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## **Pleading guilty: why vulnerability matters**

Jill Peay and Elaine Player\*

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### **Abstract**

This article examines the recent Sentencing Council's definitive guideline on what reductions in sentence can be offered for a guilty plea. We argue that its emphasis on facilitating early guilty pleas represents more than just an incentive to those intending to plead guilty and poses significant risks for defendants with vulnerabilities. The article questions whether the guideline can amount to an *inducement* to plead guilty which places uneven burdens on defendants and fails to pay due regard to the duties owed by public authorities under the Equality Act 2010. In so doing it asks questions about the integrity of the criminal justice process and argues that issues of cost-efficiency and the constructed interests of victims may have outweighed both the rights of those with vulnerabilities and the objectives of the legislative framework designed to protect them. The issues it raises are universally relevant to any system that favours defendants who offer guilty pleas.

At present something of the order of 75 per cent of all Crown Court cases result in pleas of guilty; if in all those cases the defendants were out of defiance or otherwise to insist on each detail of the case being proved to the hilt the administration of criminal justice would be in danger of collapse.

Lord Justice Hughes *R v Caley and others* [2012]<sup>1</sup>

## **Introduction**

The Sentencing Council's 2017 definitive guideline *Reduction in Sentence for a Guilty Plea* is designed to ensure that defendants who intend to plead guilty do so as early in the court process as possible.<sup>2</sup> In publishing this definitive guideline the Council has,

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<sup>1</sup> *R v David Caley and others* [2012] EWCA Crim 2821 at [6].

<sup>2</sup> Sentencing Council, 'Reduction in Sentence for a Guilty Plea. Definitive Guideline'

(Sentencing Council 2017), 4 at <http://www.sentencingcouncil.org.uk/wp->

following consultation, revised its draft guideline.<sup>3</sup> Neither document has, in our view, dealt adequately with the important consequences of this emphasis on early plea for those with vulnerabilities.<sup>4</sup> These vulnerabilities differ, but include those with learning difficulties, autism, mental illness or personality disorder, and also arise from issues of gender and/or black and minority ethnic (BAME) status. What they have in common is that they may all make these individuals more susceptible to this incentive to offer an early plea of guilty to the offence or offences charged. This is not a new problem, but is inherent in any system that promotes guilty pleas. However, the renewed pressure to tender guilty pleas at the earliest opportunity exacerbates the risks of injustice faced by vulnerable defendants.

The term 'vulnerability' used here relates both to individual differences and to how those differences can interact with the criminal justice system's emphasis on obtaining early guilty pleas. That the system benefits from guilty pleas is clear. It is clear in the

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[content/uploads/Reduction-in-Sentence-for-Guilty-plea-Definitive-](#)

[Guide\\_FINAL\\_WEB.pdf](#) The definitive guideline came into force on 1 June 2017.

<sup>3</sup> Sentencing Council, 'Reduction in Sentence for a Guilty Plea Guideline. Consultation'

(Sentencing Council 2016) at <https://www.sentencingcouncil.org.uk/wp->

[content/uploads/Reduction-in-sentence-for-a-guilty-plea-consultation-paper-web.pdf](#)

<sup>4</sup> Vulnerability is not an unproblematic concept: see N. Urquiza-Haas 'Vulnerability

Discourses and Drug Mule Work: Legal Approaches in Sentencing and

NonProsecution/Non-Punishment' (2017) 3 *The Howard Journal of Criminal Justice* 309.

Court of Appeal's views in *R v Caley and others* above. It is clear in the Sentencing Council's consultation and draft guideline, and in the definitive guideline. And it is clear in Lord Justice Colman Treacy's letter to the *Criminal Law Review*.<sup>5</sup> Whilst the effective running of the criminal justice system relies on guilty pleas, the Council's emphasis on securing early pleas has consequences over and above those associated with pleading guilty per se.

A system which relies so heavily on guilty pleas raises a number of important questions about why people choose to do this and waive their right to put the prosecution to proof. In effect, they are self-criminalising, an issue rarely acknowledged in the academic literature on the processes of criminalisation.<sup>6</sup> Of particular concern is whether some groups are disproportionately vulnerable to the incentive to plead guilty and, as a consequence, are more likely to enter a guilty plea inappropriately. This is not a new concern. Andrew Ashworth, in 1998, observed that 'the pressures to plead guilty are at present too great and the effect on innocent defendants (especially those from certain racial minorities) unacceptable'.<sup>7</sup> Prior to that Roger Hood had noted that part of the overrepresentation of black males in the prison system derived from their greater

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<sup>5</sup> 'Letter to the Editor' (2016) *Criminal Law Review* 489.

<sup>6</sup> N. Lacey 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72 *MLR* 936.

<sup>7</sup> A. Ashworth, *The Criminal Process: An Evaluative Study* (Oxford: OUP, 2<sup>nd</sup> ed, 1998, 296).

preponderance to plead not guilty: such defendants would, on conviction, thereby forgo the sentence discount for a guilty plea, potentially creating indirect discrimination against this ethnic minority group.<sup>8</sup> Indeed, Michael Tonry argued for the abolition of plea reductions on this ground alone.<sup>9</sup> Hood's observations are, notably, from a time when guilty pleas were less common. Indeed, in the period 2001-2006 the guilty plea rate varied from 54 per cent to 63 per cent, and it was only in 2007 when the Sentencing Guidelines Council published its revised definitive guideline *Reduction in Sentence for a Guilty Plea*, with its emphasis on the need for a consistent application of the guideline, that the guilty plea rate increased to its current levels.<sup>10</sup> These statistics suggest that defendants' guilty pleas are, in part, responsive to a pressure generated by the former guideline.

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<sup>8</sup> R. Hood, *Race and Sentencing* (Oxford: OUP, 1992). Hood's figures show that approximately 13 per cent of black male overrepresentation in the prison system arose from the fact that many more black than white defendants pleaded not guilty.

<sup>9</sup> M. Tonry, 'Abandoning Sentence Discounts for Guilty Pleas' in A. Von Hirsch, A. Ashworth and J. Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Oxford: Hart Publishing 2009).

<sup>10</sup> Sentencing Guidelines Council 'Reduction in Sentence for a Guilty Plea. Definitive Guideline' (Sentencing Guidelines Council 2007) at

[https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction in Sentence for a Guilty Plea -Revised 20071.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction%20in%20Sentence%20for%20a%20Guilty%20Plea%20-Revised%2020071.pdf)

The extent of this pressure is hard to document, and made harder by the absence of relevant research or statistical evidence on pleas, a particular problem in the Magistrates' court. Indeed, the figures for the rates of guilty pleas in the Magistrates' courts are not documented, despite the overwhelming proportion of cases being resolved there. But the key issue on which evidence is insufficient is whether defendants would plead guilty in the absence of any incentive by way of a reduction in sentence length. The Sentencing Council's (2017) own research did report on interviews with 15 convicted offenders in the Crown Court who had mostly received a custodial sentence, but not all of whom had pleaded guilty.<sup>11</sup> Yet even this research, which as they caution is based on a very small sample, did not address whether these defendants would have pleaded guilty in the absence of the discount. What it did reveal was the pivotal role of their solicitor's advice and that the tipping point for them in whether to plead guilty was their perception of the weight of evidence against them and the likelihood of their conviction. Clearly this indicates the significance of access to legal advice in the decision-making process: access that is no longer routinely available under legal aid. Notably, a few defendants did say that the guarantee of a non-custodial

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<sup>11</sup> Sentencing Council, 'Research to support the development of a guideline for reduction in sentence for a guilty plea' (Sentencing Council 2017), 8 at [https://www.sentencingcouncil.org.uk/wp-content/uploads/Guilty-plea-research-report\\_final.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Guilty-plea-research-report_final.pdf)

sentence would have encouraged an early guilty plea; and the only defendant who had received a community sentence acknowledged that their plea of guilty had been swayed by the prospect of avoiding custody. It is thus hard to unpick the pressure generated by the existence of a guilty plea discount, and the additional pressure that might be generated by the Council's latest emphasis on facilitating pleas as early in the court process as possible. But it is somewhat trite to argue that nothing in the guideline undermines the defendant's right to a trial,<sup>12</sup> since tendering a plea necessarily obviates a trial and, knowingly or otherwise, accepts the fact of criminalisation.

In the absence of research evidence, the actual motivation for pleading guilty is difficult to determine. It is unclear, for example, whether defendants plead guilty primarily because of the perceived inevitability of the conviction, or as a consequence of their genuine remorse for their crime, or because of a desire to get it all over with (in the same way that victims find court appearances stressful), or because of their desire to benefit from the discount on offer. This article accordingly examines some of the problematic issues relating to vulnerability that were not explored in the Sentencing Council's (2016) consultation. In particular, we question the differential impact of the definitive guideline on those with learning disability, mental illness, personality disorder or autism, and perhaps less obviously, on BAME individuals and women, especially those with caring responsibilities. The length of this list of equality-vulnerability issues makes it self-evident that the questions we pose do not apply simply to a minority element in

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<sup>12</sup> n 5 above 490.



the criminal justice process. They apply widely. For example, it is estimated that people with learning disabilities make up 20-30 per cent of offenders;<sup>13</sup> BAME groups comprise almost 1 in 5 prosecutions in the Magistrates' courts;<sup>14</sup> and up to 31 per cent of women offenders will have one or more child dependents.<sup>15</sup> The assertion that the Sentencing Council's draft guideline is intended to affect the *stage* at which the guilty plea is tendered (ie 'as early in the court process as possible') and not the proportion of guilty pleas overall, cannot go unexplored.<sup>16</sup> Indeed, it remains a curious assertion because alongside the 2017 guideline the Council published its own research with defence representatives, again based on only a small sample, which raised concerns about the

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<sup>13</sup> The Bradley Report. *Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system*. (London: Department of Health 2009),

20. For a guide to the law and practice in this area see also P. Cooper and H. Norton *Vulnerable People and the Criminal Justice System* (Oxford: OUP 2017).

<sup>14</sup> Ministry of Justice, *Statistics on Race and the Criminal Justice System 2014* (London: Ministry of Justice, 2015), at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/480250/bulletin.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480250/bulletin.pdf)

<sup>15</sup> Ministry of Justice, 'Female Offenders and Child Dependents' (London, Ministry of Justice, 2015), 2 at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/465916/female-offenders-child-dependents-statistics.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/465916/female-offenders-child-dependents-statistics.pdf)

<sup>16</sup> n 3 above, 33.

pressures discounted sentences generated on defendants;<sup>17</sup> concerns that were arguably addressed only in part in the final version of the guideline.

### **The Sentencing Council's definitive guideline: background**

In 2004 the then Sentencing Guidelines Council published a definitive guideline on the reduction in sentence following a guilty plea, as set out under s144 of the Criminal Justice Act 2003.<sup>18</sup> This guideline was revised in 2007.<sup>19</sup> The requirement for courts to have regard to a guilty plea dated back in statute to 1991,<sup>20</sup> but the 2004 guideline represented a sea change by articulating the reasons and basis for the reduction. In 2016, the Sentencing Council, the body now responsible for developing sentencing guidelines, issued a consultation document to revise the earlier guideline as required under s120 of the Coroners and Justice Act 2009. The new definitive guideline aims to improve consistency in the application of the discount and to clarify the levels of reduction appropriate at the different stages when a plea is made. Its policy objective is to encourage those who intend to plead guilty to do so as early in the process as possible.

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<sup>17</sup> n 11 above, 2 and 13-14.

<sup>18</sup> Sentencing Guidelines Council, 'Reduction in sentence for a guilty plea' (Sentencing Guidelines Council 2004) at <https://www.legal-tools.org/doc/8e6f1c/pdf/>

<sup>19</sup> n 10 above.

<sup>20</sup> Section 48, Criminal Justice and Public Order Act 1991.

A guilty plea produces greater benefits the earlier the plea is indicated. In order to maximise the above benefits and to provide an incentive to those who are guilty to indicate a guilty plea as early as possible, the guideline makes a clear distinction between a reduction in the sentence available at the first stage of the proceedings and a reduction in the sentence available at a later stage of the proceedings.<sup>21</sup>

In contrast to the 2007 guideline, which made clear that the principal purpose of the sentence reduction for a guilty plea was to improve the efficiency of the criminal process, the 2016 consultation document appears to place greater emphasis on the marked benefits to victims. And although there is an explicit acknowledgement that 'an accused is entitled not to admit the offence and to put the prosecution to proof of its case' the document nonetheless stresses throughout that an early acceptance of guilt:

- a) normally reduces the impact of the crime upon victims;
- b) saves victims and witnesses from having to testify;
- c) is in the public interest in that it saves public time and money on investigations and trials.<sup>22</sup>

To encourage offenders to plead guilty early in the process the Sentencing Council proposed retaining the existing sentence reduction of one-third if the plea is indicated at the first stage of the proceedings. For summary, either-way and indictable only

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<sup>21</sup> n 2 above, 4.

<sup>22</sup> n 3 above, 13. These justifications are also reproduced in the 2017 Definitive Guideline at 4.

offences the 'first stage' would normally be up to and including 'the first hearing at which a plea or indication of plea is sought and recorded by the court'.<sup>23</sup> If this opportunity is missed a sliding scale applies as it did previously under the 2007 guideline. However, in the consultation document the Sentencing Council initially proposed that the permitted discount should reduce more sharply than before, falling to one fifth rather than one quarter after the first stage of proceedings. This emphasis on a precipitous reduction in the discount was clearly designed to rack up the pressure on defendants to enter an early guilty plea. And yet the document unambiguously states that:

The guideline is directed only at defendants wishing to enter a guilty plea and nothing in the guideline should create pressure on defendants to plead guilty.<sup>24</sup>

Pressuring defendants to offer guilty pleas as early as possible, whilst retaining neutrality on whether a guilty plea should be offered at all, may be a distinction easier for the Council to construct in theory than it is for defendants to apply in practice.<sup>25</sup>

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<sup>23</sup> n 2 above, 5 2017. This was amended from the consultation document which differentiated summary and triable either way cases from indictable only cases. See Sentencing Council 'Reduction in Sentence for a Guilty Plea: Response to Consultation' (Sentencing Council, 2017) 9.

<sup>24</sup> n 3 above, 8. This appears in the 2017 Definitive Guideline as 'Nothing in the guideline should be used to put pressure on a defendant to plead guilty' at 4.

<sup>25</sup> See F. Leverick 'Sentence discounting for guilty pleas: an argument for certainty over discretion' (2014) *Criminal Law Review* 338, 343-344, discussing the Scottish situation

However, in response to the views expressed during the consultation period, that a discount of up to 20 per cent would be unlikely to encourage defendants to enter a guilty plea at this time, the Council accepted the need for a less restrictive approach and agreed that the maximum discount at this stage would remain at 25 per cent. The Council also left unchanged the one-tenth reduction previously allowed for a guilty plea offered on the first day of the trial. Although once the trial is underway this could be reduced to zero, at the discretion of the court.<sup>26</sup> Whilst these proportionate adjustments reflect those applied in other common law jurisdictions, this does not necessarily verify their validity. Nor, as importantly, is there evidence of their impact on vulnerable defendants.

In addition to these modifications to the Council's initial proposals there were three further differences between the consultation document and the definitive guideline. First, those under 18 were dealt with in a separate guideline: *Sentencing children and young people*; the relevance of vulnerability in young people is self-evident, but it is not

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where there was a notable increase in early guilty pleas once it became a requirement for judges to take account of a guilty plea when passing sentence.

<sup>26</sup> n 2 above, 5. This represents a steeper and faster drop after the first stage than under the 2007 guideline, which fell from one-third to one-quarter.

discussed further here.<sup>27</sup> Second, the Council introduced on the face of the adult guideline, in its Key Principles section, the following statement:

The purpose of this guideline is to encourage those who are going to plead guilty to do so as early in the court process as possible. Nothing in the guideline should be used to put pressure on a defendant to plead guilty.<sup>28</sup>

Finally, the definitive guideline took account of concerns from respondents and from some judges that vulnerable defendants would be unfairly penalised by the inflexibility of the process and introduced the following exception:

**F1. Further information, assistance or advice necessary before indicating plea**

Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea **sooner than was done**, a reduction of one-third should still be made.

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<sup>27</sup> Sentencing Council, 'Sentencing Children and Young People. Definitive Guideline'

(Sentencing Council 2017) at [https://www.sentencingcouncil.org.uk/wp-](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

[content/uploads/Sentencing-Children-and-young-people-Definitive-](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

[Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf). See also

[https://www.theguardian.com/law/2018/apr/10/immaturity-means-young-adults-](https://www.theguardian.com/law/2018/apr/10/immaturity-means-young-adults-need-more-support-in-court-centre-for-justice-innovation?CMP=share_btn_link)

[need-more-support-in-court-centre-for-justice-innovation?CMP=share\\_btn\\_link](https://www.theguardian.com/law/2018/apr/10/immaturity-means-young-adults-need-more-support-in-court-centre-for-justice-innovation?CMP=share_btn_link)

accessed 10 April 2018.

<sup>28</sup> n 2 above, 4. A statement which had been heralded in the Consultation document.

In considering whether this exception applies, sentencers should distinguish between cases in which it is necessary to receive advice and/or have sight of evidence in order to understand whether the defendant is in fact and law guilty of the offence(s) charged, and cases in which a defendant merely delays guilty plea(s) in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal.<sup>29</sup>

It is worth noting that the exception justified by the need for further disclosure may be infrequently applied in an arguably chaotic system geared to efficiency not justice. The Criminal Procedure (Amendment) Rules 2017 appear, on their face, to be unlikely to resolve the complex array of difficulties faced by defendants with cognitive impairments. Even their requirement in the Magistrates' Court that more time be permitted to a defendant to consider the initial details of the prosecution case material where that material has not been previously conveyed, may be too little, too late. Moreover, whilst the Rules' emphasis on the need for court directions to be given in simple terms and to be simply expressed are welcome, the (Amendment no 3) Rules require the Crown Court at the plea and trial preparation hearing, to ensure that

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<sup>29</sup> n 2 above, 7. See also the *Equal Treatment Bench Book* (Judicial College, 2018) <https://www.judiciary.gov.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf>, at para 77, accessed 4 April 2018. In the *Bench Book: Appendix B Disability Glossary* there is an extensive and helpful list of potential vulnerabilities together with appropriate reasonable adjustments.

explanations have been given to the defendant about credit for a guilty plea, thereby potentially, and counter-intuitively, increasing the pressure on vulnerable defendants. Indeed, where disclosure of unused material routinely occurs at a very late stage, vulnerable defendants may end up understanding neither the elements of the offence charged nor the relevance of exculpatory material.

Before considering more critically the equality issues raised by the guideline and its implications for the fair treatment of vulnerable defendants, we examine in more detail the nature of the discount and, specifically, whether it should be understood as an inducement, an incentive or a reward.

### **Is the sentence discount coercive?**

The Sentencing Council asserts that there is a difference between an incentive and a reward. The former is approved, the latter not. Hence,

There is an understandable reluctance to provide those who are guilty with a 'reward' for pleading guilty, especially when they have little or no prospect of being acquitted. However, it is important to recognise that the guilty plea reduction is in place to provide an incentive (with all the benefits outlined above) and not a reward. For it to work effectively it is important that it is a clear and unqualified incentive to the defendant.<sup>30</sup>

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<sup>30</sup> n 3 above, 15.



The Council accepts this may be perceived as controversial. This controversy merits some unpacking since the Council never satisfactorily spells out the difference.

The first issue is one of terminology, since both incentives and rewards might be regarded as an essentially positive encouragement to plead guilty. Yet one might argue that an incentive attempts to alter the consequences of individual actions in advance, promoting the choice of a specific course of action, whereas a reward implies desert and comes after the event, responding to 'worthy' actions already done, irrespective of whether the desired action would have occurred without the accrued benefit. This distinction however breaks down for repeat players, and indeed for those informed about the existence of the discount.

We would argue that the real distinction is between an incentive and an inducement (a word the Council does not use), since the former implies merely persuasive and positive connotations, whereas the latter can include negative connotations and induce someone to do something wrong or, in the case of pleading guilty, potentially to act against their own best interests.

Two further permutations suggest themselves. First, the discount may be a reflection of the absence of the greater punitive approach otherwise shown to those who have put the prosecution to proof and expended the state's resources in so doing. Alternatively,

are these 'contesting' defendants who are found guilty, implicitly being further punished for being held to have lied to a jury: overtly or by omission where they do not give evidence?

Inducements can also be considered with respect to how they work vis-a-vis the weakness of the recipient. Thus, greater proportions of the vulnerable may be induced (or incentivized) to decide matters against their best interests, and that that would be regarded as a positive outcome by the incentivisor, because of the net benefits that accrue to the community, even if they don't to the recipient, depending on whether they take a short-term view (the avoidance of custody) over the long-term view (the fact of criminalization). The difference between an objective and a subjective stance is pertinent here. Thus, a system that upholds predominantly utilitarian values would regard the guilty plea as a positive outcome for victims, taxpayers and guilty defendants who want to plead guilty, take responsibility for their offence and progress their moral transformation. Whereas, a system that promotes the protection of individual rights and the avoidance of wrongful convictions would see this as an unacceptable outcome, if an individual is induced to decide a matter against their own best interests.

All of this is simply to illustrate that placing the emphasis on the difference between a reward and an incentive may not only miss the point – that this approach is inherently coercive to vulnerable individuals - but also be much less straightforward than the Council presupposes. It certainly may not be clear to those having to make the choice

and may be particularly opaque to unrepresented defendants. Indeed, quite why the Council is so keen to make the distinction is unclear, save, perhaps, for avoiding the political cost of being seen to reward offenders.

One other matter needs to be stressed. The Council's guideline offers not only a reduction in the sentence length on the basis of an early guilty plea, it also offers an arguably much more stark choice in terms of the nature and quality of punishment for those on the cusp of custody. In Section E of the Guideline it is permissible for the sentencer to give a community sentence rather than a custodial sentence on the basis of a guilty plea.<sup>31</sup> This is not new but we argue that this possibility (and its lesser counterpart, reducing a community penalty to a fine) provides a choice that to some vulnerable defendants will be nothing short of a clear inducement to plead guilty when they may be innocent. We discuss below specific types of vulnerabilities, for example involving autistic defendants or women with caring responsibilities, where the prospects of a prison sentence may entail such profound hardships that they impel defendants to offer guilty pleas to obtain a non-custodial penalty.

### **Reliance on guilty pleas: causes for concern**

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<sup>31</sup> n 2 above, 6. It also offers reducing a community penalty to a fine. See also J. Roberts and L. Harris 'Reconceptualising the custody threshold in England and Wales' (2017) 28 *Criminal Law Forum* 477.

Controversy around guilty plea discounts is longstanding.<sup>32</sup> But it is worth noting that in the latest guideline many of the legitimating arguments – about the need for remorse, the refusal of the discount in the context of overwhelming evidence etc - have been canvassed and dismissed. What remains are rationales stemming from victims’ interests and costs. Yet, in their response to the consultation, the Justice Select Committee has highlighted some of the problematic issues unresolved by the Sentencing Council.<sup>33</sup> Many of the anxieties raised reflect five categories of concern associated with the guilty plea discount. But they may also have a differential impact on those with vulnerabilities.

First, there are generalised anxieties about the need to sustain the rate of guilty pleas (hence the Court of Appeal’s observation above) to ensure the viability of the criminal justice process. The emphasis placed on the efficient use of court resources over the integrity of the court process can lead to questions about whether the balance has been fairly struck.

Second, there is an anxiety that any inducement might pressurise some people into pleading guilty when they are in fact innocent. This has historically been regarded as

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<sup>32</sup> n 25, above and R. Henham, ‘Bargain Justice or Justice Denied? Sentence Discounts and the Criminal Process’ (1999) 62 MLR 515.

<sup>33</sup> Justice Select Committee ‘Reduction in Sentence for a Guilty Plea Guideline’ (2016) at <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/168/16802.htm>

unlikely in this country where the discount for a guilty plea is low by comparison with, for example, the US.<sup>34</sup> However, there is little justification for complacency. Recent evidence presented to the Justice Committee by the Criminal Cases Review Commission gives pause for thought. The Committee reported:

We were particularly struck by the submission to the Council from the Criminal Cases Review Commission (CCRC). This highlights the fact that a significant proportion (26.7 per cent, based on a sample of CCRC applications over the past three years) of those who apply for a review of their guilty conviction had entered a guilty plea. The CCRC observes that systemic and personal pressures to plead guilty are capable of extending to the factually innocent, as well as the factually guilty, and goes on to suggest that this may be a particular problem for vulnerable groups, such as those with mental health conditions.<sup>35</sup>

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<sup>34</sup> See at <https://www.theguardian.com/law/2017/apr/27/traditional-trial-rights-renounced-as-countries-adopt-us-style-plea-bargaining>. In countries like the US, where life sentences are much more common, the role that plea bargaining fulfils, with its attendant sentence discounts, is much more significant. See also, for a world-wide analysis, Fair Trials, 'The Disappearing Trial. Towards a rights-based approach to trial waiver systems' (Fair trials 2017), at <https://www.fairtrials.org/wp-content/uploads/2017/04/Report-The-Disappearing-Trial.pdf>

<sup>35</sup> n 33, above at para 30.

Whilst it may seem irrational that anyone would plead guilty when they know themselves to be innocent, this situation becomes more understandable when the options facing defendants are more fully examined. The offer of a discounted sentence inevitably renders a 'not guilty' plea into a gamble, a choice with an uncertain outcome which has punitive consequences in the event of failure. A 'guilty' plea on the other hand, removes uncertainty and offers defendants the chance to 'cut their losses'. The attraction of the risk-averse option could arguably arise where an individual is presented with what looks like overwhelming evidence or where they feel that their defence is unlikely to be believed because it amounts to their word against the word of the police or another figure of authority. The decision of an innocent person to plead guilty may therefore be construed as an entirely rational choice based on their estimate of their chances before the court.

Third, there is an anxiety specifically associated with the graduated discount – or sliding scale - which offers the greatest reductions in sentence to those pleading at the first opportunity to do so. Arguably, this rightly inhibits the more robust defendants from using delaying tactics to wring concessions from the prosecution or to increase their chances of acquittal, but risks disadvantaging defendants with vulnerabilities.

Moreover, inflating the incentive at the earliest stages of the prosecution can specifically disadvantage those with a legal defence who might be found innocent if they were to put their case to proof. These defendants succumb to the pressure to offer an early plea and abandon any attempt to explore the legal issues that constitute the

strength of the prosecution case. The Sentencing Council accepts that there is a difference between acknowledging what one has done and having sufficient information to know whether or not to plead guilty. But the Council portrays this as a decision about timing rather than a systemic difficulty which may impact differentially on different groups according to their social access or personal capacities to engage meaningfully with the process. Thus, there is a difference between asserting, as the Council does 'The guideline is directed only at defendants wishing to enter a guilty plea and nothing in the guideline should create pressure on defendants to plead guilty' (2016:8); and acknowledging that the unintended effect may be to place some defendants in a position where subjectively they do experience pressure to plead guilty.

The fourth concern also relates to the sliding scale of reductions, the timing of which can shift a defendant's calculation of a gamble worth taking. Here the anxiety is that some accused, having failed to take the benefit of the early, high discount might regard the lower, later discount as insufficiently attractive when weighed against the possibility of a complete acquittal. These individuals therefore go to trial and if convicted receive a much lengthier sentence, with all the costs to the state that entails, to say nothing of the stress on victims and witnesses in having to give evidence in court.

Fifth, there is the position of innocent defendants with previous convictions. These defendants fall into the 'tragedy' described by Liat Levanon.<sup>36</sup> If they plead not guilty and their bad character is admitted into evidence then their convictions – miscarriages of justice – are tragic in the sense that these are people who have gone straight despite their bad characters and yet are still convicted. But there is a further twist to Levanon's argument which we would wish to make. Being found guilty means that these defendants not only lose the sentence discount, but they will also have their sentences enhanced because of their previous convictions – if relevant and recent. So a rational calculating accused might, in these circumstances, plead guilty when they are not, in order to avoid an enhanced potential for triple disadvantage, if a sentencer were to take a more punitive attitude towards a contesting defendant. And whilst such decision-making might seem wholly counterproductive where longer sentences of imprisonment are envisaged, for defendants making decisions in the Magistrates' courts the factors may weigh very differently if the decision turns on an in custody/in the community outcome.<sup>37</sup> Indeed, a combination of fear and inadequate advice must inevitably increase the risk of wrong or inappropriate pleas.<sup>38</sup>

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<sup>36</sup> L. Levanon 'Bad Character, Tragic Mistakes, and the Puzzle of Uncertainty' Paper presented to the Criminal Law and Criminal Justice Forum, Law Department, LSE 8<sup>th</sup> December 2016.

<sup>37</sup> n 11 above, 15. See one barrister's comments that she would give an extra emphasis to clients pleading to keep themselves out of prison – regarded as a particular risk with the new more prescriptive guideline.



We now turn to a number of themes that explore the relationship between the definitive guideline and the vulnerability of particular groups of offenders, including the seeming lack of thought given to the application of the Equality Act 2010. We focus particularly on the risk of false confessions and how these can arise as an unintended consequence of the definitive guideline operating in a criminal process that is increasingly transformed by its diminishing resources.

### **Vulnerability**

Defendants in front of the criminal courts who are contemplating pleading guilty are not the most obvious category for public sympathy. These are individuals about to admit that they have done wrong to others; they have harmed them financially, emotionally, physically and/or reduced their life chances in other ways many will never know.

Protecting victims of crime from further harm and anxiety is understandably an easier sell and understandably a prominent aim of the guideline. But should this always hold sway over other interests of justice? The answer is clearly no. Article 6 of the *Human Rights Act* (1998) – and also of the ECHR – embodies into our domestic law the right to a fair trial. Article 6(2) states 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.' It protects a number of entitlements to minimum rights. In 6(3) – for example, rights to information, to interpretation facilities, and under 6(3)(b) 'to have adequate time and facilities for the preparation of his

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<sup>38</sup> n 11 above, 15.

defence'. Similarly, Article 13 of the *Convention on the Rights of Persons with Disabilities* (CRPD), which concerns access to justice and to which the UK is a signatory, states:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.<sup>39</sup>

Whilst the position of those intending to plead guilty is not mentioned explicitly, they are without doubt 'direct participants'. The extent to which their rights are properly protected, whether as vulnerable individuals or not, is questionable.

Defendants who appear in front of the criminal courts are not a random sample of the population. They disproportionately include those who are rendered vulnerable and disadvantaged in various ways, whether by education, by employment, by birth or by bad luck. They also include those who have wilfully and knowingly taken action to harm

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<sup>39</sup> See at <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

others. Those who serve custodial sentences are a further crystallisation of these groups. The statistical evidence demonstrating the assorted deprivations, disadvantages and distress amongst the sentenced population do not need to be specified here. Fassin argues that the very make-up of those we punish, people we punish because they are punishable, brings into question the legitimacy of the punishment we impose.<sup>40</sup> But for the purposes of our argument it is worth noting that levels of learning disability, mental illness and mental disorder generally are disproportionately high; that there is significant evidence of racial disparity in the flow of cases into court; and that amongst women, histories of personal trauma rooted in physical and sexual abuse are commonly in evidence amongst the sentenced population.<sup>41</sup> Given that so many defendants plead guilty it would be a fair assumption

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<sup>40</sup> D. Fassin 'Rethinking Punishment', LSE Public Lecture 16 February 2017.

<sup>41</sup> J. Peay, 'Mental Health, Mental Disabilities and Crime' in A. Liebling, S. Maruna and L. McAra (eds) *The Oxford Handbook of Criminology* (Oxford: OUP 6<sup>th</sup> ed, 2017); N. Uhrig *Black, Asian and Minority Ethnic disproportionality in the Criminal Justice System in England and Wales* (London: Ministry of Justice 2016), at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/639261/bame-disproportionality-in-the-cjs.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639261/bame-disproportionality-in-the-cjs.pdf); B. Lammy *Review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (London: Ministry of Justice 2017), at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/643001/lammy-review-final-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf); Ministry of Justice *A Distinct Approach: A Guide to*

that a significant proportion of these groups have also pleaded guilty. The question we raise is whether the vulnerability of these defendants is adequately protected in a criminal process that incentivises a plea of guilty. And whilst we acknowledge that the F1 allowances for those with a significantly reduced 'ability to understand' are admirable, the exception presupposes the disclosure or recognition of such vulnerabilities. Such an assumption, given limited legal aid provisions and the pressure on courts to hear cases in a timely fashion, may be overly optimistic.

Worryingly, there is no mention in the consultation document of any of the following words: 'mental', 'illness', 'disability', 'autism' or 'learning'. The word 'vulnerability' appears at p.11, but only in relation to victims and witnesses. 'Equality' and 'diversity' similarly make only a brief appearance and then only in relation to race and ethnicity. In the definitive guideline there is no mention at all of 'vulnerability' or 'equality'; albeit in the F1 exceptions noted above, a defendant's 'ability to understand' the process is a relevant consideration in adopting a more flexible approach to the level of discount the defendant deserves. However, the Equality Act 2010 s.4 includes within its protected characteristics, age, disability, pregnancy and maternity, race and sex. To fail to consider the effects of these on both rates of plea and the timing of pleas seems to

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*Working with Women Offenders* (London: Ministry of Justice 2013), at

<https://www.justice.gov.uk/downloads/publications/noms/2012/guide-working-with-women-offenders.pdf>

reflect a significant disregard for the public sector equality duty, especially as systemic changes have raised important questions about gender equality and recent statistical evidence shows significant disparity in the treatment of BAME groups in the criminal justice system.

**(i) Vulnerability: gender and ethnicity**

Emerging evidence suggests that the equality legislation itself may have provoked a process described as ‘vengeful equity’, whereby the equal treatment of men and women has been understood as treatment that is undifferentiated and ‘gender blind’.<sup>42</sup> In England and Wales, despite an overall reduction in crime, proportionately more women are being prosecuted and convicted today than ten years earlier. And whilst the numbers of prosecutions against men fell by 34 per cent over the same period, the numbers against women rose by 6 per cent.<sup>43</sup> Most of this increase has been a result of

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<sup>42</sup> M. Chesney-Lind ‘Patriarchy Crime and Justice: Feminist Criminology in an Era of Backlash’ (2006)1 *Feminist Criminology* 6. G. Mclvor and M. Burman, *Understanding the Drivers of Female Imprisonment in Scotland* Report 02/11(Glasgow: Scottish Centre for Crime and Justice Research 2011); N.A. Frost, J. Greene and K. Pranis, *Hard Hit: The Growth in the Imprisonment of Women, 1977-2004*, (New York, NY: Institute on Women and Criminal Justice 2006).

<sup>43</sup> In 2005 proportionately more women than men received an out of court disposal (OOCD) but this pattern of use has now been reversed. In 2005 24 per cent of women and 18 per cent of men proceeded against received an OOC. In 2015 10 per cent of

larger numbers of women being prosecuted for non-motoring summary offences, principally for the evasion of a TV licence, which alone accounted for over a third of all female prosecutions in 2015. As Nicola Lacey has observed, summary offences have been routinely marginalized in academic accounts of formal criminalization.<sup>44</sup> And yet, as we shall argue, their development has significant implications for the substantive criminalization of women.<sup>45</sup>

The growth of summary prosecutions against women gives rise to an important gender difference in criminal procedure, which is that women are proportionately more likely than men to be prosecuted by an authority other than the police.<sup>46</sup> The significance of

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women and 12 per cent of men received an OOC. Ministry of Justice *Statistics on Women and the Criminal Justice System 2015*, (Ministry of Justice 2016, 62).

<sup>44</sup> n 6 above, 952.

<sup>45</sup> See, for discussion, J. Peay and E. Player 'The Ethics of Criminalisation: intentions and consequences' in J. Jackson and J. Jacobs (eds) *Handbook of Criminal Justice Ethics* (Abingdon: Routledge 2017).

<sup>46</sup> Fewer than half of the prosecutions against women were pursued by the police in contrast to three quarters of prosecutions against men. Whilst women accounted for 27 per cent of all prosecutions in the Magistrates' court, they represented more than two-thirds of cases brought by the TV Licence Enforcement Office, almost a third of prosecutions brought by the DVLA and half of those prosecuted by the Local Authority.

this is that the disproportionate numbers of women defendants who are prosecuted in this way have less opportunity to access free legal advice prior to charge than those, principally male defendants, who have statutory protection when arrested by the police.

A detailed analysis of BAME disproportionality in the criminal justice system also reveals considerable disparity of treatment at different stages in the criminal process.<sup>47</sup> David Lammy's recent review into the treatment of, and outcomes for, BAME individuals describes the criminal justice system as having a 'trust deficit' amongst a significant sector of the British population. Drawing on data from the Crime Survey for England and Wales 2015 he notes that among those born in the UK, half (51 per cent) from BAME backgrounds compared with a third (35 per cent) of the White population, believe that

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See Ministry of Justice n 43 above, Chapter 5 Defendants Characteristics (2016) Table 5.02.

<sup>47</sup> Compared to white individuals BAME adult men and women are 75 per cent and 23 per cent more likely to be arrested and, whilst their arrest is less likely to result in a prosecution, once proceeded against they are 8 per cent and 24 per cent more likely to be convicted in the Magistrates' courts. Once convicted, however, they are 11 per cent and 12 per cent less likely to be given a custodial sentence at a Magistrates' court but, this reverses in the Crown Court where they are 8 per cent and 13 per cent more likely to receive a prison sentence. See Uhrig n 41 above (Tables 5.1; 5.2; 5.3).

‘the Criminal Justice System discriminates against particular groups or individuals’.<sup>48</sup>

This lack of trust has important consequences for the decisions that accused persons make, particularly decisions about plea and venue of trial. Data prepared to inform the Lammy Review show that little has changed in these respects since Roger Hood published his findings two decades earlier: adult BAME men and women are respectively 45 per cent and 64 per cent more likely than their white counterparts to be tried in the Crown Court; and 52 per cent and 35 per cent more likely to plead not guilty than similar white defendants.<sup>49</sup> This may be attributable not only to a lack of trust but also to the historically higher proportions of black defendants acquitted in the Crown Courts, a finding that appears to have persisted with respect to BAME defendants remanded in custody.<sup>50</sup> Although there are no comparable data published on the rates

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<sup>48</sup> See Lammy n 41 above, 6.

<sup>49</sup> See Uhrig n 41 above Table 5.3 Black and Asian men who are tried in Crown Court are respectively 58 per cent and 51 per cent more likely to plead not guilty compared to similar white men. Black and Asian women who are tried in the Crown Court are respectively 35 per cent and 51 per cent more likely to plead not guilty compared to similar white women.

<sup>50</sup> M. Fitzgerald ‘Ethnic Minorities and the Criminal Justice System’ (Royal Commission on Criminal Justice 1993, Research Study 20). See also Figure 5.08 ‘Statistics on Race and the Criminal Justice System 2014 A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991’ (Ministry of Justice 2015) at



of guilty pleas in Magistrates' courts, the findings from the Crown Court raise important questions about enduring differences in the decision making of white and BAME groups. Lammy concludes that these differences are not the result of a lack of legal advice but reflect a lack of confidence amongst BAME defendants in both the quality of advice available to them under legal aid, and in the fairness of the proceedings in Magistrates' courts. His review makes clear that their decision on plea not only leads to harsher sentencing outcomes for BAME groups, but also disproportionately denies them access to many 'out of court' disposals that are open only to those willing to admit guilt.<sup>51</sup>

Whilst the Sentencing Council acknowledged that a number of respondents had raised concerns about the potential of the sentence discount to have a disproportionately adverse impact on BAME or vulnerable defendants, it took the view that the changes it had already introduced into the definitive guideline were sufficient to meet these anxieties. The Council stressed the need to achieve a balance between certainty and consistency, and enabling sentencers to take account of individual circumstances. It believed it had achieved that balance through its amendments, taken together.<sup>52</sup>

The Council has considered whether the draft guideline gives rise to any equality and diversity issues. The Council is aware that rates of plea vary between

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/480250/bulletin.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480250/bulletin.pdf)

<sup>51</sup> See Lammy at n 41, above.

<sup>52</sup> n 23 above, 17-18.

different ethnic groups. This guideline is designed to affect the timings of pleas rather than the rates of plea. The Council considers that by promoting a more consistent approach to the application of reductions for guilty pleas the guideline will deal fairly with all groups of people.<sup>53</sup>

We do not consider this a satisfactory response to the public sector equality duty specified under s149 of the Equality Act 2010. The Council has failed to address a number of equality issues that differentially affect groups with protected characteristics.

**(ii) Other vulnerabilities**

In reality, the sources of vulnerability in the pre-trial process extend way beyond the objective characteristics protected by legislation. People can be vulnerable due to 'internal' causes such as cognitive impairments, illness, young age, and various kinds of personality disorder which will make people more suggestible etc. And they can be vulnerable due to 'external' factors. These could include those who have more than most to lose, people with primary responsibility for the care of children or elder people, those with particular economic and time pressures. In reality, pressure or stress will be a messy combination of, and interaction between, these internal and external factors. Stress is experienced subjectively not objectively. Many other parts of the criminal justice process already embody additional protections designed to respond to the condition of 'vulnerability'. Code C of the Police and Criminal Evidence Act (PACE) 1984 on the *Detention, Treatment and Questioning of Persons by Police Officers* recognises

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<sup>53</sup> n 3 above, 33.

the special status of particular groups – those with language or hearing difficulties, the visually impaired, juveniles, those with a mental disorder or who are mentally vulnerable, and those who are unable to read.<sup>54</sup> All these individuals have special protections in place. The Appropriate Adult scheme is specifically designed to cover a wide range of needs.

In *Caley and others* the Court of Appeal has recognised, despite the Court's general approach to achieving consistency, that some scope should be retained to treat individual cases individually with respect to what might be regarded as the first reasonable opportunity to enter a plea.<sup>55</sup> Here the Court of Appeal had in mind the combination of poor advice with a young or inexperienced defendant, which might prevent someone otherwise being eligible for the maximum discount. It is curious that the Court of Appeal recognizes that vulnerable individuals may fail to plead guilty because they get inadequate information or because they lack experience, and that they should accordingly be given greater leeway; yet those same vulnerabilities can expose those individuals to a heightened pressure to plead guilty, when perhaps they should not. This latter risk does not seem to have carried such weight with either the Court of Appeal, or the Sentencing Council. Arguably, it illustrates the malleability of vulnerability

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<sup>54</sup> See paras 3.12-3.20 at

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/364707/PaceCodeC2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364707/PaceCodeC2014.pdf)

<sup>55</sup> n 1 above, H11

and how it can be used to further not only progressive policies of social justice but also shore up existing inequalities and disadvantage.

**(iii) False confessions: the lessons of vulnerability**

The susceptibility of vulnerable individuals to make false confessions is now well recognised. The work of Gisli Gudjonsson has been central, as has his development of the Gudjonsson suggestibility scale, which measures ‘interrogative suggestibility and compliance’. The scale is internationally recognised and has been critical in identifying ‘at risk’ individuals.<sup>56</sup> In his compelling article reviewing the literature Gudjonsson asserts that in cases of unreliable confessions the key factor was the inability of the person to cope with police and custodial pressures.<sup>57</sup>

One of the most obvious categories at risk here are those defendants with learning disabilities. Their vulnerability has been widely acknowledged, and protected by Code C of PACE 1984, since the Royal Commission on Criminal Procedure following the highly publicised miscarriages of justice arising from the death of Maxwell Confait in April 1972.<sup>58</sup> In 1975 the Court of Appeal quashed the convictions of two children and one 18

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<sup>56</sup> See G. Gudjonsson ‘Psychological vulnerabilities during police interviews. Why are they important?’ (2010) 15 *Legal and Criminological Psychology* 161,163.

<sup>57</sup> Ibid 169.

<sup>58</sup> *Royal Commission on Criminal Procedure* Cmnd 8092 (1981).

year old with a mental age of eight, all of whom had made false confessions to murder, observing the murder or arson.

An eagerness to please, associated with brain impairment, is also now recognized.

Indeed, vulnerability to false confession is understood to extend well beyond those with brain impairments or learning disabilities, not least because of the infamous cases of the Guildford Four and Birmingham Six and the subsequent Royal Commission on Criminal Justice in 1991. However, there continues to be no agreed definition of what 'vulnerability' actually covers.<sup>59</sup> The complexity of the interactions, as Gudjonsson and MacKeith illustrate, are likely to defy any simple definition, since they can involve medical, psychiatric and psychological factors which can influence the capacity of the accused to cope with police interviews.<sup>60</sup> Moreover, Gudjonsson notes that the police can significantly underestimate vulnerability in suspects, by comparison with those derived from clinical evaluation, by up to 54 per cent.<sup>61</sup> The risk factors are poorly understood and even when identified may not be acted on. One reason for this has been revealed by Dehaghani in her work on the attitudes and actions of police custody

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<sup>59</sup> *Royal Commission on Criminal Justice Cmnd 2263 (1991)*.

<sup>60</sup> G. Gudjonsson and J. MacKeith 'Disputed confessions and the criminal justice system' *Maudsley Discussion Paper No.2* (London: Institute of Psychiatry 1997).

<sup>61</sup> n 56 above, 165.

officers when dealing with vulnerable individuals.<sup>62</sup> She found that although identified, such individuals are typically not recognised as *sufficiently* vulnerable to merit the statutory protections. Thus, judgements are made by those who may not have the requisite expertise to make them.

One of the most pressing concerns in relation to the treatment of vulnerable defendants relates to those with attention deficit hyperactivity disorder (ADHD) and personality disorders.<sup>63</sup> ADHD is disproportionately associated with the reporting of false confessions.<sup>64</sup> Gudjonsson, however, explains that:

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<sup>62</sup> R. Dehaghani, 'He's just not that vulnerable: exploring the implementation of the appropriate adult safeguard in police custody' (2016) 55 *Howard Journal of Criminal Justice* 396.

<sup>63</sup> Whilst not a personality disorder per se ADHD in children is commonly followed by anti-social personality disorder in the same individuals as adult. Indeed, there is significant overlap between the two diagnoses; see <https://www.mentalhelp.net/blogs/personality-disorders-and-attention-deficit-hyperactivity-disorder/>

<sup>64</sup> G.H. Gudjonsson, J.F. Sigurdsson, E. Einarsson, O.O. Bragason and A.K. Newton 'Interrogative suggestibility, compliance and false confessions among prisoners and their relationship with attention deficit hyperactivity disorder (ADHD) symptoms' (2008) 38 *Psychological Medicine* 1037.

The greatest challenge is undoubtedly in relation to personality disorders, because these are often linked to perceptions about criminality and dishonesty and the impact of their condition on the reliability of their accounts in police interviews and to others is less well understood than that of learning disabilities and mental illness.<sup>65</sup>

A high incidence of personality disorder is routinely documented amongst women in contact with the criminal justice system<sup>66</sup> and research evidence indicates that women are more likely than men to make false confessions.<sup>67</sup> A common finding is that women

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<sup>65</sup> n 56 above, 170.

<sup>66</sup> Ministry of Justice and Department of Health, *Offender Personality Disorder Strategy for Women* (Executive Summary), (London: Ministry of Justice and Department of Health 2011).

<sup>67</sup> See J.F. Sigurdsson and G.H. Gudjonsson, 'The Psychological Characteristics of 'False Confessions': A study among Icelandic prison inmates and juvenile offenders' (1996) 20 *Personality and Individual Differences* 321. K.D. Forrest, T.A. Wadkins and R. Miller, 'The Role of Pre-existing Stress on False Confessions: An empirical study' (2002) 3 *Journal of Credibility Assessment and Witness Psychology* 23. J.R. Klaver, Z. Lee and V.G. Rose, 'Effects of Personality, Interrogation Techniques and Plausibility in an Experimental False Confessions Paradigm' (2008) 13 *Legal and Criminological Psychology* 186. G. Steingrimsdottir, H. Hreinsdottir and G. Gudjonsson, J.F. Sigurdsson and T. Nielsen, 'False Confessions and the Relationship with Offending Behaviour and Personality among Danish Adolescents' (2007) 12 *Legal and Criminological Psychology* 287.

demonstrate significantly higher levels of compliance and acquiescence in efforts to avoid conflict, particularly when dealing with those in authority or in situations in which they feel powerless.<sup>68</sup> Sigurdsson and Gudjonsson (2003) reported that complicity was highly correlated with feelings of low self-esteem and that this psychological trait was more commonly experienced amongst women rather than men.<sup>69</sup> In an earlier study the same authors reported that the motivation for making false confessions also varied by gender, with women being significantly more likely than men to falsely confess in order to protect another person.<sup>70</sup> Interestingly, these confessions had only a weak relationship with personality characteristics, a finding that resonates with other studies

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<sup>68</sup> L.L. Carli, 'Gender, Interpersonal Power and Social Influence' (1999) 55 *Journal of Social Issues* 81; K.D. Forrest, T.A. Wadkins and B.A. Larson 'Suspect Personality, Police Interrogations and False Confessions: Maybe it is not just the situation' (2006) 40 *Personality and Individual Differences* 621.

<sup>69</sup> G.H. Gudjonsson and J.F. Sigurdsson 'The Relationship of Compliance with Coping Strategies and Self-Esteem' (2003) 19 *European Journal of Psychological Assessment* 117.

<sup>70</sup> J.F. Sigurdsson and G.H. Gudjonsson, 'The relationship between types of claimed false confession made and the reasons why suspects confess to the police according to the Gudjonsson Confession Questionnaire (GCQ)' (1996) 1 *Legal and Criminological Psychology*, 259.



that found personality factors played a less influential role in false confessions made by women than those by men.<sup>71</sup> This suggests that social and cultural factors that shape the gendered nature and cause of women's vulnerability in this context are particularly influential in understanding their false confessions.

Jones' (2011) research, based on interviews with 50 adult women prisoners in England, argues that some forms of pressure to admit guilt impact particularly heavily on women. Unsurprisingly, he found child care responsibilities to be highly influential in how women weighed up the incentive to plead guilty.<sup>72</sup> The offer of a sentence discount when applied at what a defendant believes to be the threshold to custody, can be experienced less as a rewarding incentive and more as a coercive threat. The proposition that only those mothers who intended to plead guilty would be influenced by the threat of custody, and that those with a defence to the charge would be immune from this pressure, seems to us entirely unrealistic. As one woman in Jones' study explained:

I'm saying to you now, I'm innocent, but I pleaded guilty because my barrister advised me.....he said 'If you plead you'll get a suspended sentence' and to me it

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<sup>71</sup> G.H. Gudjonsson, J.F. Sigurdsson and E. Einarsson, 'Taking Blame for Anti-Social Acts and Its Relationship with Personality' (2007) 43 *Personality and Individual Differences* 3.

And see Klaver et al n 67 above.

<sup>72</sup> S. Jones, 'Under Pressure: Women who plead guilty to crimes they have not committed' (2011) 11 *Criminology and Criminal Justice* 77.

was more important, rather than standing up for a principle, to be there for my daughter. But he obviously got it very wrong. (Jones 2011:82)

The likelihood of women falsely confessing to crimes in order to protect others is not limited to their role as parents, but has also been linked to their relationship with male partners. Most obviously, women in abusive relationships are liable to being coerced by further violence and intimidation. Jones, however, notes that oppression can also result from feelings of co-dependency, whereby an individual is overly reliant on 'other people for approval, affection and feelings of self-worth'.<sup>73</sup> In these circumstances self-sacrifice is typically rooted in compulsion rather than altruism.

Finally, the concept of 'double deviance' has been employed to understand women's seemingly greater vulnerability to making false confessions. The premise is that women are stigmatized first for their violation of the criminal law and then again, for their violation of traditional gender roles.<sup>74</sup> It is argued that the public shaming inherent in this process encourages an acceptance of guilt that is built upon a generalized acknowledgement of wrongdoing. One respondent in Jones' study, for example, explained that she pleaded guilty even though she had no recollection of the offence,

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<sup>73</sup> *ibid* 85.

<sup>74</sup> P. Carlen *Women's imprisonment: A study in social control* (London: Routledge & Kegan Paul 1983); A. Worrall *Offending Women Law Breakers and the Criminal Justice System* (London: Routledge 1990); A. Lloyd *Doubly Deviant, Doubly Damned: Society's treatment of violent women* (London: Penguin 1995).

because she believed her alcohol-dependent lifestyle had become so aberrant that she was deserving of blame and censure:

I know that I would personally never rob anyone. I am sure that I didn't attack that man but who's to say that I couldn't have done something? I see reason with that because of the way my life was going. (Jones 2011: 83)

Critics might argue that there is a difference between falsely confessing at the police station to a crime that one has not committed; and pleading guilty in court to an offence of which one may not be guilty. The latter group divide, as we have discussed earlier, into a number of different categories, but they include those who think they are guilty when they are not (and this may be because of a failure to understand the law, or the defences available to them, or because of an excess of 'guilt' feelings which can affect some defendants<sup>75</sup>); and those who plead guilty knowing they are not for other reasons. This may perhaps stem from a desire, above all other, not to be sent to custody, where that would entail either the destruction of a role in caring for others, or the inability to tolerate prison conditions where an individual may fear disability-related bullying or the profound disruption of necessary routines for those with autism-spectrum conditions.

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<sup>75</sup> *R v Murray* [2008] EWCA Crim 1792: a woman with paranoid schizophrenia who insisted on pleading guilty to the murder of her five year old daughter, rather than to diminished responsibility manslaughter.

Once an individual arrives at the court stage of the process is it assumed that they no longer need any additional protections because they will have had the benefit, or will be continuing to have the benefit, of legal advice?<sup>76</sup> If so, this is a flawed assumption. Both the Sentencing Council (2016) and the Court of Appeal in *Caley and others* accept this is not a straightforward issue. The Court asserts 'It cannot be assumed that defendants will make rational decisions....'<sup>77</sup> and accepts that defendants can get poor advice from solicitors' representatives with respect to the issue of pleading guilty. And even when counsel is present to give advice, the system may not work flawlessly. But whilst the Sentencing Council is aware of the recent restrictions placed on legal aid, it again fails to recognise or acknowledge important equality issues in relation to defendants' access to legal advice and representation and the potential implications this has for their decision on plea.

The precise impact of legal aid reforms on these issues is uncertain. What is clear is that the scale of applications for criminal legal aid has dropped substantially. From 2012-13 to 2016-17 the total number of disposals from Magistrates' courts fell by 47,500, a drop of 3 per cent, whilst the number of legal aid applications fell by more than 121,000, a

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<sup>76</sup> See *R (Howard League for Penal Reform and Prisoners' Advice Service) v Lord Chancellor* [2017] All ER (D) 22 for the implications of the withdrawal of legal aid.

<sup>77</sup> *ibid* para 24.

decline of 31%.<sup>78</sup> Over the same period, Crown Court disposals fell by 10,000, a drop of 8 per cent, whilst applications for legal aid fell by 14,000, a decline of 12 per cent.<sup>79</sup>

There are no current official data on the numbers of unrepresented defendants appearing in the criminal courts.<sup>80</sup> The Ministry of Justice undertook a study of unrepresented defendants in the Crown Court and publication was anticipated in the summer of 2016. However, in March 2017, in response to a written question in the House of Lords, the government made clear that the study comprised an internal report

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<sup>78</sup> Ministry of Justice 'Criminal court statistics bulletin: October to December 2017 (main tables)' (Ministry of Justice 2018), Table M1 at

<https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-october-to-december-2017>. Ministry of Justice and Legal Aid Agency 'Legal Aid Statistics

Quarterly, England and Wales, October to December 2017' (Ministry of Justice and Legal Aid Agency 2018), Table 3.1, accessed 19 April 2018.

<sup>79</sup> Ministry of Justice Ibid Table C1 and Ministry of Justice and Legal Aid Agency Ibid Table 3.2.

<sup>80</sup> The proportion of unrepresented defendants in the Crown Courts was published up to 2015, showing 5 per cent of defendants were unrepresented or representation was unknown in 2012, compared with 7 per cent in 2015. Ministry of Justice, 'Criminal court statistics quarterly, England and Wales, January to March 2016' (Ministry of Justice 2016), Appendix B Table B2 at

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/533097/criminal-court-statistics-jan-mar-2016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/533097/criminal-court-statistics-jan-mar-2016.pdf) accessed 19 April 2018.

only and that there were no plans to publish its findings.<sup>81</sup> The invisibility of unrepresented defendants, particularly in the Magistrates' courts, has triggered a recent study by Transform Justice which collated existing research data and gathered additional evidence from observational research in Magistrates' courts and interviews with judges, magistrates and prosecutors.<sup>82</sup> Although the samples of participants were small, their collective experience of unrepresented defendants was uniformly troubling. Prosecutors expressed concern that in the absence of legal advice, many defendants routinely accepted the charge against them and were unable to assess the strength of their case and the appropriateness of an early guilty plea. One magistrate referred to the incentivization of early guilty pleas as a 'bit of a game of poker' in which those who believe themselves to be innocent should 'hold their nerve' but amongst whom 'many cave in'. The precarious position of vulnerable defendants was observed in court by the researchers and commented on by prosecutors. They argued that mental health problems, learning disabilities and addictions were often not immediately apparent to

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<sup>81</sup> House of Lords, 'Crown Courts: Legal Representation – Written Question' (House of Lords 2017), Lord Beecham HL 5945 at

<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2017-03-09/HL5945/> accessed 19 April 2018.

<sup>82</sup> Transform Justice 'Justice denied? The experience of unrepresented defendants in the criminal courts' (Transform Justice 2016) at

[http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL\\_Singles.pdf](http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf) accessed 19 April 2018.

the court and that legal representation provided an important safeguard in protecting access to justice for those with vulnerabilities. A common observation was that unrepresented defendants faced 'pot luck' in whether they would be patiently coached through the legal process or faced with impatient advocates and judges under pressure to dispose of cases as speedily as possible. The research concludes that although the absence of reliable data makes it impossible to calculate precisely the impact of legal aid cuts on the number of unrepresented defendants appearing in the criminal courts, the reported experience of key practitioners is that unrepresented defendants are disadvantaged at every stage of decision making and that this situation is deteriorating to an extent that calls into question rights guaranteed under Article 6 of the ECHR.<sup>83</sup>

The biennial publication of statistics on women and the criminal justice system show that women defendants have less access to legally aided representation in the Magistrates' court than male defendants. Although women comprised more than a quarter of those prosecuted in the Magistrates' court in 2015, they accounted for only 16 per cent of the workload for legally-aided representation, proportions that have remained broadly stable over the previous five years.<sup>84</sup> This may reflect the higher proportion of summary prosecutions against women and the possibility that their cases are less likely to fulfill the interests of justice test, particularly where they express a willingness to plead guilty; or duty solicitors in busy Magistrates' courts may be fully

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<sup>83</sup> Ibid 28.

<sup>84</sup> n 43 above, 60-61.

occupied by risk of custody cases; or there may be a combination of these factors together with other unspecified reasons. In the Crown Court, where cases have a greater chance of satisfying the interests of justice test, men and women are equally likely to be legally represented, but then women comprise only 11 per cent of this caseload.

As the Transform Justice report has shown, the absence of legal representation in the Magistrates' courts and the speed at which cases are processed can create an unholy alliance which has implications for a wide range of vulnerable defendants who may find themselves pleading in circumstances where they simply do not properly understand what is happening or to what they are pleading. The failure of the system to pick up on widespread mental health difficulties and systemic inequalities, where individuals may be compliant because that is how they manage their lives, should not be underestimated. The invisibility of vulnerability that arises from disability, in particular, remains a real concern for the processing of individuals in the criminal courts.

(iv) **Unfitness to plead**

The Law Commission has recognised the problem of the invisibility of disability with respect to those found unfit to plead.<sup>85</sup> This has arisen in the context of the

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<sup>85</sup> Law Commission *Unfitness to Plead: Volume 1 Report* (2016) at

[http://www.lawcom.gov.uk/wp-content/uploads/2016/01/lc364\\_unfitness\\_vol-1.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2016/01/lc364_unfitness_vol-1.pdf)



Commission's six year programme of work examining the difficulties of the current law on *Unfitness to Plead*, and its incompatibilities with our obligations under the ECHR, and indeed the CRPD (the UN Convention on the Rights of Persons with Disabilities).<sup>86</sup> The bulk of the Law Commission's Report concerns the position of the limited number of those who should be found unfit to plead and who should be diverted away from conventional conviction. However, the Commission also considers the position of those who may not have the capacity to plead not guilty, because they cannot participate effectively in a criminal trial, but who may nonetheless have the capacity to plead guilty and to be punished conventionally. This necessarily entails consideration of a number of difficult issues. In recognition of the vulnerability of an 'unfit, but fit to plead guilty' group the Commission is recommending a series of special procedural safeguards which would include a separate assessment, once found unfit, of their capacity to plead guilty. And for those who would otherwise be processed conventionally, the Commission proposes screening for unfitness for all those under 18; and if resources do not permit that, to make screening mandatory for those under 14. In that context some of the most egregious examples of borderline unfit individuals pleading guilty to offences for which they may have had a legitimate defence, or for whom an unfitness finding would have been more appropriate, may be avoided. The government's response to the Law

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<sup>86</sup> <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> See also J. Peay, 'Mental incapacity and criminal liability: Redrawing the fault lines?' (2015) 40 *International Journal of Law and Psychiatry* 25.

Commission's Report *Unfitness to Plead* is awaited. The real solution, of course, is comprehensive screening;<sup>87</sup> but, in a context where the Commission has been acutely aware of limited resources, this is not going to happen. Equal access to justice again appears to come with an unaffordable price tag.

Under our current system it falls to the judiciary to make determinations of unfitness based on medical evidence. Mackay's research shows that there are around 100 verdicts of unfitness per year.<sup>88</sup> Given the number of arguably unfit sentenced individuals in the prison system this might be regarded as woefully low. But it raises another issue. Can the judiciary be the natural safeguard against an inappropriate guilty plea? One must have considerable sympathy for the judiciary (and indeed the magistrates) since expecting them to perform this task effectively in a busy court setting would be well-nigh impossible. Thus, the invisibility of disability is likely to be a greater problem with respect to guilty pleas (where no-one may have identified mental health as an issue) than with respect to not guilty pleas. Anything that makes more likely the

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<sup>87</sup> Brown, P Stahl, D Appiah-Kusi, E Brewer, R Watts, M, Peay J, and Blackwood, N (2018) 'The Fitness to Plead Assessment Tool: development and validation of a standardised instrument to assess the psycholegal capacities required to stand trial in England and Wales', *PLOS ONE* (in press).

<sup>88</sup> R.D. Mackay, 'Unfitness to Plead in Operation', in B. Livings, A. Reed and N.Wake (eds) *Mental Condition Defences and the Criminal Justice System Perspectives from Law and Medicine*. (Cambridge: Cambridge Scholars Publishing 2015).

tendering of an inappropriate guilty plea from someone with a mental health issue is profoundly problematic, where the checks and balances proposed or in place would not catch such potential miscarriages.

**(v) Vulnerability: too easy to miss**

A reliance on self-disclosure by vulnerable people of their vulnerabilities looks overly optimistic; in its place the system arguably relies on advocates to protect the vulnerable. Yet, this may be indefensible where those advocates are not present, not legally aided, insufficiently knowledgeable about issues of vulnerability or inclined to dismiss any suggestion that their client may be vulnerable to inappropriate pressure to enter a guilty plea. The Court of Appeal in *Caley and others* recognised that in order to facilitate early guilty pleas, or indicate a willingness to plead guilty to a lesser charge (the problem of 'cracked' trials is, in itself, a significant cost to the system)<sup>89</sup> 'advocates at the magistrates' court must be equipped to explain to the defendant the practice relating to reduction for guilty pleas ....but to the extent to which these things are wise and necessary they ought already to be the trend.'<sup>90</sup>

Being able to explain the sentence discount for a guilty plea is one thing; being able to spot when someone is inappropriately considering pleading guilty is another. It is, unfortunately, ironic that whilst we recognise and support vulnerable victims, the

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<sup>89</sup> Ministry of Justice 'Criminal Court Statistics' (Ministry of Justice 2016, Table C6).

<sup>90</sup> n 1 above, para 21.

statutory scheme to protect vulnerable defendants under s.104 of the *Coroners and Justice Act 2009* has never been implemented. Instead, defendants are reliant on the near ad hoc exercise of discretion by Judges.<sup>91</sup> Defence intermediaries or other support persons may not even be present when instructions are sought from a vulnerable client in custody, making it even harder to discern the validity of a potential guilty plea. And it is no great comfort that the qualitative research (albeit small scale) with sentencers conducted by the Sentencing Council acknowledges the importance of vulnerability in relation to victims and witnesses but not in relation to defendants.<sup>92</sup>

## Conclusions

The process of pleading guilty remains an under-researched area of criminalization and criminal justice. Indeed, research remains woefully sparse and even statistics on pleas in the Magistrates' courts are unavailable. Yet this is a field which contributes directly to

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<sup>91</sup> For an excellent analysis of the current provisions see L. Hoyano and A. Rafferty 'Rationing defence intermediaries under the April 2016 Criminal Practice Direction' (2017) *Criminal Law Review* 93 and *OP* [2014] EWHC 1944 (Admin). *R v Rashid* [2017] EWCA Crim 2 underlines the court's reluctance to permit the more extensive use of intermediaries. The *Equal Treatment Bench Book*, n 29 above, rightly cautions, but with respect to witnesses, the possibility that 'needs have not been considered or identified', 2-15.

<sup>92</sup> n 11 above, 10-11.

the integrity of the criminal process and, more pragmatically, to the nature and size of the prison population. The issues we raise are not marginal concerns but affect large numbers of people. They are concerns which might, and arguably should, have been raised against the guidelines in 2004 and 2007, but they were not. And so it remains curious that whilst parliament has been cognizant of the needs of vulnerable individuals at the police station, evidenced through the introduction of Code C of PACE 1984, and the courts have acknowledged the difficulties that vulnerable prisoners face at assorted decision-points in prison without legal aid,<sup>93</sup> the act of pleading guilty has been remarkably untouched by such concerns.

This oversight is particularly regrettable given the systemic pressure on defendants to admit their guilt and forego their rights to require the prosecution to prove their case beyond reasonable doubt. The inducement to plead guilty at the first opportunity, whilst clearly of benefit to criminal justice agencies and to some victims and witnesses, selectively ignores the vulnerabilities of specific groups of defendants and ratchets-up their risk of making a false confession or receiving a more severe sentence. We recognize that there is a powerful lobby to preserve the sentence discount on pragmatic grounds, believing that the criminal process would grind to a halt if defendants chose to take their case to trial. This article, however, has been less concerned with the

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<sup>93</sup> n 76 above. The Court of Appeal found against the Lord Chancellor with respect to withdrawal of legal aid for pre-tariff reviews by the Parole Board, category A reviews, and decisions as to placement in a Close Supervision Centre.

existence of the sentence discount (although we do regard it as resting on insecure theoretical foundations) and more pre-occupied by the recent guideline designed to induce a guilty plea as early in the process as possible. In our view this imposes an uneven burden on defendants and fails to uphold principles of fair treatment embodied in the public sector equality duty. In short, the 2017 guideline is the straw that breaks the camel's back. A prospect that looks all the more likely in the context of woeful legal aid provision, provision which already has drawn adverse comment from the Court of Appeal.<sup>94</sup>

The sources of vulnerability we have discussed are varied and although we have separated them analytically, in defendants' real lives they coexist in complex combinations and in varying degrees of intensity. Because there is no single category of 'vulnerable' people there is no universally applicable solution to the problems we raise. Arguably, however, the first step is to recognize and acknowledge that the range of vulnerabilities we discussed in relation to the Council's guideline are unjustifiably neglected and have adverse consequences for the integrity and rectitude of the criminal process. As Andrew Ashworth and Mike Redmayne note:

A convincing normative theory of the criminal process needs to be properly connected to facts about actual criminal processes.<sup>95</sup>

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<sup>94</sup> Ibid.

<sup>95</sup> A. Ashworth and M. Redmayne *The Criminal Process* (Oxford, Oxford University Press 3rd ed 2005, 23).

Initiating reform requires some understanding not just of the range of vulnerabilities that attach to individual defendants but also of how this vulnerability to harm is systemically constructed. Feminist scholars, in particular, have challenged concepts that are tied to individual weakness and have pointed to the importance of understanding the 'politics of vulnerability': how power relations shape who is labeled vulnerable, under what conditions and how that vulnerability is responded to by state agencies.<sup>96</sup> We have shown how the criminal justice system is alert to some forms of vulnerability and indifferent to others. The harms for defendants that arise from the risks and uncertainties associated with the Council's guideline on the guilty plea discount fall squarely within this latter category. And they do so because of the wider ideological context which gives meaning to this decision-making process.

In England and Wales, like many other western democracies, contemporary criminal justice policies and practices are shaped by neo-liberal systems of governance that champion personal responsibility and the obligation to self-govern.<sup>97</sup> From this

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<sup>96</sup> V. Munro and J. Scouler, 'Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK' (2012) 20 *Feminist Legal Studies* 189; M. Fineman, 'Vulnerability, equality and the human condition' in J. Jones, A. Gear, R. Fenton and K. Stevenson (Eds) *Gender, Sexuality and Law* (London: Routledge 2011: 53-62).

<sup>97</sup> J. Simon, *Governing through Crime: How the war on crime transformed American democracy and created a culture of fear* (Oxford: Oxford University Press 2007); D.

perspective, the opportunity to take advantage of a maximally reduced sentence in return for an early plea of guilty can be understood as a process of rational decision-making, engaged in voluntarily by individuals acting in their own best interests. Within this intellectual framework it makes sense for the Sentencing Council to assert that the guideline provides only an incentive to those already intending to plead guilty and affects only the timing and not the nature of a defendant's plea. However, if this process of decision making is understood differently, as one structured by differential perceptions of fear and insecurity, then the provision of an incentive to follow a particular course of action can readily be reconfigured as a coercive prescription to conform. Consequently, to formulate ways in which vulnerable defendants might be protected from the regressive consequences of the guilty plea discount, we conclude that the intellectual and moral reasoning that currently frames this transaction has to broaden its parameters and challenge its own selective perceptions. Protecting defendants from the risks they fear requires a renewed emphasis on due process practices that have been short-circuited in the latest guideline in the pursuit of other social goals.

Arguably, the greatest harm arises when a defendant makes a false confession and suffers the consequences of a conviction for an offence they did not commit. We

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Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Clarendon Press 2001); K. Stenson, and R. Sullivan, eds) *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (Cullompton, Devon: Willan 2001).



discussed earlier how this need not be an irrational decision from the defendant's point of view, but a defensible calculation when weighed against their assessment of other competing risks. The Sentencing Council has declined to recognize that a sentence discount, objectively substantial or not, offered against a diminishing time frame can be experienced as a coercive gamble, in which the risk averse may choose to cut their losses. Their assertion that the guideline is intended to bring forward in time the stage when a guilty plea is made rather than to increase the rate of guilty pleas, seems to us to be defensible only if sufficient due process resources are invested in the pre-trial stage. Absent these safeguards, the rectitude and integrity of the criminal process is severely compromised by the additional time pressures brought to bear on defendants in a system increasingly defined by its deficits in legally aided advice and representation.

The observations of the Court of Appeal in *R (Howard League for Penal Reform and The Prisoners' Advice Service) v The Lord Chancellor* [2017]<sup>98</sup> are telling and again demonstrate the selective perception of Article 6 rights at other stages of the criminal process. Here the court has recognised that it is the intersection of issues of vulnerability and of the complexity of the decisions to be made, which makes the procedure inherently unfair where legal representation is absent and other safeguards insufficient. Importantly the court stressed that this was not about any individual circumstances, but about systemic failings. Most notably, the court argued that the

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<sup>98</sup> n 76 above, 244.

threshold for establishing unfairness was high, and yet it had been crossed in these circumstances where legal aid had been withdrawn.

Although access to independent legal advice is a necessary protection, it is not a sufficient safeguard against the kind of false confessions we discussed earlier. Those who have reason to be risk averse are rendered acutely vulnerable when the stakes are high. The mother of dependent children who is advised by her lawyer that the likely sentence if found guilty by the court would be custodial, but that the discount for an early plea of guilty would result in a non-custodial penalty, is vulnerable not because she lacks legal advice but because she is faced with a gamble she cannot afford to lose. If the avoidance of wrongful conviction is a major moral imperative then the discount for a guilty plea should not carry such significant weight. In our view, the decision at the cusp of custody should never hinge on the offender's plea or on the timing of that plea. Section 152(2) of the Criminal Justice Act 2003 makes clear that a custodial sentence is only justified when the offence is so serious that no other, less punitive, sentence can be justified:

The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.

The Sentencing Council in its definitive guideline on the imposition of community and custodial sentences has also concluded that whilst '(t)here is no general definition of

where the custody threshold lies....the clear intention of the threshold test is to reserve prison as a punishment for the most serious offences'.<sup>99</sup> But what factors can legitimately pull a case back from falling on the wrong side of the custody threshold? The power to reduce a custodial sentence by taking account of personal mitigation clearly preserves the ability of the courts to exercise justice with mercy in individual cases. But the sentence discount for a guilty plea does not constitute personal mitigation, it is a device to reduce costs and improve the efficiency of the criminal justice system, whilst also relieving victims and witnesses from giving evidence at trial. Whilst these are desirable outcomes, the principle of subsidiarity provides a strong argument for limiting their pursuit when this threatens weightier claims to justice. This is already acknowledged to an extent in that there is a notional maximum discount of 33 per cent against the 'deserved' sentence. In addition the Sentencing Council has included this caveat in its earlier guideline on the imposition of custodial sentences:

For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.<sup>100</sup>

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<sup>99</sup> Sentencing Council *Imposition of Community and Custodial Sentences: Definitive Guideline* (Sentencing Council 2017, 7). <https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive-Guideline-Imposition-of-CCS-final-web.pdf>

<sup>100</sup> *Ibid* 7.

It has been argued that the induced benefit arising from a guilty plea should not amount to the avoidance of custody.<sup>101</sup> Whilst we support measures to reduce the use of custody this mechanism in our view carries too many hazards for vulnerable defendants and should be pursued by other means such as an overall reduction in starting points or removing some offences from custodial penalties altogether. In any event, an offence which is insufficiently serious in the presence of a guilty plea to warrant custody should not merit a custodial sentence in its absence. The weight attached to the plea is so potentially life-changing that it risks other more cherished ambitions, notably the avoidance of miscarriages of justice caused by the coercion of false confessions. Yet the Council's definitive guideline explicitly permits a custodial sentence to be reduced to a community penalty in the light of a guilty plea.<sup>102</sup>

But aside from safeguards to protect against false confessions we are concerned to protect defendants who do not engage with the inducement to plead guilty and consequently experience harsher sentences, particularly BAME defendants whose vulnerability stems from their disproportionate lack of confidence in the fairness and integrity of the criminal process. The Lammy Review has confirmed the persistence of

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<sup>101</sup> See Roberts and Harris n 31 above.

<sup>102</sup> n 2 above, 6. See E1. Imposing one type of sentence rather than another.

disproportionately severe sentences for Black and Asian offenders arising from their unwillingness to plead guilty. The Review draws attention to the fact that their unwillingness to admit guilt has repercussions that extend beyond the sentence discount. Many of the more progressive and rehabilitative opportunities, such as out of court disposals and non-custodial interventions available in ‘problem-solving courts’, are open only to those who accept their guilt. Greater investment in legal aid is unlikely to provide an effective remedy, as many BAME defendants mistrust the independence of the advice provided by state-funded lawyers. David Lammy argues that providing greater due process protection for these groups calls for a more creative approach from statutory and non-statutory organizations. He calls for a collaborative effort on the part of the Home Office, the Ministry of Justice and the Legal Aid Agency, as well as the Law Society, the Bar Council and the voluntary sector, to experiment with different approaches to explaining legal rights and building trust with BAME communities. These could include, ‘a role for community intermediaries when suspects are first received in custody, giving people a choice between different duty solicitors, and earlier access to advice from barristers’.<sup>103</sup> In each case, he argues that ‘the effect on the proportion of guilty/not guilty plea decisions for different ethnicities should be evaluated’ and the results published as part of a wider public consultation.

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<sup>103</sup> See Lammy n 41 above, 27.

It is hard to conceive how those encountering the criminal courts for the first time react. We know that seemingly mature, well-balanced, well-informed adults can find the experience exceptionally stressful and confusing.<sup>104</sup> The Sentencing Council seems almost overwhelmed by its desire to protect victims and witnesses from this experience; so why the seeming neglect of defendants' vulnerabilities? Indeed, it fails wholly to acknowledge the competing perceptions of reality that arise out of defendants' differential experience and which critically inform the choices they make. If the guilty plea discount is not intended to ratchet-up the pressure, it may certainly have that effect with its sliding scale, its repeated assertion of the desirability of obtaining a plea 'as early in the court process as possible' at 'the first stage of the proceedings' and, critically, its inducement to avoid custody. Is this not inherently coercive?

The answer to this question, in the context of the toxic mix of factors we have identified, is yes. The absence of evidence on the scale of the problem is regrettable, but the real concern lies with the preparedness of the system to be complicit with a process that undermines its acclaimed core values. Reinforcing these core values is not difficult, but at a time of fiscal restraint would entail a profound shift in political priorities. Clearly, the operation of any guilty plea discount has the potential for coercion, but reducing the

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<sup>104</sup> R. Burnett, C. Hoyle and N. Speechley, 'The context and impact of being wrongly accused of abuse in occupations of trust' (2017) 2 *The Howard Journal of Criminal Justice* 176.

momentum of the decision-making process and its associated pressures on vulnerable defendants is a first step. In isolation this is insufficient, but alongside the space for more timely legal advice to facilitate informed choices, greater rectitude is likely to be achieved. To alleviate the additional burden on the courts more opportunities for diversion and more flexibility in the diversion process, as suggested by Lammy, could provide one solution.<sup>105</sup> The risk of increasing the number and length of custodial sentences, as a result of an increased number of not guilty pleas, could be addressed by other measures such as the recalibration of guidelines for specific offences. Arguably these solutions would be more transparent and publicly defensible than placing coercive pressure on vulnerable defendants.

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<sup>105</sup> See Lammy n 41 above.