solicitor 6).

The effect of this perception was that accused persons felt they should play the game and many endured process costs they did not want to pay. As Casper notes:

> Most did not expect to beat their cases; most simply hoped for the best deal possible, a minimum sentence.[485]

The findings here develop Casper's point leading to one of the most significant contributions to emerge from the interviews with accused persons. The accused persons interviewed here typically expressed a desire to plead guilty to escape the process costs of the court process (discussed further below). However, despite policymakers assuming Plea Bargaining always promotes Guilty Pleas, it can delay them. Plea Bargaining means that accused persons (and defence lawyers) feel a need to delay pleading guilty to play the game – with fiscals likewise feeling the need to overcharge (Fiscal 1 and Fiscal 2). Thus, accused persons paralleled the views of legal actors and felt a need to resist the impulse to plead guilty as this is for "the gullible ones" (a view in line with defence lawyer's and fiscals).

[485] Casper (1978), p.66.

II – Is this a Game to You?

There are two critical problems with accused persons' perception of gamesmanship. The first problem is that the justice system can punish accused persons more severely for attempting to game the system. Gaming the system is perceived to undermine the remorse and contrition accused persons ought to display. While some argue that a lack of remorse *may*[486] rightly impact on sentencing, it is inequitable that the system punishes accused persons for practices that it encourages of legal practitioners. Indeed, Sentence Discounting itself is a high-level form of gamesmanship designed to reward policymakers. Moreover, policymakers reward others for Plea Bargaining. For example, policymakers reward defence lawyers for Plea Bargaining via the Legal Aid system. Thus, it is hypocritical to punish accused persons for attempting game the system when everyone else is rewarded for it.

The second problem is that accused persons viewing the pre-conviction processes as a game may influence how they view the post-conviction stages. Presently, there is little research on the relationship between accused persons' perceptions of the pre-conviction stages and desistance. However, research suggests that "'psychological' or 'correctional' rehabilitation can take a person part of the way towards a better life."[487] Moreover, in Scotland, there has been some recognition that "constructive payback" in sentencing can promote desistance:

> Judges should be provided with a wide range of options through which offenders can payback in the community… By payback, we mean finding constructive ways to compensate or repair harms caused by crime. It involves… reducing reoffending.[488]

[486] See Chapter 2 for an analysis of the problems with sentencing based on remorse.
[487] McNeil et al. (2012) p.10.
[488] Scottish Prisons Commission (2008), para 11.

Accused persons who view the pre-conviction process as a game may have similar views of the post-conviction process. This view may make accused persons less likely learn positive "lessons"[489] or to internalise normative values from a conviction. Failing to internalise normative values may undermine desistance through means that as constructive payback. Thus, a perception that pre-conviction processes are a game may result in problematically similar perceptions of post-conviction engagements as games.

C – "Against the Law"

The third type of legal consciousness accused persons expressed was that of being against the law. Where accused persons perceived themselves as being against the law, they were liable to resist it rather than acquiesce.[490] Policymakers might assume that this perspective is the most common. Indeed, interviews with legal practitioners suggested that there was a significant cohort of accused persons who would fall into this mindset: those belligerent accused who will resist until the bitter end. For example, Solicitor 4 noted that "some people will just never plead guilty."

Those who are against the law perceive themselves to be "up against the law, its schemas, and resources."[491] This research found elements of accused persons being against the law. For example, Accused 2 noted that "it used to be a good system. But, now it is shambolic." This negative view motivated some of their uncooperative attitudes. Where accused persons did view themselves as being against the law (and the system as being against them), they were liable to offer resistance in what Ewick and Silbey call "non-conventional" ways. This resistance occurred through means that did not involve engaging with the law on what accused persons perceived to be

[489] Casper (1978), p.XI.
[490] Ewick and Silbey (1998).
[491] Ewick and Silbey (1998), p.48.

its own terms.[492] When accused persons were seen, or reported, resisting they did so for reasons related to asserting their agency and reinforcing what they felt to be fair, proper, and right. In most cases, this was a rally against what they felt to be their demeaning position in the criminal process.

For example, Accused 4 would, when the judge was not on the bench, share his negative opinion of the process with others in court. Accused 4 said that the process was "bull shit" and that he was not fully present because he "spent all last night getting stoned." This rebellion amounted to an unconventional form of resistance to the requirement that he attend court and respect the court's etiquette. In this way, Accused 4 resisted the authority of the court and its norms. While the court had him physically trapped, mentally he had secured autonomy in an unconventional way that was accessible to him. Some accused persons directed their resistance at court staff other than prosecutors, defence lawyers, and judges. Unconventional targets for resistance were clerks, police officers, and security staff.

However, the research finds that, while there are elements of against the law behaviour, accused persons did not fall into this category as much as policymakers might expect. Court observations reveal that most accused persons in court are placid. This links with the findings of Jacobson et al. (2016) concerning "passive acceptance" among accused persons. Thus, the notion of accused persons rallying against the system is more myth than reality. Moreover, accused persons can also be sympathetic to legal practitioners when issues do occur. Accused 7 argued that:

> Considering what they [legal practitioners] are working with, I'd say they are actually doing a good job. When you consider what they are having to work with in general. I'd say they're doing a really great

[492] In part, this is because accused persons are unable to do this. The court process affords limited functions for non-legal actors.

> job… I can't slaughter it, and actually, when people do, I'll stand up for it. That's nothing to do with a political line, just in general.

Even Accused 4 had positive views despite his in-court rebellion and the statement that throughout proceedings he "wanted to laugh in the judge's face:"

> I will give them that. They have treated me quite well.

Consequently, all three categorisations of legal consciousness are beneficial as they touch upon how accused persons perceive the law in multiple ways: as noble, ignoble, legitimate, illegitimate, etc. These categorisations of legal consciousness also touch upon how accused persons perceive their relationship with the law and how it can be seen as a game they must participate in to avoid being played themselves. Moreover, these categorisations allow the analysis to show that accused persons compartmentalise their views. For example, notions of the formal law were discussed as separate from accused persons' own lived experiences of the criminal process. This compartmentalisation meant that a single accused could, and did, express a view of being before the law, with the law, and against the law in various contexts.

3 - The Pains of Being An Accused

Much of what the accused persons interviewed said resonated with other work exploring the legal consciousness of lay persons. In particular, the work of Sarat on the "welfare poor" offers useful insights.[493] Sarat explores the legal consciousness of those who are dependent on welfare. The welfare poor are similar to accused persons in that both groups generally lack various forms of "cultural capital."[494] Indeed, a Venn diagram of the two groups in Scotland would reveal considerable overlap.

[493] Sarat (1990).
[494] Bourdieu (1986).

Most accused persons' lack of cultural capital places them at a disadvantage compared to a typical legal practitioner facing the same charges. Consequently, a typical legal practitioner will likely experience a given situation differently from a typical accused person. This different interpretation is a key point that research may lose if reading off accused persons' experiences from legal practitioners' understandings of them. Indeed, the pains of being a defendant made a Guilty Plea more tempting, regardless of Sentence Discounting, than legal practitioners suggested.

A – Are Accused Persons Inured to Process Costs?

There is something of a perception amongst policymakers that those with criminal histories are more immune to the process costs of the criminal system compared to 'normal' people. Several interviewees were also of the view that socio-economically disadvantaged accused had less to lose. There was a belief that fines were a minimal punishment due to the limited means of many accused persons,[495] and even custody had little incentive (e.g. Solicitor 2). Sheriff 4 noted that:

> You sometimes think that the whole process of having to stand in the dock and plead guilty and be found guilty. It is a big thing to a lot of people… the court process can be quite a deterrent for a lot of these people in itself…
>
> I think, if you are a person that leads an otherwise respectable life and you're not familiar with the courts, the fact of having been charged and going to court can be a significant deterrent.

By contrast to the typical accused person, legal practitioners thought that "respectable" or 'normal' people could be more vulnerable to the effects of the criminal process. For example, a first summary conviction was thought to carry more

[495] Several legal practitioners were of the view that fines simply meant a small deduction from benefits to be paid over a period.

weight than a thirteenth. Legal practitioners generally thought that for those with many convictions, summary cases would often not matter to the person convicted. These were the "rubbish cases" that matter nothing to anyone (accused included) beyond the need to have them disposed of (Solicitor 5).

Certainly, those accused who were less familiar with the criminal process (Accused 1, Accused 3, Accused 5, Accused 10, and Accused 12) found it unnerving in a way that those with more experience did not. For those with jobs (Accused 1, Accused, 5, Accused 6, Accused 10, and Accused 12) the prospect of a conviction was also disconcerting for their employment. For example, Accused 10 faced both a potential custodial sentence and damage to their business. Indeed, Accused 10 ultimately received a custodial sentence but was of the opinion that the criminal record and collateral consequences were the most punitive element. By comparison to the process costs Accused 10 said that prison was "cushy."

The issues that Accused 10 felt were important differed from those who were unemployed and already had a criminal record. Thus, accused persons are not a heterogeneous group, and they may experience the justice system differently. However, as Accused 9 demonstrates, even someone with extensive experience of incarceration can experience profound implications of going through the criminal process and facing the prospect of custody. Moreover, evidence suggests that those with experience, quite contrarily to becoming inured, suffer in several ways.[496] Thus, it is wrong to assume experienced offenders are inured to process costs.

Consequently, it is important to stress that how accused persons experience the criminal process is poorly understood. It is also important to be careful with making

[496] For example, contact with the system causes harm in that it serves to "stigmatize and criminalize." (McAra and McVie (2012b), p.555).

unfounded assumptions when dispensing leniency. As Bandes has argued, compassion may lead to a "break" for those a legal practitioner "instinctively understands, sympathises with, [and] identifies with."[497] This break is not necessarily bad as penal parsimony is generally desirable. However, unintentional discrimination can lead to "the danger of cultivating selective empathy for those… who live 'respectable lives.'"[498] While little research exists in Scotland, Bandes had argued that:

> In the US and elsewhere, this kind of compassion may be selectively doled out based on racial bias and class bias, unconscious or otherwise.[499]

Thus, there are serious issues raised by notions that some accused persons are inured to the burdens of the justice system. Firstly, this research finds that this is not always the case (see below). Secondly, even if accurate in some respects, this assumption raises problems regarding notions of equality before the law.

B – The Controlling Nature of the Pre-Conviction Process

For all accused persons (regardless of experience and capital) the State's coercive and controlling aspects are more overbearing than they are for the 'general public.[500] This underlines Sarat's claim that for those caught up in the system, "the law is all over:"

> The recognition that **". . .** the law is all over" expresses, in spatial terms, the experience of power and domination; resistance involves

[497] Bandes (2017), p.190.
[498] Bandes 2016.
[499] Bandes (2017), p.190.
[500] What one defines as the general public can be biased based on background. For many of those with a criminal history, their associates also had similar histories.

> efforts to avoid further "spatialization" or establish unreachable spaces of personal identity and integrity.[501]

One burden accused persons face is that it is possible they will be remanded in custody pending a trial.[502] Those in remand face significant issues as conditions can be "worse than prison" (Accused 2). Accused 2 discussed their experience of remand through the years. They noted that court cells were extremely uncivil. They also noted that, while things had improved, this lack of civility was problematic because "if you treat people like animals they will act like animals:"

> [In the past] You were crammed in a cell with everyone. There were no toilets, no room to spit. When we piled out, we would fight with the screws just for something to do…
>
> And the food. You get a sandwich, and it is the cheapest, saddest sandwich you ever have seen. You also get a packet of crisps and nine times out of ten they are out of date. That's what they give you, the cheapest stuff possible.

Even if an accused remains at liberty pending their case's disposal, they can be subject to onerous bail conditions. For example, accused persons awaiting trial may be prohibited from speaking to certain persons, accessing the internet, entering certain locals, banned from entering their accommodation, etc. Solicitor 8 noted that:

> I can't tell you the number of people that come to me, and I say, "I hope you have somewhere to go because you can't go home."

Accused persons may also be required to cooperate with the court and its staff in various ways. While there are often good reasons the system places these burdens

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[501] Sarat (1990), pp.347-348.
[502] The likelihood of this varies based on the offence and policies operating at the time.

on accused persons, this does not make them any less onerous. As such, accused persons' freedom is limited throughout their engagement with the justice process. Indeed, accused interviews support the findings of Feeley that "the process is the punishment."[503]

C - Is the Pre-Conviction Process Overwhelming?

These stresses accused persons face engendered a sense of feeling "overwhelmed" (Accused 3). Even experienced and knowledgeable accused persons were not immune to this. Accused 9 noted that:

> Its fucking complicated. It's a big, big organisation. When you think about all the people and the outside organisations. It's like a big spider's web. Fucking humongous. See the judicial system… when you sit down and think about it...

As a result, choices such as how to plead may not be desired by accused persons. Plea decision-making is extremely difficult given all the facets of Plea Bargaining. For example, it is not immediately evident whether one big section 38[504] is better than two section 38s and two resisting arrest charges. Nor it is always apparent what is beneficial and what is detrimental when agreeing on the narrative of an offence, etc.[505]

While accused persons did seek respect and could exercise their agency if they felt slighted (discussed below), the plea-making decision is something they typically handover to their defence lawyer. As such, accused persons want agency, but they

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[503] Feeley (2017).
[504] An offence of threatening or abusive behaviour.
[505] For example, an offender being intoxicated during the commission of a crime can be perceived as mitigating in some contexts and aggravating in others. See Chapter 4 for an analysis of how 'factors' can vary depending on context.

can also be overwhelmed by it. This dilemma is what Schwartz calls "the paradox of choice."[506] Having more options to choose from is not always welcome, and certainty can be more desirable. In the criminal process, the only way to achieve a perception of certainty is to have someone else (a legal expert) make the decisions.

The effect this paradox of choice has on Guilty Pleas is complex. Lawyers themselves, while exercising a significant degree of autonomy, did report that they act for the clients' interests (see Chapter 7). However, given the indeterminacy of the client's interests, this leaves a great deal of scope for a defence lawyers' views on how a case should proceed to take effect. The indeterminacy of clients' interests means that it may not be differences between Court 1 and Court 2 clientele that account for different pleading behaviours.[507] This point is important as there was some perception that differences in clientele may have accounted for the differences between Court 1 and Court 2. As Sheriff 2 noted:

> The impression is that in a large number of cases the accused place their agents in a very difficult position in the sense that they quite properly exercise their right to put the Crown to the test. Now there is nothing wrong with that... but there are numerous cases where it is perfectly obvious from day one that this case will prove, but there is no plea until the last minute.
>
> I don't fault the agents for that, because they have no doubt given advice at an earlier stage, but the client has decided not to take it in the hope that the case will go away, or witnesses won't turn up... I understand [from speaking to other sheriffs] that that can vary from place to place.

[506] Schwartz (2004).
[507] Instead, the difference between Court 1 and Court 2 may relate to how defence lawyers understand clients' interests based on their culture. However, it is possible that clients come to share the cultural values of defence lawyers.

This research cannot make comparisons between the clientele of Court 1 and Court 2. What it can do is note that, from the interviews with accused persons, those who are accused of an offence face some significant influences that make a Guilty Plea more appealing. Thus, it seems that when Guilty Pleas are not forthcoming there is a reason for this: there is something that makes the Guilty Plea seem unviable.

4 – Liminality: Betwixt Guilt and Innocence

A – The Criminal Process and Waiting

This research found that accused persons experienced substantial distress due to the waiting involved in the criminal process involved. That accused persons feel waiting to be detrimental challenges the assumptions of many legal practitioners and policymakers that it is trivial or benign.

Some accused persons had to travel far to attend court and incur a significant cost (e.g. Accused 4 took two buses). Others had to arrange childcare (Accused 3), miss work (e.g. Accused 1, Accused 5, Accused 6, and Accused 10). Following this, the court told them to attend another day as it was unable to hear their case for one reason or another. Accused 2 noted this was often inevitable as the courts were overbooked:

> You get told to be there at quarter to ten. And then to come back at two o'clock. You know they are never going to get to you. Look how many people they have to get through. I know it, and they know it. But they still make you come, and you have to wait until they tell you, "we are putting it back." Why can't they tell you that in the morning? They know it's not going to happen today, but you still have to wait for them to tell you to go away.

Accused 9 commented that one of his biggest criticisms was:

> Repetition! You're going to court, and like the police aren't there. They should be there! Come on to fuck; they're the ones that brought it there. All this, "a trial can't go ahead because PC Shiny Buttons is in Marbella for a week."
>
> PC Shiny Buttons knew court was coming so he shouldn't have booked his holiday. He chose that profession. Or they could do it by video link. Its good enough you can do it in Barlinnie [a prison] and for ID parades (very common for ID parades now).

In court observations, the judge instructed one man who had travelled a significant distance that, as part of bail, "you will have to make yourself available to the court at short notice." In another instance, a defendant had been waiting for his case to call since the court opened. Eventually, a court officer informed the accused that he was to come back after lunch to see *if* it will call at that time. A friend of the accused [508] pleaded with the officer that this was not possible:

> You don't get it. He's an alcoholic. If he goes for lunch, he is not coming back. That's just not something he can do.

After lunch, the case did in fact call, and the accused was not present. Possibly, (per the friend's warning), the accused, having stayed sober all morning, had missed court due to his dependency issues. Unfortunately, information about the difficulties of this accused did not (at least at that time) reach the judge. Instead, the judge was informed[509] that a phone caller had left a message that the accused had gone to a hospital for an unspecified reason. The caller left a clearly fictitious and humorous name which elicited laughter in the public gallery.[510] Consequently, the impression provided to the judge was that the accused was mocking the court. The judge

[508] Many attended courts alone.
[509] The judge was informed in open court by a different court officer who had not heard the friend's warning.
[510] Why the phone caller (whether the accused or an acquaintance) chose this immature route instead of explaining the difficulties over the phone is unknown.

appeared singularly unimpressed and noted that he would seek evidence of this hospital visit, which the accused had better be able to provide.

Accused 10 even noted that waiting and the process overall was worse than prison. For those with families or employment, there were additional issues. Several accused persons with employment had lied to their employers to conceal the fact they were being prosecuted. Accused 3 had childcare issues to manage but never knew how long she would be waiting in court on a given occasion. This uncertainty made arranging childcare difficult, and she complained it was frustrating to ask someone to "babysit" when she could not say for how long.

Accused 12's initial meeting with his lawyer was observed. Accused 12 lamented that, "there are an awful lot of maybes and buts." Accused 12 was facing a driving charge and was offered a Fixed Penalty Notice (FPN). The defence lawyer advised that *if* Accused 12 did not accept the FPN he "may" be taken court, or the charge "may" be dropped. This was a case that, if proceeding to court, would *almost* certainly be heard at a summary level. "Most likely," the defence lawyer advised, it would be at the JP level, "but" this was not guaranteed: "there are no guarantees."

Accused 12's defence lawyer also advised that if going to court and pleading guilty, it was unlikely that the number of points awarded would increase, "but" again this was not certain. Accused 12 queried, if rejecting the FPN, how long it would take the Crown to decide upon a course of action. The defence lawyer advised that it could be months and Accused 12 would need to wait and see if anything came through the post. Accused 12 did not relish this prolonged period of waiting and asked if there was any way to get a faster resolution. The defence lawyer advised that there was not.

In the end, Accused 12 was reassured by his defence lawyer that it was worth rejecting the FPN. From this example, and the subsequent interview, it is clear that

waiting and uncertainty can affect an accused person's decision-making (though defence lawyer advice is often key).[511] Indeed, future research should further explore what this radical uncertainty does to a person's decision-making and whether it makes accused persons risk-averse.

B – Accused Persons as Liminal Entities: Between Guilt and Innocence

A key point to emerge from court observations is how trapped and powerless accused persons are in the criminal process. In the courts, people haunt the hallways like spectres stuck between two worlds (freedom/confinement and innocent/guilty). This finding challenges assumptions that in summary cases the most punitive part of the criminal process is the judicially imposed sanction.

All accused persons interviewed spoke negatively of the waiting involved in their case. However, the issue was not just the (often considerable) inconvenience. The issue was also the frustration and the reifying effect that waiting had on their powerless position (whether 'with," "before," or "against" the law). Accused persons were legally, ideologically, psychologically, and physically trapped.

These difficulties of waiting that accused persons experience are similar to those of other groups, such as those dependent on welfare:

> Power and domination are… represented in the legal consciousness of the welfare poor in temporal as well as spatial terms; thus, the people I studied often spoke of an interminable waiting that they said marks the welfare experience. In that waiting they are frozen in

[511] Indeed, as Part 3(C) of this chapter argues, various pressures can overwhelm accused persons. Accused persons being overwhelmed might be why they rely on defence lawyers' advice as much as they do.

> time as if time itself were frozen; power defines whose time is valued and whose time is valueless.[512]

In the summary criminal process, professional actors' tightly control time. It is the demands of legal actors and the legal system that largely determines when cases call, not the accused. This control means that while accused persons are not convicted, they do not perceive themselves to be free either.

Consequently, this research found that the problem with waiting is that accused persons find themselves to be liminal entitles:

> Liminal entities are neither here nor there; they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremony...
>
> As liminal beings they have no status... Their behaviour is normally passive or humble; they must obey their instructors implicitly, and accept arbitrary punishment without complaint. It is as though they are being reduced or ground down to a uniform condition to be fashioned anew.[513]

Accused persons exist between guilt and innocence. Accused 11 lamented the postponement of his cases and the feeling that he was "stuck in limbo." Accused 11 had a lengthy record and felt a custodial sentence was a distinct possibility. He even attended his sentencing hearing with a packed bag showing that even while at liberty he was thinking of custody.[514] Accused 11 noted that during the pre-conviction period he had reflected on his life, and how he wanted to turn it around. Accused 11 hoped

[512] Sarat (1990), pp.347-348.
[513] Turner (2017), p.95.
[514] He was not the only one to do this, though most did not.

that if he did not get a custodial sentence, that this would be his chance.[515] As part of this he reflected on his lack of freedom during the court process:

> You hear them banging on when people do get the jail, "oh they've got Xbox's, they've got this, they've got that." But what they seem to forget is the loss of freedom. Freedom is everything! Ask Mandela… well, you can't but look at the shit he put up with. The lack of freedom is the punishment. You go to prison as a punishment, not to be punished. And, I don't know... They'd have us drinking dirty water.

For Accused 11, he was not free while in the liminal state. Moreover, Accused 11 was not even free to come to terms with his lack of freedom in the liminal state. Others noted the burdens of being an accused and linked this to their lack of freedom. Accused 1 was frustrated that "it just hangs over you. There's nothing you can do about it." Accused 10 noted that:

> While I was happy at the time to draw it out [for the Plea Bargain which did not happen], I wish now that I'd just gotten it over with and moved on. Instead, I've wasted a lot of time when I could have gotten it over with and moved on. But at the time it wouldn't have made sense for me to plead guilty

In terms of why Accused 10 did not plead guilty, he thought he would secure a Plea Bargain. This Plea Bargain made a Guilty Plea appear imprudent. When the Plea Bargain fell apart Accused 10 then pled guilty. Thus, this is another reminder that accused persons may be pre-disposed towards pleading guilty. It is also a reminder that Plea Bargaining may deter early Guilty Pleas. In the case of Accused 10, the Plea Bargain collapsed late on at the long-postponed trial diet.

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[515] See Schinkel (2015) for a discussion of narratives of change. This discussion shows that positive narratives often fail because of uncontrollable circumstances such as limited life choices.

I - Literal Liminality

It was a common sight to see bewildered accused persons in court. There are many examples from court observations I could note to exemplify liminality (e.g. Accused 11 with his packed bag). However, in the interests of brevity, I have picked two here.

In one of the courts observed there is a long corridor between the public waiting area and the courtroom itself. On one occasion I encountered Bob.[516] Bob was alone, disconcerted, and pacing in the secluded corridor between the public waiting area and the courtroom. When I asked Bob if he was ok, his first response was a disheartened, "I just want to go home and get away from this place." As to why Bob was in the corridor, it transpired that his lawyer had told him to "go to Courtroom [X]."

Bob did not know whether "go to Courtroom [X]" meant to wait inside the courtroom or in the public area outside the courtroom. As Bob thought his trial was due to take place, he had attempted to enter the courtroom but had seen that "there are people in there doing something." Therefore, Bob was confused, distressed, and remained in the isolated corridor pacing back and forth. Bob's entrapment in the corridor between the courtroom and the public area was a fitting illustration of the liminal position in which accused persons find themselves.

Regarding Bob's case, this was a summary case Pleading Diet. The procedure is that all parties (at liberty) are to enter the court and wait for their case to call, so they can plead guilty or not guilty. Yet, no one had explained this to Bob, and it is certainly not intuitive. The courtrooms with large doors and lights denoting "in session" are foreboding and any lay person could be forgiven for being uncertain as to whether

[516] Not his real name.

this is an invitation to enter or a warning to keep out (as the experience of Jon below demonstrates).

I told Bob that he could enter the court. With this clarified, Bob was freed from the corridor. However, Bob's liminality did not end there. After pleading not guilty, Bob noted that "I thought that for better or worse at least it would be over and done with." In fact, this was a pleading diet, and Bob was given two further dates to come back to court.[517] Bob remarked "why have I to come back, TWICE? I hate this place."

On another occasion, I was waiting to enter the court in the public waiting area. The schedule listed the courtroom as opening at 10 am. However, the courtroom was double-booked: there were two judges listed to sit in the courtroom at 10 am. The courtroom being double-booked meant one judge's sitting would be delayed, but by how long was unclear to the public.

Closed court business ran until about 10.40. During this period, there was no announcement regarding what was happening and a general sense of confusion among those waiting. Some individuals haunted the area near the door persistently, while some would disappear and reappear every few minutes.

One individual, Jon, was nervously waiting. Jon had a case that was due to call and was concerned he would miss it. Jon felt he should be in the courtroom after 10 am because his letter said so, but he was trapped in the public area. Like Bob, Jon was a liminal entity twice over. As an accused Jon was liminal and between guilt and innocence. Moreover, even in the purgatory of the court building, Jon was liminal as he was betwixt the public area and the courtroom (albeit less literally than Bob). Jon and Bob are not aberrant cases.

[517] When the sheriff read out the dates, Bob panicked and interrupted. He wanted to know if this would be given to him in writing as it was a lot to remember.

Jon would run to the courtroom door every-time a clerk left or entered. Each time Jon was told it was a closed court. Jon would then move away only to do the same whenever another person entered or left. This routine played out four times. On the fourth occasion, Jon was too slow. The clerk had closed the door. Jon proceeded to knock on the door frantically. When the clerk opened the door, Jon told him, "I'm supposed to be here!" The clerk again told him it was still a closed court and shut the door. Jon went back to waiting.

C – The Criminal Process as a Liminal Prison

This research found that the court process becomes a liminal prison for accused persons. Rather than trapping persons in a cell, the court process traps the accused in the betwixt. Accused persons are free, but at the same time, they must attend court on set days and often for the better part of a day. Even out with court accused persons awaiting their case to call cannot escape their liminal position.

From this perspective, it is little wonder that some claimed they might plead guilty to be 'free.' This links with other research on accused perspectives in the US which has found that "delays that filing of motions or demanding trial can produce – place strong pressures on the defendant to get it over with, to cop out and "escape" to prison."[518] Consequently, the court process, delay, and waiting are not as benign as they first appear. Without effort, the criminal process takes a toll on accused persons. Indeed, "waiting time and uncertainty" has been found to be highly stressful:

> The wait is devastating because it is associated with uncertainty, doubt, inability to control, constant questioning and confronting one's fears. It is associated with constantly thinking about what has happened – magnifying every detail and reaction, every piece of

[518] Casper (1978), p.16.

> information – in an attempt to find spaces of control that allow survival…
>
> The message is 'there is no reason to hope'... nobody can do anything to avoid what will happen if the person does not speak… when the time between [] sessions finally arrives, it is a time of wearing down the detainee, of psychological exhaustion from the effort to maintain control, and of constant self-questioning and obsessive rethinking of one's actions.[519]

As a result, while legal actors valued legal principles, and each acted within the proper bounds of her or his role, a key finding is that accused persons do not experience the system in this way. Accused persons gauge the effect of the system as a whole. The total sum of all the parts (no matter how well-intentioned each element is) is what accused persons experience. While accused persons were surprisingly sympathetic to legal practitioners' struggles, this had limits. As Accused 10 noted, "they have their job and do the best they can, but that's not our problem".

In sum, the pre-conviction process traps accused persons. There is the physical waiting in court. There is also the waiting for court dates, waiting for a sentence, etc. The pains of waiting are a critical finding of this research because there appears to be a widespread perception that accused persons wish to "put off the evil day."[520] However, this research finds that unless there is a belief in a likely acquittal *or a* Plea Bargain, there appear to be a great many accused persons who want their case over with one way or another court.

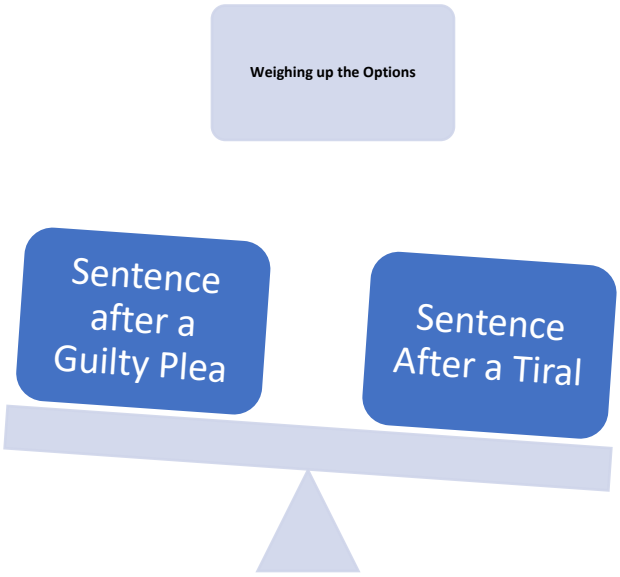
[519] Sales (2016) p.57.
[520] Tata (2007a).

5 – Accused Persons' Perspectives on Sentencing

A common complaint accused persons had was the uncertainty of the process. This uncertainty extended to all elements of the case: whether they would be charged, what the charges would be, where they had to be, how long they had to be there, etc. However, the most criticised aspect of the process was the uncertainty about what the sentence outcomes would be. Accused persons deciding how to plead wanted to know what they were 'looking at' if they plead guilty and what they were looking at if they plead not guilty and were convicted. This concern is an important finding regarding how accused persons interpret the sentencing process.

In terms of interpretation of the sentencing process, from this sample of accused persons, the two relevant considerations are (1) the sentence if pleading guilty and (2) the sentence if pleading not guilty and then being found guilty following a trial.

Figure 2



The significance of this finding lies in the fact it challenges certain views. For example, Abrams (2011) argued that the correct comparison should be between (1) the sentence if pleading guilty and (2) the sentence if pleading not guilty, factoring in the chance of an acquittal. While those such as Abrams make an argument for this

approach (see Chapter 4), this is not how accused persons evaluate the Sentence Discount. This key finding affects the nature of Sentence Discounting relative to the presumption of innocence.

Consequently, accused persons viewed going to trial as posing a 'risk' that this could lead to a higher sentence. This perception undermines the arguments of policymakers that Sentence Discounting is a reward for pleading guilty that does not violate the presumption of innocence (see Chapter 2). While policy architects *may* genuinely hold this view, the views of those who need the presumption of innocence should arguably take precedence. For example, Accused 4 claimed they pled guilty to avoid a higher post-trial sentence, not to benefit from a Sentence Discount:

> I just pled guilty because they had my [social media evidence]. They would've thought I was lying. So, I just plead guilty otherwise I would've got more of a sentence.

The veracity of Accused 4's claim of innocence is unknowable.[521] Yet, it is significant that in this sample of accused persons there is one who claims they plead guilty, even though innocent. There was also another (Accused 5) who claimed they genuinely had no idea of their guilt or innocence but would have pled guilty if not for their belief that the Crown was "embellishing" the incident.

This finding raises questions about whether Sentence Discounting might lead the innocent, and those who are uncertain of guilt, to plead guilty. For example, Accused 3 (and Accused 5 to some extent) while accepting wrongdoing, was unclear as to what the charges were. It is also a significant finding that for the accused persons interviewed, Guilty Pleas did not result in a discount. Instead, accused persons thought that a Not Guilty Plea ran the risk of "more of a sentence." When I asked Accused 4 whether they felt their Guilty Plea received a discount, the response was:

[521] In some interviews it seems there is divergence between accused persons' notions of culpability and the legal notion. However, the research did not probe this in detail.

> No. I just got the same thing. I would've got locked up if I didn't plead guilty. That's why I pled guilty.
>
> [Interviewer: "Did the Judge tell you that because you plead guilty you didn't get the jail?"]
>
> No, my solicitor. He said that to me. That if I didn't plead guilty, that if I said, "not guilty," they've got [evidence]… so I would've got fucked if I pled not guilty…
>
> It felt like I had pressure put on me and that.
>
> [Interviewer: "From the court, or the lawyer, or just everything?"]
>
> The court. Fucking bullshit like.
>
> The system is fucked up. I've been going to court loads of times since [a young age]. I'm [X] now, and the system is fucked up. They just always want to put things on me.

Consequently, Accused 4 claimed he pled guilty while innocent due to his lawyer's advice and a belief that the sentence would increase.[522] The issue was not framed as one where the accused might benefit from a Guilty Plea. Indeed, while some policy debate (and case law) expresses concern that Guilty Plea Discounts may be too generous, no accused person interviewed had this concern. For accused persons, the 'discount' was a trial penalty that created a disincentive to plead not guilty, regardless of their perceived guilt.

[522] Most accused interviewees perceptions of possible sentences came exclusively from their defence lawyer. Accused 2 and 9 felt they had enough experience to hazard a guess. Accused 5 reported that they initially attempted to Google the possible sentence (with little success beyond a realisation that sentencing is formally "vague").

A - The "One-Third Sentence Discount"

Interestingly, while accused persons spoke of pleading not guilty as a risk, they also regularly spoke of the 'one-third sentence discount' as a matter of fact. That accused persons mentioned Sentence Discounting was significant. The interviews were designed to avoid mention of Sentence Discounting to see if accused persons would identify it themselves without any prompting and, if so, how they would describe it. In all cases they did, though accused persons often conflated Sentence Discounting with Charge Bargaining and Fact Bargaining. Indeed, accused persons seemed to care little for the legal nuance that distinguishes Sentence Discounting from the mitigatory effects of a Guilty Plea.

Crucially, this talk of Sentence Discounting would seem to refute the argument that accused persons feel the presumption of innocence is violated - or at least that it is not Sentence 'Discounting' that violates it. However, upon further questioning, it transpires that accused persons were repeating what their defence lawyers had told them. As defence lawyer interviews showed, the lawyer-client discussion of section 196 is far less caveated than the analysis presented in Chapter 2.

Thus, this apparent incongruity between the perception of a longer post-trial sentence and the use of the term 'discount' was less significant than it appeared. Accused persons used the term 'Sentence Discount' unreflectively and repeated what their lawyers had relayed to them. However, when reflecting on the plea decision-making process, accused persons considered going to trial to be running the risk of a higher sentence.

Accused 2 was exceptional in his view regarding the certainty of Sentence Discounting. Accused 2 felt he had legal expertise and referred to criminal procedure, Renton and Brown, etc during his interview. After Accused 2 noted the Sentence Discount, I asked him follow-up questions about how it worked. During his answer he noted that:

> It is not compulsory. If you are a sheriff, you don't need to give me a discount! You might turn around and go, "I appreciate that you pled guilty and will be looking for a discount, but the charges are too serious I'm not giving you a discount."
>
> [Interviewer: Can you appeal if you don't get a discount?]
>
> You can choose to appeal it if you want to, but you won't be successful. They will turn to you and say:
>
> > "You are appealing a decision that a sheriff has made where he said he is not awarding you a discount or a sentence reduction because the charges are serious. You were getting found guilty, and you knew you were getting found guilty. You thought you could do damage limitation to yourself by pleading guilty. That doesn't wash."

Much of what Accused 2 identified as a caveat of Sentence Discounting from their experience ties in with what sheriffs said in interviews. These caveats highlight the problems with the lack of legitimate expectations regarding Sentence Discounting. While in practice the discount may be predictable, it would be unfortunate to be the exception who does not get a discount. Moreover, Accused 2 also highlights the negative view judges take of accused gaming the system (see Section 2(B)(ii)).

In sum, the critical finding that future research should be aware of is that accused persons may uncritically use significant terminology in ways that do not accord with their perceptions. To this end, this research was correct in approaching the question of Sentence Discounting indirectly to allow accused persons to self-identify issues.

6 – Does Perceived Fairness Matter?

Where accused persons thought the process was unfair, they were 'against the law.' Where accused persons are against the law they can disrupt the smooth running of the court.[523] For example, Accused 5 reported that while they had no recollection of the alleged incident, they would have pleaded guilty if not for the fact they felt the Crown was acting unfairly by overcharging:

> I might have [committed the offence]. I don't remember. And if they hadn't embellished and it sounded reasonable, I would have held my hands up and apologised to the guy. In fact, I will apologise if I ever see him again, though not that I would recognise him…
>
> But [in the narration of the alleged offence] that's just not how I talk. Drunk or not.

In this regard, the importance of procedural justice becomes apparent.[524] Indeed, accused persons have a powerful desire to be heard, valued, and respected (in part because of their liminal state). Some interviewees even spoke of how they would threaten violence to achieve fairness. For example, Accused 11 noted that if they were not shown respect, then they would physically lash out.

Accused 1 expressed a strong dislike for the court fiscal in his case and this partly motivated his Not Guilty Plea. When Accused 1 spoke of winning his case, his satisfaction was not just relief, but also that he had "showed them." The victory was, in part, about getting his own back on the "snarky" fiscal who was thought to have enjoyed demeaning him in court. Indeed, for Accused 1 part of his victory was that the police officers and fiscals were shamed for conduct he perceived to be wrong.

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[523] Ewick and Silbey (2003) analyse the resistant methods that may be adopted. They show how lay persons may appropriate elements of the system in offering resistance.
[524] Lind and Tyler (1988).

Likewise, Accused 2 offered resistance where he felt the system was against him. Accused 2 was a repeat offender and had spent over thirty years of his life in prison for various matters. He was a person who had served a life sentence in instalments. However, this did not make Accused 2 cynical. Like other accused persons, Accused 2 had compartmentalised perspectives of the law.

One view Accused 2 had was highly formalistic. During his incarceration Accused 2 had taken to self-studying law and felt that "everything you need to know" was written somewhere (references were made to Renton and Brown's work on criminal procedure, etc). This formalistic view endeared Accused 2 towards being before the law. This view persisted despite Accused 2's recognition of the indeterminacy of Sentence Discounting and his perception of Plea Bargaining as a game. Indeed, these competing views are an example of how accused persons compartmentalise different legal consciousnesses.

However, while lauding various aspects of the law, Accused 2 recounted one instance he was against the law. In this instance Accused 2's lawyer was unavailable and G4S directed him to an available lawyer:

> I went to court, and because the lawyer I had at the time, [Solicitor X], was [Court 3] based, he couldn't get up here. It was such short notice.
>
> So, they [G4S] were saying to me, "you will just use the lawyer we dictate to you." I say, "It doesn't work that way. It's my right. I'll just do it myself." And they didn't like it.
>
> But they were shocked that an accused could sit there and be highly competent within the law and can start bringing out quotations of law where the sheriff is like [bang]…."I'm not here to be dictated by you." "Well, you are when I'm proving my innocence!"

Thus, Accused 2 found that, "even among defendants competent in the art of self-defence it is harder for the unrepresented defendant to *get away* with the same methods as a lawyer."[525] Interestingly, while Accused 2 perceiving himself to be against the law prompted him to represent himself, Accused 2 recognised the value of a lawyer throughout the interview and spoke highly of his lawyer:

> [If you want to testify] don't contradict your lawyer. He's fighting for you… he should always tell you, "what you've got to do here is…"

However, despite recognising the value of a lawyer, Accused 2 would rather represent himself than be told who his lawyer would be. Ultimately, Accused 2 had resisted what he perceived to be an illegitimate use of power and a violation of his rights. In other cases, accused persons who felt aggrieved relied on complaints processes to try and offer resistance. In the case of Accused 12, he felt that he had been wrongfully accused and he made a complaint against the police. Other accused persons adopted a similar approach: Accused 9 complained against court staff and Accused 11 against G4S staff.

A - Equality

Experienced and inexperienced accused persons shared a perception that they were undervalued in the pre-conviction process. For example, Accused 5 noted that the fiscal dealing with his case in court had little knowledge of it and appeared to be reading off a script. Accused 5 felt frustrated because he felt that his case, though important to him, was not respected by those prosecuting it:

> [The fiscal] was just reading off a script. I don't think they he had ever seen anything about my case until the night before… And then they must have gone through and highlighted bits and just read them off.

[525] McBarnet (1981), p.136.

> Then the judge asked them a simple question, why I was not to go to an address [as part of bail conditions]. He just had no clue and took a long time reading the file for the answer. I think even the judge was not happy. [Exasperated] I mean, just come on. Be prepared.

While an unprepared prosecution might be thought desirable from an accused's point of view, it is interesting that this was taken as insulting and demeaning. The lack of preparation was also felt to add stress as Accused 5 reported he only received the charges against him twenty minutes before he had to enter a plea of guilty or not guilty.

Several accused reflected on the hierarchical structure of the court. They commented that this was an old system better suited to a bygone era. Accused 6 noted that:

> I mean the "My Lord" stuff and the wigs and the gowns.
>
> You're not "My Lord." You're a guy doing a job just like me. And fair enough, you may know more about the law than me, but you're not "My Lord" [sarcastic tone]…
>
> I think society has moved on. We've evolved. That stuff belongs in the past…
>
> I just can't get over that police officer bowing in court [laughs]. It's absurd!

If the court was perceived as being based on a feudalistic hierarchy, Accused 6 was not accepting a peasant designation. He drew on more modern Liberalist and economic ideas to rationalise that the sheriff was just a person in a wig and that individuals should be equals. This old-fashioned operation was also criticised by Accused 9:

> You don't need that shit… It's prehistoric... See all the rigmarole, I don't know… it's too formal. It's like dinosaurs with the way they set it up with all the pomp and ceremony.

Accused 11 felt that there was inequality in other ways:

> You will see it. The lawyers come in at first, and they will maybe get searched the first time. But they go out and in, out and in, and they bypass the metal detector. But if I go out, say to hand a tenner to the Missus, and they see it, I've still got to go through the thing again. The problem isn't me having to go through the thing again; it's picking and choosing who has to go through it.

Within the court itself, Accused 2 felt legal professionals were unwilling to respect his legal arguments due to his status:

> The judge's attitude was he thinks he's smarter than us, and the judge thinks:
>
> > "Fair enough he might be smart to the extent he's proved his innocence. But I'm not going to give him that innocence. I'm telling him he's guilty because I'm not having a smart arse come in here and telling us, showing us… that's not happening."
>
> He didn't want a smart arse coming in.

In sum, accused persons may struggle with the lack of agency they have in the criminal process. Indeed, the whole process of Scottish summary justice is one that leaves the accused a liminal entity. Beyond instructing their solicitor (though most seem to follow their solicitor's advice)[526] and responding to the odd token prompt

[526] Pragmatically this is, in many ways, prudent. However, it does mean the accused's agency here is mostly symbolic. Thus, they do not feel empowered.

from a judge (e.g. when stating how they plead or silently nodding when the judge warns "do you understand me, Mr X?") most accused do almost nothing in their trials. Events play out before them, often in confusing ways (as Accused 3 found).

7 - Accused who do not want a Sentence Discount

In the Scottish context, the Sentence Discount relies on assumptions approaching a "self-interest" version of rational choice theory.[527] However, this research observed multiple cases where the accused desired custody rather than a Sentence Discount. Certainly, some legal professionals felt that, for some, "the jail holds no fear" (Solicitor 2). However, asking for custody is a step further and challenges assumptions that Sentence Discounts are desirable.

The research asked Sheriff 4 whether offenders can choose a custodial sentence rather than an alternative disposal. Sheriff 4 responded that, effectively, they could "to the extent that they will not comply with another order." Regarding accused asking for custody, Sheriff 1 noted that:

> You get people saying they want to go into custody.
>
> There was a time when a lot of females appearing in the Custody Court would say to their lawyers that they want to go to jail. They thought that Cornton Vale was some time out.
>
> I try to discourage that view myself.

Sheriff 3 noted a similar trend:

> If you want to sit and cry come into this court at Christmas. Because people will commit petty crimes, so they get their Christmas dinner

[527] Korobkin (2000), p.1061.

> and are warm and dry, and they have company. So, it is horrific. The elderly, the homeless, and the young who are on their own.
>
> I had an older gentleman who wanted in [a prison]. I said, "I'm not going to jail you, you've got a terrible record, you're on benefits, and I'm going to fine you." He said he wanted the jail and I told him, "no." He walked out of here [and immediately committed a more serious offence by vandalising the court]. So, I jailed him for that. But that was what he wanted, so he was determined he was going to be jailed no matter what.

In some cases, prison was thought to be beneficial. For example, a case was observed where the defence lawyer requested custody so that the client could take part in a prison programme. The sheriff inquired as to how long the programme would take. The defence lawyer was uncertain and paused. The sheriff asked whether six months would be enough. The defence lawyer said it would, and the sheriff passed sentence on the various charges that, with the Sentence Discount, came to a total of six months.

Some accused persons took this desire further and set out to offend to receive a custodial sentence. For example, Solicitor X noted that:

> There was a guy… and he was an alcoholic who, basically: got the jail, had his own cell, got out, and straight away got drunk and went straight back in again. And his instructions were always "I want the jail." And he always asked for the duty solicitor and asked for the jail.
>
> And I got him one year; it was my job as duty solicitor. I appear with him and I say:
>
> > "He pleads guilty My Lord. You'll see he's got a terrible record and he's on licence. I am instructed not to ask for anything other than a custodial sentence."

> And it was a new temporary sheriff, fresh out of the box [laughs lightly]. And he says:
>
> > "No, no, no [Solicitor X]. This man needs treatment; this can't go on. This needs to be sorted out. We are going to see social work, and we are going to get him on a probation programme, and he is getting bail."
>
> At which point my client, who is getting led out, turns around and says, "you're fucking useless!"
>
> [In a sombre tone] Because he wanted the jail. And that's an extreme example. But a lot of them need the jail, particularly with addiction issues.

In another observed case (though not a summary case), the commission of the offence itself was carried out to receive a custodial sentence. Regarding this case, the relevant sheriff noted:

> I've got exactly this issue.
>
> I have two guys who were caught because they phoned the police and they had offensive weapons on them. Because they wanted on to drug programmes and they could only get on to these drug programmes in the jail.
>
> And they came in front of me, and they pled guilty at the first opportunity indictment, and I gave them both the maximum. Because I was appalled, you know, that they were using the system in that way. That they wanted a lengthy four-year sentence (actually they didn't want that because one of them has appealed).

> But I said to them: "You have to be careful what you wish for. You want a prison sentence you are going to get a prison sentence." And I gave them both four years, but I did discount it.
>
> … And I just said, "they wanted prison, that's what they got." And they had previous convictions as well. It wasn't as if they were squeaky clean. And I just felt the whole thing was set up. They had gone out purposely with offensive weapons in their property. They phoned the police themselves, got caught, the police told them to move on, and they said, "oh, by the way, we've got a screwdriver and a broken pair of scissors on us."
>
> [It's] a waste of police resources. All that, you know. And they both said they wanted to get on these programmes in prison. 'Off you go.'

Thus, there are at least some accused who will not be tempted by Sentence Discounting and who seek custodial sentences. Some wish to take part in programmes only accessible in prison. Some seek food and shelter. Some may seek custody to smuggle drugs and contraband.[528]

Others may not 'desire' custody but are institutionalised. Indeed, there is a growing recognition of PTSD among prisoners and ex-prisoners. Some researchers have suggested that Post-Incarceration Syndrome (PICS is a subset of PTSD) may result from long-term imprisonment[529] and others have argued prison may negatively impact health.[530] Accused 2, Accused 9, and Accused 11 demonstrate the potential relevance of PICS to summary courts. Those with considerable experience of incarceration go through sheriff summary courts. Furthermore, accused persons can

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[528] Accused 10 noted there were "guys I met who went in with their bodies full of drugs. And when they get out, they will live on the money for that until they go back in."
[529] Liem and Kunst (2013).
[530] Brinkley-Rubinstein (2013).

accumulate lengthy periods of incarceration through multiple summary sentences. These short custodial sentences are a vicious cycle. Each custodial sentence makes another more likely by adding to an accused's criminal record. Moreover, each custodial sentence risks already troubled people becoming "institutionalised" (something Sheriff 3, Solicitor 2, and Solicitor 7 noted). Unfortunately, research on the number of those who fall into these categories is not available.

Conclusion

This research found that accused persons are cognisant of a variety of factors when deciding how to plead. Some of these factors make an early Guilty Plea more likely while others make an early Guilty Plea less likely. Salient factors included:

- The advice of lawyers;
- The perception of a better Plea Bargain if drawing proceedings out;
- Considerations (and coercion) regarding co-accused;
- Concerns regarding children, partners, and family;
- Fear about employment and future prospects;
- Whether a Not Guilty Plea may tip the sentence over the custodial threshold;
- Process costs relating to liminality;
- The indeterminacy of sentencing at the point of deciding how to plead.

Part 1 of this chapter criticised the limited research that has been carried out on how accused persons perceive the pre-conviction stages of the criminal process. While there is some useful research, far more is needed given the implications of accused perspectives for plea-decision making, the presumption of innocence, and the expedient disposal of cases.

Part 2 of this chapter set out three general types of legal consciousness that accused persons expressed. Part 2 argued that there is a perceptual compartmentalisation between accused persons' experience of the law and their ideas of the formal law.

This compartmentalisation allowed them to express a variety of types of legal consciousness. Crucially, accused persons were not as "against the law" as policymakers assume. In court, accused persons were docile, and in speaking about the process, many had profound respect for the justice system.

Part 3 scrutinised the pains of being a defendant. The pains of being a defendant can be less evident than those of being physically detained. However, this chapter demonstrated these pains are significant. Even seasoned offenders were not as inured to these pains as legal practitioners assumed.

Part 4 analysed the issue of accused persons caught in the criminal process existing as liminal entities. During the criminal process accused persons are trapped between guilt and innocence. This liminal state results in stress and made Guilty Pleas more tempting. Indeed, these issues mean that accused persons can be pre-disposed towards pleading guilty.

Part 5 demonstrated that accused persons perceive Sentence Discounting as leading to a longer post-trial sentence if convicted. Thus, Sentence Discounting does not create an incentive to plead guilty. For accused persons, Sentence Discounting creates a disincentive to risk a trial. Interviews also suggest that Sentence Discounting is detrimental to the presumption of innocence in practice. This finding challenges the assumptions of policymakers that Sentence Discounting is not a penalty for going to trial.

Part 6 shows the importance of perceived fairness to accused persons. Accused persons perceive Plea Bargaining, Sentence Discounting, and other practices as unfair. Accused persons also resented the perception that legal practitioners did not treat them equals. Several accused persons felt that legal practitioners regarded their case trivial or as a game. In some cases, this unfairness can delay Guilty Pleas as

accused persons seek to assert their perceived rights. In other cases, the unfairness adds the pains of being an accused.

Part 7 examines those accused who want a custodial sentence. Those who want a custodial sentence do not want a Sentence Discount. While these accused are not the majority, they are not uncommon. These accused who desire custody show that the most basic assumptions underlying Sentence Discounting may be problematic.

A - Future Research

It would be worthwhile carrying out further interviews with persons going through courts to better understand how their views develop. The accused persons whose cases were partially observed in this research demonstrate that it would be useful to systematically combine interviews and case observations.

One question to address is how accused persons develop their legal consciousness. It may be typical for accused persons to start before the law, and increasingly discover caveats to this as they engage with the system. Indeed, Merry has noted in her work that working-class persons going to court:[531]

> Emerged from their encounters with the law with a more complex understanding, having experienced the dual legal ideologies embedded within the American lower courts. One of these ideologies expresses the dominant American vision of justice provided by the rule of law, the other a situationally based, lenient, and personal…

However, given that experienced accused in this research still expressed strong respect for the law (one even claimed they would "stick up" for it) it would appear there is more to this that needs to be understood. Indeed, these experienced accused

[531] Merry (1986), P.253.

often spoke more neutrally than inexperienced accused such as Accused 1. Thus, familiarity may not only breed contempt.

Chapter 9 – Legal Practitioners' Two Narratives of Law

Introduction

This chapter interrogates the two culturally-embedded narratives that legal practitioners (judges, prosecutors, and defence lawyers) drew on to explain decision-making.[532] The first narrative is formalistic and draws on notions of law as a body of rules, policies, and guidelines (see Chapter 4). This 'formal narrative' (based on law-texts) is abstract and accords with policymakers' conception of Sentence Discounting as a formalistic process where decision-makers apply rules to facts. However, on its own, this formal narrative cannot determine Sentence Discounts in actual cases:

> Reliance on a formal description of the criminal justice process… can be termed the fallacy of formalism. The problem, of course, is that formal descriptions do not adequately represent actual practices. At best, they oversimplify; often, they are wrong. And however appealing in the abstract, principles look quite different in practice.[533]

As Chapter 2 demonstrated, the formal law on Sentence Discounting is radically indeterminate in its application to any real case. Likewise, legal practitioners' narrative of the formal law cannot be applied to real cases to determine a single outcome. For example, the formal narrative espoused by legal practitioners noted that Sentence Discounting is "discretionary." "Discretion" does not determine an outcome in a real case. Indeed, "discretion" arguably advocates a wide range of permissible outcomes in a real case. Moreover, Chapter 2 also noted that this radical

[532] Chapter 8 notes that accused persons displayed a remarkably similar dichotomous view. It may be that accused persons derive these views from legal practitioners.
[533] Feeley (2013), p.123.

indeterminacy extends beyond Sentence Discounting. This wider implication makes this research a case-study of law more generally, not simply of Sentence Discounting.

The limits of the formal narrative require legal actors to draw on a second culturally-embedded 'contextual narrative' to explain decisions. The contextual narrative coexists with the formal narrative. Legal practitioners understand the contextual narrative as grounded in the realities of daily legal work: the "'common-sense' narratives that frame decision-making practices"[534] (see Chapter 4). As such, the contextual narrative encompasses legal practitioners' beliefs in the vital role that social dynamics play in summary work, etc.

First, Chapter 9 offers an empirical conceptualisation of how legal practitioners perceive the two narratives work together. Legal practitioners explained decision-making as shuttling between the formal narrative (abstract in nature) and the contextual narrative (perceived to be practical in nature and the application of 'common-sense'). Consequently, this research found legal decision-making to be understood as an interplay between *legal practitioners' two narratives of law*. For practitioners, the formal law is part of the context in which they perceive they make decisions. To explore practitioners' understandings of this context the chapter draws on Bourdieu's concept of "habitus" and Hawkins' concepts of "surround, "field," and "frame."

Second, Chapter 9 shows the advantages of the two narratives. The formal narrative provides a touchstone of determinacy, definition, and authority. However, on its own, the formal narrative is not workable. By shuttling between two narratives, legal practitioners are able to perceive the formal law as vital to decision-making, even though it is instrumentally limited when viewed in isolation. Thus, using two-

[534] McAra (2008), p.498.

narratives enables legal practitioners to draw on the benefits of the formal narrative in terms of legitimacy, cultural capital and reassurance.

Finally, Chapter 9 argues that the formal narrative is more than just a rationalisation for non-law based decision-making. While the finding that the contextual narrative is crucial challenges formalistic assumptions, the formal narrative is not a façade. Legal practitioners' perceptions of decision-making cannot be explained without the formal narrative. In making this argument, Chapter 9 inspects research that suggested Scottish judges ignore the law on Sentence Discounting.

1 – Legal Practitioners Conception of 'Law' and 'Shuttling'

The thesis has argued that the formal law alone cannot determine Sentence Discounting. The argument made is that legal practitioners shuttle between the formal narrative and the contextual narrative in explaining decision-making. However, in this shuttling process, it is important to note that it is not argued that the two narratives exist independently of one another. The formal narrative influenced by the contextual narrative and vice-versa. As a result of this:

> There is no "law-text-in-itself"... "the context is already remarked in the [law-]text. "Culture" thus partakes in the presence of the law-text at least as much as any word which inscribes a law-text.[535]

To conceptualise this shuttling process Bourdieu's work is valuable. Bourdieu has argued that objective and subjective approaches in research are complementary. Bourdieu places importance on perceived structural factors as being necessary to understand actors' behaviours. While some have argued that Bourdieu does not

[535] Legrand (2008), p.131.

sufficiently account for human agency and is overly deterministic,[536] his work is useful to avoid falling into the "intellectualist trap"[537] of the objective/subjective dichotomy.[538] Avoiding this "trap" is necessary for an analysis of culture as:

> Though [culture is] ideational, it does not exist in someone's head; though unphysical, it is not an occult entity. The interminable debate, because it is unterminable,... as to whether culture is "subjective" or "objective," together with the mutual exchange of intellectual insults (..."impressionist!"-"positivist!") which accompanies it, is wholly misconceived.[539]

Bourdieu's work helps to establish a conceptual framework for two cultural narratives of law by arguing that structural factors are internalised by individuals to become of their "habitus." Habitus is a socially and culturally acquired way of meaning-making. It is a "structuring structure" that denotes the disposition a legal practitioner brings to bear in a given case.[540] Bourdieu's argument it that:

> Social structures, or social positions, generate socialized dispositions, and socialized dispositions generate practices.[541]

A legal practitioner's habitus includes their belief in the formalistic notions of law. Interviewees demonstrated this belief when they drew on the formal law to explain and justify decision-making. Habitus also includes legal practitioners' understandings of the context of their daily practice. Interviewees demonstrated this understanding when they drew on seemingly common-sense notions such as "court cultures" to explain how the meanings that can and cannot be attributed to the formal law.

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[536] Hutton (2006), p.163-164.
[537] Wacquant (1989), p.35.
[538] Hutton (2006), p.161
[539] Geertz (2000), p.10.
[540] Asimaki and Koustourakis (2004).
[541] Nash (2003), p.188.

That habitus is socially and culturally acquired explains the level of homogeneity between sheriffs, defence lawyers, and fiscals.[542] Habitus frames perceptions of what is possible and what is impossible in a given case. For example, habitus enables legal practitioners' understanding of the "going rate" for an offence. Habitus also enables the shared understandings and values that lead to local court cultures. For example, legal practitioners in Court 2 had similar views regarding the interests of justice and what was correct in each case. However, habitus does not mean that legal practitioners do not have agency:

> Even if Bourdieu underlines that the habitus is the fundamental and most frequent of the subjective motors of human practices, he does not deny the existence of causally effective actions motivated by reflexive deliberations, noting only that such form of behaviour depends on specific social and historical conditions of possibility.[543]

Consequently, the formal law is instrumentally limited until employed by front-line legal actors. However, the formal law is still relevant because it influences the habitus of legal practitioners (i.e. how they think and what they think is possible and impossible). Thus, while the formal law may not determine outcomes on its own, it is significant because practitioners have internalised the formal narrative, which they use in a shuttling process.

A - The Perceived Structure for Decision-Making

Legal practitioners perceive that there is a structure to their decision-making environment. For example, Sheriff 3 and Sheriff 5 noted that *Gemmell v HMA* was important for Sentence Discounting decisions. Sheriff 1 and Sheriff 4 noted various presumptions against custodial sentences were significant with regard to Sentence

[542] Especially within a court.
[543] Peters (2014).

Discounting's effect on the custodial threshold. Thus, the analysis needs to have a method to conceptualise the context in which legal practitioners perceive themselves to be making decisions.

Hawkins provides a schema that is useful to understand the perceived context in which legal practitioners believe they are making decisions. Hawkins' develops a three-tier system of "surround," "legal field," and "frame."[544] Hawkins' work is compatible with that of Bourdieu. Indeed, Hawkins' concepts of "surround" and "legal field" serve a similar role to Bourdieu's notions of a "social field" in that they serve to pattern and mould discretionary decision making.[545]

Hawkins' macro conception of this decision-making structure is the "surround." The surround refers to broad factors that affect the decision-making environment and includes the state of the economy, political climate, etc. Macro-cultural understandings can be understood as part of the "surround." For example, this includes the macro-level analyses of those such as Garland (2001) and Melossi (2001) when referring to penological culture and general attitudes towards welfarism, etc.[546] In the context of sentencing, the surround includes legal practitioners' perceptions of the media and public attitudes. For example, several sheriffs noted the challenge of sentencing in an environment where it is thought that the media will be hostile to anything other than a custodial sentence. Defence lawyer and fiscal interviews also identified that the surround for bail decisions might include a recently publicised crime committed by an offender on bail.[547]

[544] Hawkins (2002).
[545] Hutton (2006), p.161.
[546] Garland (2001).
[547] Accused persons also noted that decision-making regarding release from prison was felt to be influenced if there was a recent absconsion.

Thus, the surround is a way to account for the macro perceptions that enter into decision-making. However, it is not possible to have a perfect understanding of the surround as it is subjective and always changing. It is even more difficult for interviewees to articulate the surround. Yet, while challenging to articulate, interviews did attempt to describe the surround in order to explain decision-making. In the context of Sentence Discounting, austerity and strained public funds were felt to be important features.

The next level in Hawkins' schema is the legal decision-making field. Hawkins' notion of field is a subset of the surround and consists of elements that are deemed directly relevant to decision-making by legal practitioners:

> The field is defined by the law, the legal institutions, and the legal bureaucracy in its formulations of policy. It is further delineated in the ways in which the organisation communicates other aspects of its legal mandate to its audiences.[548]

In this thesis, the decision-making field is a legal-discourse based narrowing of the surround. The decision-making field includes formal laws and policies (e.g. COPFS policies on prosecuting hate crimes). Thus, the decision-making field is the formal narrative of the law. Exactly what is considered part of the legal decision-making field can be contested. Not only is the formal law radically indeterminate, but there are various interests at stake as multiple institutions cooperate and compete to craft the formal narrative. For example, policymakers create statutes, and the upper echelons of the legal profession create judgments such as *Gemmell v HMA*. Likewise, legal practitioners contribute to the formal narrative through the interpretations they make in routine cases.

[548] Hawkins (2002), p.143.

The final level in Hawkins' structure is the "frame." The framing process is where front-line decisions occur. Front-line actors make decisions that give effect to the formal narrative. In giving effect to the formal narrative, front-line actors also draw on the culturally-embedded contextual narrative. The work front-line actors preform going between the formal narrative and the contextual narrative is a framing process. There is an indeterminate number of ways a front-line decision-maker may frame matters. Thus, the frame is what legal practitioners (sheriffs, fiscals, and defence lawyers) see as the relationship between the 'formal narrative' and 'contextual narrative.' As such, the framing process is where front-line actors' decisions become the law in practice.

However, due to habitus, the framing process is patterned by legal culture. Legal practitioners must internally feel[549] and externally demonstrate[550] their decisions are appropriate. To achieve this feeling of being appropriate front-line actors typically stick to known patterns. Thus, patterned decision-making drives a front-line decision-maker to select a typification that operates as a culturally pre-approved choice. By the end of the shuttling process, "the case is a more or less familiar narrative which prompts a more or less familiar ending."[551] In the context of Sentence Discounting, this often means choosing a stated Sentence Discount based on a sliding scale.

B - Negotiating the "Frame"

Hawkins privileges structural factors, organisational factors, and actor agency in a way that undervalues inter-actor social relationships. Social relationships are

[549] C.f. Trevino (1986). Where there is a strong culture "collective norms about what is and what is not appropriate behaviour are shared and are used to guide behaviour. Organizational members share values and goals."
[550] Tata (2002).
[551] Hutton (2014), p.4727.

essential for Plea Bargaining and sentencing more generally. Both Plea Bargaining and sentencing involve the collective negotiation of the frame by front-line actors.

Collective negotiation of the frame means that front-line actors are not making a sequence of decisions in (what Hawkins terms) "series." To Hawkins, a serial decision is one made by an actor who then passes the case on to another actor to make a subsequent decision. While prior decisions in a series can curtail later decisions, each serial decision is conceived of as being made in isolation.

This isolation of each serial decision seems intuitive in that "presumably [different actors] operate under different constraints and take different factors into account in their decision making."[552] Conceptualising the process of case disposal as a number of serial decisions where each decision-maker applies rules to facts is similar to how factory production is conceptualised: each worker on the conveyor tending to their task in isolation. However, as noted earlier, this formalistic model is not reflective of front-line decision making in summary cases. For example, Chapter 5 noted that Marking Hubs usually make decisions in series due to their isolation from other court actors. Legal practitioners perceived series decision-making to be counter-productive as case disposal is felt to require parallel decision-making as parties collaborate - even if this is through veiled "encoded evaluative messages."[553]

For example, while a sheriff is the only formal sentencer, the sentencing is more collaborative than it may initially appear. Legal practitioners convey coded messages through legal formality, routine, and pageantry. Defence lawyers routinely provide the court with their opinions[554] on sentencing during the plea in mitigation. During

[552] Baumgartner (1992), p.133
[553] Tata (2010), p.252.
[554] There is a skill in doing this. The defence lawyer's opinion should be clear to legal practitioners. However, defence lawyer's must encode their opinion so that it does not challenge the formal authority of the judge to make the decision however they like.

court observations, judges engaged in dialogue with defence lawyers regarding sentencing. Defence lawyers also customarily agree on the plea in mitigation (and the sentence recommendation) with the court fiscal in advance. This routine of seeking a fiscal's agreement means that the judge can take the fiscal's lack of objection as an indication that they approve.

Coded communications, such as pleas in mitigation, go beyond merely offering information to other practitioners such as judges. Coded communications enable dialogue to take place between those in court. These coded communications rely on shared understandings, capital, and subtle cues. While coded communications are undramatic, they are crucial to routine summary work:

> It is equally important, however, to analyse penal routines and standardized arrangements, since these also enact meaning, value and sensibility, even if their audience is a more restricted one and their communications less vivid. Indeed, the cultural meanings of routine practices are often more revealing for being 'offstage' and understated.[555]

Interestingly, defence lawyers were seen to convey their evaluations of their clients in a coded form. A defence lawyer's negative evaluation of their client will often see the lawyer distancing themselves from the client.[556] When the defence lawyer distances themselves from the client, this communicates to those in court that the defence lawyer does not support the actions. For example, in a case where the client

[555] Garland (2006), p.428.

[556] E.g. Rather than say "I would request," the defence lawyer might say "my client requests" or "I am instructed to request." This can convey that the defence lawyer does not personally approve. Similar behaviour was noted by McConville et al. (1994), p.207.

insists on mounting what the defence lawyer thinks is an untenable defence,[557] the defence lawyer may make the court aware of this in order to "save their powder" (Sheriff 3).

That defence lawyers can communicate when they are acting against their better judgment is a significant finding. Defence lawyers communicating their approval or disapproval of an action can affect how others regard that action in court. For example, sheriffs in Court 2 noted that they form opinions on the extent to which defence lawyers act as contemporary officers of the court (see Chapter 7). Sheriffs felt that knowing the extent to which a defence lawyer is a contemporary officer of the court helped them to gauge the likelihood of substantive arguments. Thus, a lawyer who must go to court in what they feel is an untenable case may wish to protect their reputation by distancing themselves from responsibility. Where defence lawyers need to distance themselves from clients to protect their position in the court workgroup, this can have implications for clients.

Charge Bargaining and Fact Bargaining between defence lawyers and fiscals is another parallel decision that relies on non-formalistic features such as social capital. For example, one interviewee noted that how they responded to a case depended on whom they were working with:

> There are certain characters in any walk of life where you know you can ignore the first couple of bits [plea offers] and then get to the serious bit… but equally, you know when some lawyers say, "I'm

[557] Solicitor 7 noted they had a client of this type. The client wished to go to trial and argue self-defence. Solicitor 7 noted that in their opinion this was not a viable defence. However, Solicitor 7 could not dissuade the client and as such, "he is going to trial. He is going to lose."

> going to trial" you think, "I had better go look at my papers, I've missed something" (Solicitor X, speaking of their time as a fiscal).

Thus, in practice, sentence decision-making (including Sentence Discounting and the charging decision) is collaborative. There are oral communications[558] that carry encoded messages to enable dialogue. For example, defence lawyers making an argument will gauge[559] when a judge is convinced, considering (often where the dialogue is most evident), or unpersuaded (in which case the defence lawyer moves on to another argument).[560] This research found that legal practitioners consider these parallel decisions to be vital to routine work. As Sheriff 2 noted, pleas in mitigation are crucial because "the defence may invite you to go down a road you haven't thought of."

While legal practitioners may have a similar habitus, there are court specific variations. The research found that Court 1 and Court 2 have different understandings of what is acceptable. The differences between courts mean that lawyers unfamiliar with a court may face difficulties (see Chapter 7). The difficulties in appearing in an unknown court are the reason "out of towners" will usually try and research new courts in advance (Solicitor 3, Solicitor 4, Fiscal 1, etc). Yet, even this is still problematic. As Sheriff 6 noted with different defence lawyers attending Court 2:

> They try and come down here, and they try and put trials off. And they expect that they are going to get continued Intermediate Diets. And they don't get it.

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[558] In some cases, there may also be paper-based communications, and these too can carry encoded messages. See Tata (2010).
[559] In some cases, the defence lawyer sets out a list of options for the judge to choose from by drawing on their knowledge of what is acceptable in the circumstances.
[560] Some defence lawyers may go through the performance of making a motion even when they know it will not be agreed. This may be to show the client that they are zealously adversarial.

> We don't continue Intermediate Diets unless we absolutely have to. And the out of town agents send a one-sheet piece of paper to a local agent, and the agents here know, "no we are not doing it, we are not asking for it. So, you come down and do it yourself."
>
> So, there is a very different attitude towards things.

In sum, the formal law alone makes legal practice appear radically indeterminate. Yet, there is a structuring structure to be found in habitus (the culturally acquired dispositions of legal practitioners). These culturally acquired dispositions allow for encoded communications and de facto rules for individual courts. These differences between courts are why lawyers, fiscals, sheriffs, and even some accused persons feel the need to: know your court, know your sheriff, and know the rules of the game.

2 – The Advantages of Shuttling Between Two Narratives

Legal practitioners describe the formal law as vitally important. However, as Chapter 2 shows, the formal law concerning Sentence Discounting is radically indeterminate. As a result, legal practitioners also drew on the contextual narrative to explain decision-making. The research observed practitioners' reliance on both repeatedly in interviews. When asked about Sentence Discounting, legal practitioners (judges, prosecutors, and defence lawyers) first drew upon formal narratives. The formal narrative of Sentence Discounting served as an abstract justification.[561] This belief in the importance of the formal narrative is powerful. Indeed, during the access phase of the research, some argued that the formal narrative alone explained the practice of Sentence Discounting. However, in interviews, when asked hypothetical questions, legal actors also drew on the contextual narrative.

[561] C.f. Tata (2007b).

A crucial finding of this research is that drawing on the contextual narrative did not mean that legal practitioners discarded the formal narrative. Legal practitioners shuttled between the formal law narrative and the contextual narrative to explain decisions. As Sheriff 1 noted, the formal law regarding Sentence Discounting is essential, "but you have to look at it in the context." This context for Sheriff 1 was based on culturally-embedded understandings.

Analysing decision-making as a shuttling process between two narratives helps to illuminate how legal practitioners maintain radically indeterminate formal laws are vitally important. Analysing two narratives also helps the research to interrogate what practitioners mean by the importance of "context" and 'feel for the game' (or "doxa" as Bourdieu would say). Moreover, analysing the operation of these two narratives reveals that 'law' means different things in different contexts. Practitioners shuttle between the two narratives in a way that is intuitive to them, but not immediately apparent to outsiders. Indeed, the contextual narrative is difficult to articulate since knowledge of it comes from practical experience. By contrast, the formal narrative is easy to articulate as it is quotable to anyone who asks. Thus, shutting allows legal practitioners to draw on the strength of formal narrative (e.g. the justifiability of the formal narrative) even though alone it cannot determine decision-making.

A - The Cultural Capital of The Formal Narrative

That legal practitioners consider the formal narrative important despite its limitations is an important finding that challenges arguments that formalistic thinking is no longer prominent. It is also interesting that the formal narrative is so prominent in policymaking even though legal philosophy has long recognised its limitations. For example, Oliver Wendell Holmes shunned formal narratives in favour of pragmatic ones:

> If we take the view of our friend the bad man, we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.[562]

Why is the formal narrative still advocated so prominently? The formal narrative is favoured (at least in part) for its pageantry and theatre, but also because it has been embedded in the legal curriculum and does the work of legitimation in a notionally formalistic legal framework. For practitioners, the formal narrative was a touchstone of determinacy, definition, and authority.[563] It drew on abstract ideas, such as liberal legal theories focus on the distinction between legitimate and illegitimate power. While this may have limited causal effects in real cases, this normative and expressive role of law is essential.

For example, various laws on prostitution are instrumentally limited,[564] but still significant as their importance lies in their "considerable symbolic power, buttressing the moral values that define the 'body politic' in a time of concern about permeable national boundaries."[565] Indeed, "legitimacy is a property that is not simply instrumental in nature, but reflects a social value orientation toward authority and institutions."[566] As such, the formal narrative of law plays a crucial role in helping to uphold the legitimacy of the power that the State exercises upon those in court

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[562] Holmes (1897), pp.460-461.
[563] This is not entirely dissimilar to how some accused persons may rely on violence as "a touchstone against which identities are honed." (See McAra and McVie (2015), p.5).
[564] In that they are based on "moral intuition" rather than "clear-cut evidence."
[565] Hubbard and Scoular (2016).
[566] Hinds and Murphy (2007), p.27.

(victims, accused, witnesses, jury members, and even members of the public who become subject to the various threats and demands the courts make).

Consequently, the formal narrative is important because it connotes legitimacy and the majesty of law. By contrast, the contextual narrative lacks majesty. However, this does not mean the contextual narrative is without value. The value of the contextual narrative is that it allows legal actors to be "prophets" and predict case outcomes.[567] Legal professionals take pride in their knowledge of the contextual narrative. In tandem with the formal narrative, the contextual narrative results in professional knowledge.

I – The Reassurance of the Formal Narrative

The formal narrative is also important for its ability to provide reassurance. Research on procedural justice suggests that a perception of legitimacy helps to improve public satisfaction independently of actual outcomes.[568] However, it also seems that legal actors themselves need to feel they are exercising legitimate power due to the significant consequences their decisions often carry. Some sheriffs spoke of the difficulties of sentencing in particular cases and asked, "what you would do?"

The issue was that in these emotional cases there was no 'right answer' that could assuage the potential for nagging doubt as to whether the decision made was correct and necessary. Such decisions are problematic as, "one of the most important cultural tasks of the sentencing process is to persuade audiences that sentences passed by the court are just."[569] It is difficult for legal practitioners to persuade others that a decision is just if they cannot persuade themselves. To persuade themselves legal practitioners rely on dialogue with peers and a belief in the formal law. Dialogue

[567] Holmes (1897), pp.460-461.
[568] Hinds and Murphy (2007).
[569] Hutton (2014), p.4728.

with peers allows legal practitioners to draw reassurance from others agreeing that they are correct. A belief in the formal narrative of law also helps legal practitioners gain reassurance. Indeed, these "occupational hazards" may be why "judges are encouraged to believe in their own omniscience" and the omniscience of the formal law.[570]

This matter of conscience is significant as it can be a challenging task to sanction another human being. Indeed, it is interesting that in interviews the term "the Court" was used by judges to describe themselves in the third person when discussing sentences that were intended to be punitive, rather than rehabilitative, etc. The implication of "the Court" is that that it is not the individual judge punishing the offender.

Court observations revealed many difficult occasions in which "the Court" must reach a decision. For example, one such scenario occurred in Court 1. In this instance, the issue revolved around whether bail would be granted or whether he would be remanded over Christmas. The accused's family made an emotional plea for him to receive bail. This plea was presented to Sheriff X via a young defence lawyer who seemed to sympathise with the family, though this did not impact his/her demeanour in court, and he/she communicated to the judge that bail could rightly be refused.

Yet, for the sheriff (one who had a good rapport with accused persons and who would go out of their way to engage with them)[571] this request for bail had to be balanced against the violent nature of the offence. In this case, the offence had occurred in the family home and involved a weapon. The complication was that the mental instability

[570] Bandes (2017), p.192.

[571] There is variation in how sheriffs elected to engage with accused persons in terms of demeanour and language. This is worth further research as this may affect accused persons' perceptions of the process. See Argyle et al. (1970); Jacobson et al. (2016); and Swaner et al. (2018).

of the accused made the family feel that bail was crucial due to a belief he would attempt suicide in prison. But, there was also a concern that if granted bail the accused posed a risk to his family.

In such a situation one could hypothesise that the better solution would be some form of non-punitive medical treatment. However, this supposition is irrelevant to the sheriff. The sheriff must make their decision based on the limited options available.[572] They must also make this decision in the knowledge that whichever decision they make, grave harm might occur to vulnerable people (the accused, his family, or both). Ultimately, the sheriff decided to refuse bail. The sheriff stated that they were "not unsympathetic" and the overall atmosphere in the court was sombre for that moment.

While no formal law unequivocally required this outcome, the sheriff stated that this is what was required and that "the Court has no choice." In the interview, Sheriff X was asked whether sheriffs "are at pains" to avoid custodial sentences and remand where possible. Sheriff X's full response to this question is below:

> Well, we are at... I understand your reference to "at pains," but what we are doing is applying the law. And the law is quite clear that a sentence of imprisonment should only be imposed if there is no other appropriate sentence available. And thus, we would be failing in our duty if we didn't try and ascertain another sentence. But, eventually, there has to come an ultimate sanction... but it is only the most serious of offences...
>
> The question then comes up, a very common one. You put someone on bail for an allegation of domestic abuse, which on the face of it is

[572] In Scotland there is a trend of using prisons as places of treatment despite their punitive nature. This is beyond the control of judges who do not decide how budgets are allocated.

not a particularly serious allegation. But, nonetheless, every domestic abuse case has to be viewed seriously. So, they are given the privilege of bail and are not remanded in custody. And then they appear three days later having breached those conditions.

You then have to ask yourself, because they plead not guilty to the breach of conditions (against the presumption of innocence):

- Is the complainer making the story up? You don't know that because it's the very early stages.
- Are there children involved? Is the accused trying to have contact with the children?
- Are there other proceedings going on in the civil court that you may be involved in, or your colleagues may be involved in? So, you know there is a family dynamic going on?
- Or, is there absolutely no reason at all why he should have been in touch with her (or her with him as it happens both ways).

And then you have to decide against the record. If there are no previous convictions for breach of bail, then I would give an accused person the benefit of the doubt. But, if you then begin to build up [a negative inference], you then have to be saying to the accused that "court orders are made for a purpose, and if you are not going to follow them then the privilege of bail will not be afforded to you."

It is in those cases that you may very well withdraw the bail and remand them. And sometimes that can have the effect of bringing the reality home to the person, such that at the Intermediate Diet (which of course being a custody case is very short) there will be a plea of guilty just to get it disposed of. And you may or may not then

> give the person a non-custodial disposal having then marked their card and having made them understand the reason for the order. Otherwise, you would just be granting bail forever.
>
> The difficulty for the courts is in applying the bail legislation is that the privilege of bail is given to everybody unless there is a good reason. So, there is a presumption for bail, not against bail. And it is that presumption that I will have to apply.
>
> So, I presume everyone is entitled to bail until I determine there is a good reason they should not be... The only time I look at it the other way is when someone has got a previous violent offence on indictment when the presumption goes the other way.

Sheriff X's answer shows that even though the formal law is indeterminate, it is still crucial in the psyche of the sheriffs. Sheriff X drew on the formal narrative of the law and also upon the defence lawyer's and Crown's belief (a parallel decision) that bail could rightfully be denied for reassurance. Thus, even where the formal narrative law seems unhelpful in that it does not dictate outcomes, it may still offer comfort to legal practitioners that they are doing the 'right' thing.

3 - Is the Formal Narrative a Façade?

This concluding section addresses the potential counter-argument that the formal narrative of law is a façade. So far, the analysis has presented a congenial view of the two narratives working together. However, some might argue that the formal narrative is irrelevant. To reject this argument, this section argues that the conceptualisation of two narratives accords with the importance that legal actors attributed to the formal law in making and legitimating decisions. Interviewees also espoused even potentially self-serving notions, such as judicial independence, in terms that displayed their respect for formal ideas law. It was also notable that legal practitioners expressed pride in their work and the nobility in serving the law. While

this did not preclude various analytical critiques (interviewees did not consider the law to be perfect), legal practitioners still believed in the formal law.

A – Is the Formal Narrative a Rationalisation?

The radical indeterminacy of the formal law has profound implications regarding how 'law' is considered (see Chapter 2). The question "what law is" is one that every jurisprudence student will be asked. The Law Schools will teach the various theories that have been proposed by legal scholars to try and make sense of what is perceived to happen in practice. The conventional theories will include: legal positivism;[573] Hart's notions of law's "open texture;"[574] Dworkin's notion of "principles;"[575] etc.[576] The theoretical exploration of what law is will also likely cover alternative theories.[577]

A limitation of many legal theories is that they are "determined to fit the square peg of formalism into the round hole… [and contribute to] the sacralization of posited law."[578] In doing so, some theorists become engaged in an enterprise of making a theory to fit with fundamental values (i.e. trying to defend and justify the status quo). Thus, for example, we see Dworkin seeking a way to explain an apparently non-rule-based decision as being based upon some latent legal "principle."[579]

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[573] Austin (1863).
[574] Hart (1958).
[575] Though Leiter (2003) considers Hart the victor, Brown (2017) seems to verge on something appropriating Dworkin's view. Brown describes discretion as "underpinned by principles, rather than hemmed in by rules" (p.193) and notes virtues of judges that are reminiscent of Dworkin's Hercules.
[576] E.g. Raz (1977).
[577] For example, Fuller (1969).
[578] Legrand (2008), pp.134-135.
[579] For example, this is seen in Dworkin's analysis of *Riggs v. Palmer*, 115 N.Y. 506 (1889) and *Henningsen v. Bloomfield Motors*, 32 N.J. 358 (1960).

We also see something similar in Hart's approach of supporting the formalistic view but making concessions to Realism in those 'exceptional'[580] cases where this does not appear to work.[581] Other more modern theories of law also flatter by being compatible with Rule of Law values. For example, Shapiro's "Planning Theory of Law"[582] attempts to build on traditional understandings. Shapiro argues that law is a virtuous plan, (plans can be partial and are norms to guide conduct), that exists to rectify moral deficiencies and reduce deliberation costs, and that legal interpretation involves applying the plan.

From a critical perspective, it can be argued that these theories are attempting to create a rationalisation for legal practice that shields formalistic notions of law from doubt.[583] These legal theories spare the need to reject the feasibility of the formalistic narratives by allowing the idealistic notion to survive - albeit in increasingly caveated ways.[584] As such, despite whatever issues are identified, "the rhetoric is rarely actually denied, it is simply whittled away by exceptions, provisos, qualifications."[585]

Thus, where difficulties arise, theories of jurisprudence may serve to allow these to be "managed out of existence."[586] Managing problems is essential as much of the value of formalistic narratives is political. These narratives go hand in hand with terms such as 'Rule of Law,' 'democracy,' etc. The rhetoric of these terms serves as an

[580] See the discussion of John's case in Chapter 2, Section 8.
[581] With some caveats post-script. See Coleman (2001).
[582] Shapiro (2011).
[583] Hart, Dworkin, Shapiro, etc. are not 'formalists.' However, their theories contain formalistic notions. These formalistic notions are also demonstrated in legal practitioners' formal narrative.
[584] For example, Chapter 2 (Section 8) disputed the claims that sentencing is 'exceptional' regarding its radical indeterminacy.
[585] McBarnet (1983).
[586] McBarnet (1983).

assertion that a justice system is legitimate, just, and generally laudable. Consequently, doubting these formalistic notions may be problematic.

Research can pick up on the limitations of formalistic notions of law when it asks, 'what is the law,' or 'what the law requires.' Asking questions about the law may (as this research did when I asked legal practitioners technical/formal questions on Sentence Discounting) result in a formal narrative of law. For example, interviews with legal practitioners[587] regarding Sentence Discounting all began with some espousal of section 196 and quotes from case law. Offering this formal narrative is what legal practitioners are expected to do:

> To use the rule is to conform one's own conduct to the relevant pattern, and to accept the rule is to adopt the attitude that the pattern is a required standard both for oneself and for everyone else in the group.[588]

Yet, despite legal practitioners' belief in the formal narrative, research may (after analysing the formal narrative's limitations) conclude there is an issue as legal actors cannot reconcile the formalistic explanations of law with what they do in practice. However, this research demonstrates that the issue is not a 'gap' between law and practice. Rather, the issue is that the formal narrative of law is so indeterminate that it permits a wide range of practices. Legal actors cannot readily reconcile the importance of the formal narrative with the particular decisions they make. For example, the formal narrative does not explain why decision A was taken rather than the equally permissible decision B, C, D, etc.

Consequently, while the formalistic narrative does have limitations, it is not just a rationalisation. Certainty, there is a strong basis to argue that the formal narrative presents a view of the formal law as more determinative than it actually is. However,

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[587] Judges, prosecutors, and defence lawyers.
[588] Perry (2006).

this view is internalised by legal practitioners as part of their habitus. This internalised role of the formal narrative means that legal practitioners rely on it in ascribing meaning to real cases. Thus, this thesis argues the formal narrative should not be dismissed when seeking to understand 'the law.'

B – Do Judges 'Ignore' the Law?

Some would argue that the formal narrative of law is little more than a falsehood.[589] The argument would be that judges decide a case for non-legal reasons and then retroactively seek to justify that decision in terms of the formal law. Notably, there recent research in Scotland that challenges the value of the formal narrative. Brown has argued that with regard to Sentence Discounting:

> Some [judges] paid only lip service to the statutory provisions and appellate jurisprudence, whilst others ignored it all together either by inflating the headline their sentences.[590]

This quote is a small part of a work not focused on Sentence Discounting. Yet, it is a point that appears problematic for the argument that the formal narrative is not a façade. Unfortunately, little analysis is made of this point as it is incidental to the main focus on an argument about individualised sentencing and rebuttal of reform. However, Brown's findings suggest that the formal narrative of law is not important (at least to "some").

Brown's findings also suggest that judicial statements regarding Sentence Discounts and sentences can be quasi-fraudulent (if not outright fraudulent). The implications of Brown's findings are troubling. Even if one supports individualised sentencing, and is against Sentence Discounting, this does not justify *sacrificing the standards of the*

[589] E.g. Frank and Bix (2017).
[590] Brown (2017), p.226.

judiciary and the Rule of Law "on the altar of establishing truth and justice above arid, legal technicality."[591]

However, there is another possibility that my research suggests is more likely. While it is possible "some" judges have gone rogue (there are limitations to accountability and transparency), I did not encounter evidence of this in my research. My research found that judges perceive the formal law as essential, but complicated. While interviewees in my research made criticisms of the formal law regarding Sentence Discounting, they did not suggest they ignored the law. All the legal practitioners I interviewed reported that they took account of the formal law. Differences in practice were attributable to the indeterminacy of the formal law, which is permissive of a wide range of decisions.

What my interviewees thought to be problematic with Sentence Discounting is attributing an impact to Sentence Discounting in isolation.[592] Legal practitioners felt that ascribing an effect to Sentence Discounting in isolation was artificial because sentencing is a holistic process. Judges in my research stressed the need to consider the case in its entirety.

As a result, my findings do not suggest judges are ignoring the law. Instead, my analysis suggests that the law cannot be applied solely in line with formalistic notions because it is radically indeterminate on its own. This radical indeterminacy necessitates that a contextual narrative of law must be drawn on as well to make decisions predictable and manageable in high-volume summary work. For example, there were different views on Sentence Discounting's potential effects on the

[591] Adapting McConville and Marsh's criticism of the Criminal Procedure Rules McConville and Marsh (2014), p.168.
[592] As Chapter 2 notes, sentencing is thought to be a holistic process, and there are difficulties in attributing a number to the Sentence Discount.

custodial threshold.[593] The interviews suggest that the issue was that judges could not divide sentencing up into stages as *Gemmell v HMA* suggests. Indeed, *Gemmell v HMA*'s rejection of the mechanical application of Sentence Discounts[594] is probably a recognition of this fallacy by the High Court of Criminal Appeal. As such, the issue with formal accounts of sentencing is that they can only explain part of what legal practitioners perceive to be important in making decisions.

It may be that the interviewees in Brown's research were trying to convey that the formal narrative of Sentence Discounting is not the whole story. Indeed, based on the professionalism of those I interviewed, it might be questioned whether those judges who "ignored" the law in Brown's research would accept that they are acting inappropriately. Rather, it would seem likely that they would feel they are acting legitimately and in accordance with the formal law. Perhaps the issue lies in how these judges articulated the two narratives. Indeed, my research found many instances where sheriffs would deny a discount, but this was *always* perceived to be compatible with the formal law.

Conclusion

This chapter has scrutinised the implications of the radical indeterminacy of the law regarding Sentence Discounting. The chapter shows that formal legal certainty with Sentence Discounting is more elusive than legal practitioners suggest when asked superficial questions. In practice, legal decision-making is the result of an interplay between two narratives. The first narrative is the one jurisprudence focuses on: this was called the 'formal narrative.' The formal narrative of law is vital to legal

[593] See Chapter 2, Section 4(A).
[594] Given the rejection of a mechanical application of Sentence Discounts as impractical, it is contradictory that *Gemmell v HMA* also suggests the Sentence Discount is an isolated consideration.

practitioners as it is internalised by them part of their habitus. The formal narrative is not a façade, but it cannot work alone.

Due to the limitations of the formal narrative for decision making, interviewees also drew on a second 'contextual narrative' to explain decision-making. Legal practitioners use these two narratives in a sophisticated fashion. Legal practitioners shuttle between both narratives to explain decisions. Together, the two narratives help to illuminate how practitioners understand the operation of Sentence Discounting, and the law more generally. The analysis of the two narratives also helps to challenge formalistic assumptions. Even routine cases involve more than just the application of formal laws.

Importantly, the use of two narratives means that while the formal narrative is radically indeterminate on its own, it is still a crucial part of legal decision-making. However, because decisions are the result of a complicated shuttling between two narratives, this means that the effects of changes to the formal law can be hard to predict (as the critique of Marking Hubs in Chapter 5 demonstrates).

Chapter 9 has also examined the context in which practitioners perceive that they apply these two narratives. To do this Bourdieu's concept of "habitus" was drawn on along with Hawkins's concepts of "surround," "field," and frame. Together Bourdieu's work and Hawkins' work enable the analysis to understand the context in which legal actors perceive they are making decisions. The analysis also investigated the operation of social dynamics and how multiple legal practitioners collaborate in sentencing decisions. This investigation examined how defence lawyers, fiscals, and judges reach decisions through coded dialogue. This dialogue is crucial as:

> The meaning of an object [e.g. a case or an accused] represents the outcome of the communicative exchange... Because such communicative exchange takes place in the midst of a complex set-of communicative exchanges - what we call a 'culture'.... it is only

> within such a complex network that the objects meaning may be determined.[595]

Legal practitioners cooperating to create meaning serves an instrumental purpose in disposing of cases (it enables Plea Bargaining). Cooperation also provides decision-makers reassurance from peers that decisions are correct. This desire for reassurance is something that formalistic assumptions overlook,[596] but it is something decision-makers require. Thus, the formal narrative and group support are useful in helping decision-makers to feel secure they acted appropriately.

In conclusion, the chapter provides a conceptualisation of legal decision-making using two cultural narratives. The chapter argues that the operation of the law in practice depends on social relationships as well as the formal law. These two narratives may be why legal actors have difficulty describing decision-making: there is no objectively right answer in a formalistic sense.

[595] Melossi (2001), p.404.
[596] Such arguments tend to focus on caseload pressures, etc. The causal connection between caseloads and Plea Bargaining is tenuous: Feeley (1982); Weigend (2006); Vogel (2007).

Chapter 10 - Thesis Conclusion

1 - Thesis Question: The Nature and Extent of Sentence Discounting

The thesis aimed to interrogate the nature and extent of Sentence Discounting for Guilty Pleas in Scottish Sheriff Court summary cases. Section 196, the statutory provision pertaining to Sentence Discounting, initially appeared to be an important but confined target for enquiry. As a form of Plea Bargaining, section 196 and Sentence Discounting raised fundamental questions of justice, legitimacy, and due process that were unexplored.[597] However, the thesis found that, in practice, section 196 was difficult to analyse in isolation due to the social nature of summary justice.

Perhaps the most significant finding of the thesis pertains to the importance of the social rules that underpin Sentence Discounting and summary work more generally. While social rules are crucial to the current operation of the justice system, they pose challenges to formalistic notions of law. Despite legal practitioners' belief in the importance of formal law, the thesis finds that, on its own, the formal law is radically indeterminate. Alone, the formal law cannot be used to clearly explain why decision A was taken rather than the equally permissible decision B, C, D, etc.

The radical indeterminacy of the formal law means that there is not a discernible 'gap' between the formal law and practice. The boundaries of the formal law cannot be clearly demarcated by case law and statute (in a deductive manner), or by other quasi-legal positivist analyses.[598] To know the 'law' (to be able to 'prophesise' what will happen), one needs to know the relationships at work. Thus, at the level of its practical implementation, the thesis finds that the 'law' is relational.

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[597] Surprisingly, there has not been an evaluation of section 196.
[598] For example, "second order justifications" (MacCormick (1994)).

A – Methods

When beginning my PhD, there was a dearth of empirical court research in Scotland,[599] and no research dedicated to section 196. Consequently, I started from a position whereby almost nothing was known about Sentence Discounting's operation. The poor state of existing knowledge provided flexibility in that whatever I did would be novel in some way. However, the lack of research also meant that there were many unknowns, which made determining viable methods difficult.

Given that the viability of certain methods was unclear at the outset, the research had optimistically aimed for a mixed methods approach. Indeed, the question of 'nature and extent' is one that would benefit from mixed methods: 'nature' would lend itself to qualitative methods and 'extent' would lend itself to quantitative methods.

I determined two courts that would make ideal candidates for research and negotiated access for court observations and interviews - meaning that these methods (thanks to an open-minded judiciary) were viable. However, more thoroughly immersive ethnographic methods were not possible as senior sheriffs considered this too intrusive and defence solicitors were disinclined. However, ethnographic methods are something that future research should consider. In arguing the case for ethnographic research, proposals should aim to demonstrate how ethnographic research need not be disruptive[600] and the benefits such research might bring (e.g. a more in-depth understanding of plea decision-making and the causes of late Guilty Pleas). Indeed, perhaps, this research will help to show that court research need not be significantly disruptive.

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[599] There was a gap following Tombs (2004).
[600] Harrington (2002), p.54.

The quantitative element proved not to be viable. Senior sheriffs approved access to court records in principle, and a pilot was planned to assess the viability of collecting data from court records.[601] However, SCTS objected and access to court papers became tied to accessing SCTS's electronic data. Due to the time that elapsed in negotiating access to SCTS's data, the pilot was not possible. SCTS data was not used either as, once access was negotiated, SCTS conceded they could not utilise their data in any meaningful way. However, the redeeming feature of the SCTS experience is that it highlights severe issues with 'available' data in Scotland – a key finding of this research.

Thus, my research involved semi-structured interviews and court observations in two courts that were comparable in most regards apart from Guilty Plea trends. This methodology was robust, and I am grateful for the access obtained. However, there are still questions to be addressed. Notably, the effects of discounting on sentences cannot be addressed without a quantitative element. Perhaps, in the future, dedicated quantitative research can be carried out, and this thesis can help to inform that endeavour.

2 - The Reality of Summary Justice

Trials continue to symbolise the presumption of innocence and signify the nobility of the summary process in convicting the guilty and protecting the innocent from the manifest power of the State. Indeed, much of the ideology and rhetoric of Anglo-American criminal law still centres on a trial process that is increasingly irrelevant to most criminal cases. This focus on trials is problematic given the "vanishing trial"

[601] For example, it was unknown what was recorded, how long court papers were stored locally before being archived off-site, and what the cost of retrieving archived papers would be.

(now almost gone) in Anglo-American jurisdictions.[602] The focus on trials means there is less attention on the safeguards (or lack thereof) when people plead guilty.[603]

This thesis confirms the findings of over works concerning the centrality of Guilty Pleas as a method of disposing of cases taken to court.[604] The thesis also sheds light on the importance of legal practitioners (judges, defence lawyers, and prosecutors) in shaping case trajectories, and how section 196 has statutorily enshrined an "ideology of triviality"[605] and a presumption of guilt.[606] However, there is a nuance to this trivialisation as legal practitioners shuttle between a formal narrative and a practical narrative to explain their practice. Thus, for example, while there may be a presumption of guilt, legal practitioners also criticised what they considered to undermine due process.

Notably, while defence lawyers are a vital component in the production of Guilty Pleas, they were also critical of Sentence Discounting and other related strives for 'efficiency:'

> And that's the thing. It seems to be going down the road of getting things done quickly. Whereas there is no section in the Act [the Criminal Procedure (Scotland) Act 1995] that says, "it must be done properly," or that there must be "quality." It is all speed, speed, speed. Which, I don't think is the right way to go. (Solicitor 4)

The criticism is that, in the name of a conceptualisation of 'justice' that is synonymous with expediency, the formal law (e.g. *Gemmell v HMA*) ignores normative and

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[602] Galanter (2004).
[603] For a discussion of what safeguards could be useful for Plea Bargaining, see Bibas (2015).
[604] A significant point to note is that this thesis did not explore Direct Measures. Direct measures account for a significant number of 'case' disposals.
[605] McBarnet (1983)
[606] Jacobson et al. (2016).

practical issues of due process. For instance, *Gemmell v HMA* seeks to encourage Guilty Pleas that are so early that defence lawyers may not be able to evaluate the case thoroughly. *Gemmell v HMA* justifies quick Guilty Pleas on the basis that the accused will know if they are guilty. While this may be true of some cases, Solicitor 7 complained:

> You can't say that [clients know they are guilty]. Guilty of what? They've not got a law degree... I don't like Gemmell for that reason as it's too simplistic.

Indeed, the radical indeterminacy of the formal law means that it can criminalise a broad range of conduct,[607] and it can criminalise it multiple times through different offences. For example, there is a fine-line between careless driving and the more serious charge of dangerous driving. Thus, Accused 12's lawyer cautioned that if he wished to contest his careless driving FPN, it was *possible*[608] he would be prosecuted for dangerous driving (a more serious offence) as the divide is often a matter of subjective inclinations on the part of the marking prosecutor or the charging police officer. This radical indeterminacy facilitates Plea Bargaining and undermines formalistic notions of the law as the objective implementation of justice.

In reality, Plea Bargaining and the gearing towards Guilty Pleas in summary cases undermines due process ideals and disadvantages accused persons:

> Summary justice is thus characterised legally not by positive attributes but by negative ones; it negates many of the procedures held to be necessary in the ideology of due process… the 'informality' [of the lower courts] would seem to rather one-sided: the

[607] Silvergate has claimed that the average American commits three felonies a day. (Silvergate (2011)).
[608] This was felt to be unlikely, but there were no guarantees.

> defendant's role… is still governed by formal procedures, but the defendant's rights are significantly reduced.[609]

For example, *Gemmell v HMA* advocates a highly discretionary system of Sentence Discounting. This system works, as McBarnet notes of the summary process generally, in a "one-sided" manner.[610] For judges Sentence Discounting is discretionary. Yet, accused persons are still facing 'encouragements' to plead guilty early. Even factors that delay proceedings that are beyond an accused's control (for example a failure of the Crown to make a disclosure) may cost an accused their discount.[611] Even defence lawyers cannot effectively counter these crime control traits as they become part of the Guilty Plea generating machinations. The drive for Guilty Pleas puts defence lawyers under significant pressures (e.g. financial and social). Indeed, a presumption that most clients are guilty (and can, therefore, plead guilty) seems necessary for the economic viability of defence work funded by legal aid.[612]

Consequently, criminal justice rhetoric and practice contradict. On the one hand, trials have an indispensable significance that goes to the legitimacy of criminal justice. On the other hand, in practical terms, the trial is considered impractical or even wasteful as most cases are not worthy. Indeed, it may now be the case that:

> A full-dress trial may be less of a centrepiece than a monument to the failure of the many pre-trial machinations to produce a Guilty Plea.[613]

This contradiction between rhetoric and practice poses problems for the legitimacy of the criminal justice system. What does it say about a *justice* system when its self-

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[609] McBarnet (1983). p.139-140.
[610] McBarnet (1983). p.139-140.
[611] This was the view of sheriff interviewees.
[612] Benner (2008), and Tata (2010).
[613] Ashworth (1988). pp.112-113.

proclaimed touchstones of propriety are systematically negated or avoided? Moreover, what does it say about the justice system that the pervasive belief of practitioners and policymakers is that these touchstones of legitimacy must be avoided?

3 – The Tragedy of Accused Persons' Disenchantment

Interestingly, and at first glance happily, the thesis has a positive message concerning the legitimacy and fairness of the justice system in the eyes of accused persons. Accused persons are not, as some suspected, cynical, jaded, and fundamentally against the law. Indeed, accused persons had a belief in the "majesty of the law."[614] Thus, accused persons do not inhabit a different "moral universe,"[615] and their perspectives are compatible with key normative values associated with the justice system. However, unfortunately, the justice system fails to live up to its rhetoric and systematically disenchants accused persons of noble ideals.

Within the complex web of relationships in the summary justice system, the accused finds him or herself in a difficult situation. There is little to substantiate the rhetoric of the 'right' to trial and to reassure that defying the social etiquette of the court (by not pleading guilty when 'advised') will not be punished. Indeed, accused persons are aware that resisting a Guilty Plea is going against the grain. For example, Accused 5 could not recall the events surrounding the alleged charges but perceived that the system demanded and expected him to plead guilty. Likewise, Accused 4 claimed he was innocent but that he would be penalised for pleading not guilty. Thus, accused persons come to learn that Guilty Pleas are expected just as much as rising when the judge enters the courtroom. Any 'lay' notions of fairness are dissuaded in the

[614] Ewick and Silbey (1998).
[615] Jacobson et al. (2016), p.171.

"theatre of the absurd"[616] where, for example, 'equality' is said to be key, but 'Ladies' and 'Lords' literally sit above all others.

Ironically, while defence lawyers protested the swiftness of summary justice in various ways, they also facilitate Guilty Pleas by portraying the court as a fickle and relational affair to accused persons. Unverifiable claims ('hard judges,' 'soft judges,' 'good deals,' etc) create the background to warrant Guilty Pleas in the minds of accused persons. Consequently, this is a system that, effectively, works in a Kafkaesque fashion to achieve Guilty Pleas, but then places the responsibility of these decisions on accused persons who made them 'freely.' Thus, the tragedy of the criminal process is that, in some ways, accused persons are before the law when in practice (in many ways) the law is against them.

4 - Final Reflections

This thesis has undertaken a thorough interrogation of Sentence Discounting in Sheriff Court summary cases. So what? What is the footnote that this thesis can be condensed into that the evidence backs up? What are the implications for legitimacy, justice, and fairness? Ultimately, the thesis demonstrates *the on-going importance of negotiated due process and the challenges therein*.

Legal theory suggests that due process follows from various formal rules and procedures.[617] However, what this thesis shows is that the formal law is radically indeterminate and due process and crime control functions are mediated by SLBs (those working in courts and interacting with accused persons). Thus, to understand summary justice, it is necessary to interrogate SLB-SLB interactions and how SLBs secure the compliance of others (such as the accused). It is from these interactions

[616] Carlen (1976a).
[617] For example, in the Scottish context, see McDiarmid (2018) for an analysis of procedures and Article 6.

that the criminal justice system's operation is produced. Notably, this is a modus operandi whereby Guilty Pleas are normalised.

In the normalisation of Guilty Pleas, accused persons are reconstructed as something akin to "dummy players."[618] While accused persons do have a perspective of their own, the summary process demands (because it requires)[619] the passivity of accused persons. To ensure accused persons' passivity and 'efficiency,' the legal process denies ideals that would be problematic. These problematic ideals include allegedly 'lay' understandings of 'fairness,' 'justice,' 'equality,' and the 'presumption of innocence.' This failure is tragic because accused persons believe in the values propagated by rhetoric but are repeatedly told that this not how 'things work.' Thus, the stereotypical cynicism of accused persons is actually a reflection[620] of the disenchantment of legal practitioners trapped with the Atlassian task of upholding (in practice negotiating) ideals in the face of systemic challenges.[621] Considering all these challenges, the legal practitioners I interviewed may be commended for the good they manage to do from a problematic position which should not exist.

In conclusion, it seems that policymakers should repeal section 196. The effects of section 196 on the expedient disposal of cases are unproven. Indeed, this thesis finds reasons to question whether the Sentence Differential may be inefficient. Moreover, section 196 serves to legitimate the presumption of guilt and the ideology of triviality that others have identified as problematic in the past.[622] Admittedly, repealing section 196 is not the solution to the many challenges due process ideals face in the

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[618] Carlen (1976a).
[619] That the summary process is dependent upon the passivity of lay persons raises interesting questions regarding how lay persons could meaningfully engage in the current process.
[620] A reflection without the gloss of the 'formal narrative.'
[621] Cases that reach court are often the result of broader social issues. The justice system cannot solve these systemic issues. Moreover, policy demands for expediency and legal aid constraints create issues for those in summary courts.
[622] Carlen (1976a) and McBarnet (1983).

summary justice system. However, repealing section 196 would be a small (perhaps mostly symbolic) step back from the statutory enshrinement of the belief that most cases are unworthy of due process.

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Appendix 1: Interview Schedule for Legal Practitioners

Probe how plea-sentence dynamics are understood by practitioners in general terms

- What are Plea-Sentence Dynamics?
- What perceived effect might a plea (guilty/not guilty) have on a sentence?
- What perceived factors might influence this? (E.g. Stage of the plea, offence type, etc.).
- What is the perceived rationale for the effect of plea status on sentence?
- Statute (i.e. S.196 of the 1995 Act), remorse, etc?

Probe the perceived role of mitigation in sentencing

- How plea type and pleas in mitigation are perceived to interact with or influence sentence?
- How remorse, plea type, and timing of plea are perceived to interact?
- The perceived role of remorse, if any, in sentencing?
- Whether Guilty Pleas are perceived as mitigating factors?

Probe perceptions regarding the perceived drivers of and inhibitors to early Guilty Pleas

- How the plea-sentence relationship is perceived to shape case trajectories?
- How are sentences perceived to influence plea decision-making?
- How are these effects thought to change based on sentence type and sentence length.
- What is the perceived role of the lawyer-client relationship in early Guilty Pleas?
- What is the normal relationship in summary cases (e.g. Perceived levels of trust, cooperation, rapport, etc.)?
- Is the relationship thought to be affected by advice to enter a Guilty Plea?
- What is the perceived role of prosecution-defence dynamics in plea decision-making?
- Are positive relationships perceived to promote early Guilty Pleas?

- Are there any perceived barriers to early Pleas resulting from relationships?

Probe how Guilty Pleas are perceived to influence sentences

- How are early pleas thought to interplay with other decisions in borderline custody cases?
- How pleas are thought to relate to the current presumption against short custodial sentences?
- How the nature and timing of pleas is perceived to operate in non-custodial sentencing?
- To what extent can a Guilty Plea change the quantum of a sentence?

Appendix 2: Interview Schedule for Accused Persons

Explore feelings about the Criminal Process

(The aim is to keep the questions general to allow the respondent to contextualise their answers within the context of their own lived experience)

Explore respondent's experiences of justice.

Explore what it was like for the respondent being accused – what were the concerns and what were their worries.

Explore How Decisions are made in life Context

Explore what influences the respondent's decision-making.

Explore how decisions are made within the context of their lives.

Appendix 3: Ethics

This investigation involved court observations and interviews with legal professionals and accused persons. Due to the nature of this investigation and the nature of research participants, there was no significant risk to the physical or mental wellbeing of research participants. The confidentiality and privacy of participants was the key ethical issue arising from this research.

To ensure the privacy of all participants all responses are fully anonymised (see Chapter 4). This anonymity extends to events observed in court, even though these proceedings were public. All participants received an information sheet and a consent form pertaining to the investigation and were given the opportunity to raise questions before, during, and after the interviews.

For accused persons' interviews, the information sheet noted, and I reiterated at the beginning of interviews, that confidentiality would be breached if necessary to prevent serious physical harm to any person. Moreover, for accused interviewees, the focus was not their alleged offence but their perception of the criminal process. The information sheet noted, and I reiterated at the beginning of interviews, that interviewees should not mention any criminal activity or facts that were not already known to the authorities.

Appendix 4: Legal Practitioner Information

Participant Information Sheet for Legal Professionals

Name of department: Law School
Title of the study: Understanding Plea-Sentence Dynamics: An Exploratory Study

Introduction
This study examines the relationship between plea and sentence. This research is being undertaken by Jay Gormley, a PhD (Law) student at the University of Strathclyde who holds a Bachelor of Laws with First Class Honours and a Masters (Law) degree by research from the same institution. His contact email is: jay.m.gormley@strath.ac.uk.

What is the purpose of this investigation?

This study seeks to contribute to scholarship on the relationship between sentence outcomes and early pleas of guilty. In particular, the research focuses on 'borderline' summary cases (i.e. where custody is a distinct possibility but not inevitable). The research will complement existing work and shed new light on plea-sentence dynamics by utilising quantitative and qualitative methods.

In Scotland, in common with other jurisdictions, there is a dearth of research on plea-sentence dynamics. Existing academic and practice sources focus primarily on jurisprudential and procedural issues that the practice raises. The main exception to this is Goriely et al (2001). As a by-product of their comparison of case outcomes achieved in otherwise similar cases by the then new PDSO solicitors and private firms, Goriely et al (2001) found that there was (except for sexual offence cases) limited evidence of the timing of guilty pleas impacting on sentencing. Since then however, there have been a number of significant changes to law, policy, and practice, but as yet there has been no research study of the situation in daily summary practice.

Official statistical sources are of limited value in understanding the plea-sentence relationship. For instance, Government data is sourced from Police data, which is primarily collected for operational purposes. Consequently, the police do not record information needed to understand plea-sentence dynamics (e.g. there are no data about the stage at which accused persons plead guilty). Likewise, COPFS only collect data for operational purposes and as such its data cannot be used to explore plea-sentence dynamics. In light of this knowledge gap this research will explore plea-sentencing dynamics in summary cases.

Do you have to take part?
Participation is voluntary, and participants can withdraw without detriment.

What will you do in the project?
If you choose to take part you will be interviewed. Interviews will last between 15 and 30 minutes.

Why have you been invited to take part?
You have been asked to take part as you are a key actor in the justice system. Your perspectives and experience will help to generate hypotheses and further inform the exploration of plea-sentence dynamics.

What happens to the information in the project?
The identity of all research participants will be fully protected. Participants will be unidentifiable in publications. All data held will be fully confidential. Electronic data will be encrypted and stored in password protected files. Any hard copy data will be stored in a secure lockfast cabinet. All email addresses within the SCTS are secure, thus any email correspondance will similarly be protected. The relevant provisions of the Data Protection Act and the Freedom of Information Act will be complied with in their entirety.

The anonymised data from this investigation will be incorporated into a Doctoral thesis and may be used in articles that could be published in academic journals or presented at academic conferences. When writing-up the thesis, numbers (e.g. Sheriff 1) will be used when citing any extracts from the interviews with participants in order to protect their identity and ensure confidentiality. If the data from this investigation are used in any related publication, the same protections will be adopted in order to ensure the anonymity and confidentiality of all participants. No participant will be identifiable from any publication arising from this investigation.

The University of Strathclyde is registered with the Information Commissioner's Office who implements the Data Protection Act 1998. All personal data on participants will be processed in accordance with the provisions of the Data Protection Act 1998.

Thank you for reading this information – please ask any questions if you are unsure about what is written here.

What happens next?
If you are happy to participate you will be asked to sign a consent form to confirm this.

If you do not want to be involved in the project, it would be appreciated if you could inform the researcher by return.

Researcher contact details:

Jay Gormley

School of Law

University of Strathclyde

Lord Hope Building

141 St James Road

Glasgow G4 0LT

T: 0141 548 3614

E: Jay.m.gormley@strath.ac.uk

Chief Investigator details:

Appendix

Professor Cyrus Tata and Professor Neil Hutton (PhD Supervisors)

School of Law

University of Strathclyde

Lord Hope Building

141 St James Road

Glasgow G4 0LT

T: Cyrus Tata: 0141 548 3614; Neil Hutton: 0141 548 3400

E: cyrus.tata@strath.ac.uk and n.hutton@strath.ac.uk

This investigation was granted ethical approval by the University of Strathclyde Law School Ethics Committee.

If you have any questions/concerns, during or after the investigation, or wish to contact an independent person to whom any questions may be directed or further information may be sought from, please contact:

Secretary to the University Ethics Committee
Research & Knowledge Exchange Services
University of Strathclyde
Graham Hills Building
50 George Street
Glasgow
G1 1QE

Telephone: 0141 548 3707
Email: ethics@strath.ac.uk

Consent Form for Legal Professionals

Name of department: Law School
Title of the study: Understanding Plea-Sentence Dynamics: An Exploratory Study

- I confirm that I have read and understood the information sheet for the above project and the researcher has answered any queries to my satisfaction.
- I understand that my participation is voluntary and that I am free to withdraw from the project at any time, up to the point of completion, without having to give a reason and without any consequences. If I exercise my right to withdraw and I don't want my data to be used, any data which have been collected from me will be destroyed.
- I understand that I can withdraw from the study any personal data (i.e. data which identify me personally) at any time.
- I understand that anonymised data (i.e., data which do not identify me personally) cannot be withdrawn once they have been included in the study.
- I understand that any information recorded in the investigation will remain confidential and no information that identifies me will be made publicly available.
- I consent to being a participant in the project
- I consent to being audio recorded as part of the project.

(PRINT NAME)	
Signature of Participant:	Date:

Appendix 5: Accused Information

Participant Information Sheet for those who have been accused of an alleged criminal offence

Name of department: Law School
Title of the study: Experiences and views of the Scottish Criminal Justice System: Deciding whether to plead guilty or not guilty to an alleged criminal offence

Introduction

This study examines pleas of guilty and pleas of not guilty, and experiences of the Scottish Criminal Justice System. This research is completely independent of the Criminal Justice System and participation in the research will not affect any legal process. This research is funded by the University of Strathclyde.

This research is being undertaken by Jay Gormley, a PhD (Law) student at the University of Strathclyde. His contact email is: jay.m.gormley@strath.ac.uk.

What is the purpose of this investigation?

In Scotland, little is known about accused persons' experiences and views of the criminal justice system and why they choose to plead guilty or not guilty. This research would like to speak people who have been accused of an alleged criminal offence to explore their experiences and views of the justice system. The research hopes to inform academia and policy making.

Do you have to take part?

Participation is voluntary and participants can withdraw without detriment.

What will you do in the project?

If you choose to take part you will be interviewed about your experiences and views of the justice system, and how you felt while deciding to plead guilty or not guilty. Interviews will last between 10 and 45 minutes (depending on how much you would like to say). You will be asked not to disclose any alleged criminal activity that is not already known to the authorities.

Why have you been invited to take part?

You have been asked to take part as you have been accused of a criminal offence. The aim is to find out about your views of the justice system in general.

What happens to the information in the project?

Participants will be unidentifiable in publications. Recordings and transcripts will be fully confidential. Electronic data will be encrypted and password protected. Any hard copy data will be stored in a secure lockfast cabinet. The relevant provisions of the Data Protection Act and the Freedom of Information Act will be complied with in their entirety. Confidentiality will only be breached if necessay to prevent serious physical harm to any person.

The anonymised data from this investigation will be incorporated into a Doctoral thesis and may be used in articles that could be published in academic journals or presented at academic conferences. When writing-up the thesis, numbers (e.g. "Person 1") or fake names will be used when citing any extracts from the interviews with participants to protect their identity and ensure confidentiality. If the data from this investigation is used in any related publication, the same protections will be adopted to ensure the anonymity and confidentiality of all participants. No participant will be identifiable from any

publication arising from this investigation. Taking part in this study will not affect any ongoing legal processes.

The University of Strathclyde is registered with the Information Commissioner's Office who implements the Data Protection Act 1998. All personal data on participants will be processed in accordance with the provisions of the Data Protection Act 1998.

Thank you for reading this information – please ask any questions if you are unsure about what is written here.

What happens next?

If you are happy to participate you will be asked to sign a consent form to confirm this.

If you do not want to be involved in the project, it would be appreciated if you could inform the researcher by return.

Researcher contact details:

Jay Gormley

School of Law

University of Strathclyde

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Glasgow G4 0LT

T: 0141 548 3614

E: Jay.m.gormley@strath.ac.uk

Chief Investigator details:

Professor Cyrus Tata and Professor Neil Hutton (PhD Supervisors)

School of Law

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E: cyrus.tata@strath.ac.uk and n.hutton@strath.ac.uk

This investigation was granted ethical approval by the University of Strathclyde Ethics Committee.

If you have any questions/concerns, during or after the investigation, or wish to contact an independent person to whom any questions may be directed or further information may be sought from, please contact:

Secretary to the University Ethics Committee
Research & Knowledge Exchange Services
University of Strathclyde

Graham Hills Building
50 George Street
Glasgow
G1 1QE

Telephone: 0141 548 3707
Email: ethics@strath.ac.uk

Consent Form for Accused Persons

Name of department: Law School
Title of the study: Experiences and views of the Scottish Criminal Justice System: Deciding whether to plead guilty or not guilty to an alleged criminal offence

- I confirm that I have read and understood the information sheet for the above project and the researcher has answered any queries to my satisfaction.
- I understand that I am asked not to disclose any alleged undetected criminal offending.
- I understand that interviews will not have any impact on ongoing criminal proceedings.
- I understand that confidentiality will be breached only if necessary to prevent serious physical harm to any person.
- I understand that my participation is voluntary and that I am free to withdraw from the project at any time, up to the point of completion, without having to give a reason and without any consequences. If I exercise my right to withdraw and I don't want my data to be used, any data which have been collected from me will be destroyed.
- I understand that I can withdraw from the study any personal data (i.e. data which identify me personally) at any time.
- I understand that I am asked not to discuss any alleged crimes or criminality that are unknown to the authorities.
- I understand that anonymised data (i.e., data which do not identify me personally) cannot be withdrawn once they have been included in the study.
- I understand that any information recorded in the investigation will remain confidential and no information that identifies me will be made publicly available.
- I consent to being a participant in the project.
- I consent to being audio recorded as part of the project.

(PRINT NAME)	
Signature of Participant:	Date: