

Is the Glass Half-Empty or Half-Full? An Exploratory Study of Defence Lawyers' Constructions
of Plea Negotiations and Accused Persons' Rights within the Ontario Criminal Justice System

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Abstract

Plea bargaining is a pervasive practice in North American legal systems, as well as internationally. In Canada, the majority of criminal cases are disposed of by plea negotiations. Although plea negotiations are a staple within the Canadian criminal justice system, the practice has been continually critiqued in relation to accused persons' rights. Scholarship existing on the topic typically suggests that plea bargaining negatively impacts accused persons because of the existence of a trial penalty. Using a descriptive exploratory methodology, the present study conducted in-depth interviews with 25 defence lawyers from across Ontario to understand how they construct the trial penalty and the role of remorse and accused persons' rights with respect to plea bargaining. The present study found that from the perspective of lawyers it is not simply that a trial penalty either 'exists' or 'does not exist'. Rather, their voices point to the deep and complex layers that exist within the practices of plea negotiations, trials, and sentencing. There is no simple formula that a lawyer can use to determine how things will turn out at trial. Instead, various factors, such as the nature of the offence, the offender, witnesses, complainant, court time, court resources, and the economic and administrative demands of an overburdened justice system interact together to create a complex dynamic that the lawyer must assess and present to the client. Ultimately, running a trial is presented to the client as a gamble; yet, in many instances taking the gamble was constructed as being worth the risk. However, findings from the present study also demonstrate that while lawyers continuously expressed the importance of trials, the reality of the situation is that accused persons, for a wide variety of reasons, are often incentivized to plead guilty, even when it is not in their best interest. These decisions have tremendous impacts on the lives of those accused of criminal offences or awaiting trial. Further, certain disadvantaged accused may be more greatly impacted by the criminal justice system,

particularly Indigenous and Black populations who are overrepresented within the incarcerated population, as well as accused persons from low socioeconomic status and those who are remanded to custody awaiting trial.

Dedication

To my parents, for always doing the best they could, no matter what obstacles life's journey presented them with.

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Introduction

“Any person charged with an offence has the right to be tried within a reasonable time... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; to not be denied reasonable bail without just cause.”

(Canadian Charter of Rights and Freedoms, 1982; s. 11 (b)(d) and (e) respectively)

Should going to trial and being found guilty result in a harsher sentence than if you had just pled guilty from the outset? This is a thought-provoking question that introduces the concept of the trial penalty. The trial penalty is conceptualized as existing when an accused person receives a harsher sentence after conviction at a trial than they would have had they pled guilty from the outset (Chasse, 2009; Lafontaine & Rondinelli, 2005). Lafontaine and Rondinelli (2005) indicated that the trial penalty has also been referred to as an “entertainment tax” (p. 116). Their definition of a trial penalty centers around the understanding that an offender receives a harsher sentence upon conviction after a trial because they made the system go through the motions (Lafontaine & Rondinelli, 2005). Generally speaking, running a trial places a drain on court resources and can have a negative effect on witnesses, especially in violent cases (Lafontaine & Rondinelli, 2005; Di Luca, 2005). Although some scholarship within Canada has addressed the topic of the trial penalty (for example, see Chasse 2009), there is no evidence to support its existence as a separate entity apart from the reduction in sentence an accused generally receives from a guilty plea.

Case law in both Ontario and Canada, as a whole, has demonstrated that pleading guilty typically affords an accused a lesser sentence because of the mitigating nature of a guilty plea; case law does not support the notion that running a trial is aggravating. However, scholarship that critiques plea bargaining routinely draws on legal rights to try to indicate that plea

bargaining infringes upon an accused's right to trial (Di Luca, 2005). Some scholars, such as Chasse (2009) and McCoy (2005), have even expressed that plea bargaining is a coercive force, and because of this, accused persons plead guilty for fear of a more punitive sentence after a trial. However, to ignore the multifaceted benefits of plea bargaining overlooks not only the benefits that plea bargaining affords the community, the accused, witnesses, victims and the administration of justice (*Martin Committee Report*, 1993; Di Luca, 2005), but also diminishes the fact that although the practice of plea bargaining has changed over time it has remained a relatively stable entity within the North American criminal justice systems for the better half of a century (Sanborn, 1986; Di Luca, 2005).

Literature that has addressed the concept of the trial penalty has done so without consulting the legal professionals who work within the criminal justice system on a daily basis. Although a rich body of literature exists on the topic of remorse as an expressive function (see, for example, Weisman, 2014), the present study aimed to understand the role that defence lawyers believed remorse to play, with respect to pleading guilty and sentencing. In order to investigate the relationship between plea bargaining, the rights of accused persons and sentencing, the present study aimed to gain in-depth insight into defence lawyers' experiences of the criminal justice system and plea negotiations to encapsulate the innate complexity of the law, questions of justice and, more broadly, the communicative role that law plays within society.

Purpose of Research Project

When discussing the theoretical and philosophical dimensions of punishment it is easy to distance oneself from the role that the criminal justice system plays, in not only many individuals' lives, but also the broader community. Drawing on Garland (as cited in Manson, et al., 2000), it is evident that the relationship between society and the criminal justice system is in

a continual state of change. Because each dimension of the relationship shapes the others it is important to conduct research on various aspects of the criminal justice system. Furthermore, the restriction of one's freedom and liberty should never be taken lightly. Thus, from a social justice stand point, there is great relevance in exploring the concept of the trial penalty and remorse within the criminal justice system.

In order to address these aims and to fill the existing gap in Canadian literature, the purpose of this research project had two components. The first was to understand how defence attorneys in Ontario conceptualized the issues surrounding a trial penalty. The second purpose was to explore the ways that defence attorneys perceived the role of remorse within the criminal legal system. In this way, the present study was not interested in examining the actual role that remorse played regarding mitigation during sentencing. Nor did the study aim to examine plea bargaining as a defensible legal practice. Rather, the purpose was to explore how lawyers understood and conceptualized the trial penalty and remorse.

Given that the existence of a trial penalty is contested, the purpose of this project was not to determine whether or not it definitively exists. Rather the purpose was to understand how defence lawyers in Ontario, Canada conceptualized the trial penalty within their everyday interactions with various court actors. In doing so, this study also explored the ways in which defence lawyers understand the role that mitigation plays during sentencing. Lastly, the present study explored whether or not a relationship existed between the two.

Outline of the Present Study

The present study begins with a review of the existing literature on the topic of plea bargaining, the trial penalty and remorse. The literature review also discusses the contextualizing factors surrounding the present study, including philosophical justifications of punishment, bail,

sentencing, the communicative function of the criminal justice system, and overrepresentation within the Canadian criminal justice system. Following the discussion of this relevant scholarship, the present study's methodology is discussed. This includes an overview of the study's theoretical framework, methodology, participant demographics, method of data collection and a discussion of the process of data analysis. Next, the findings of the present study are discussed, in-depth, to ensure that lawyers' constructions of the trial penalty, role of remorse and the process of plea negotiations are fully expressed. Lastly, the present study concludes by discussing this study's findings, identifying future research directions and highlighting the contributions to theory, practice and policy.

Chapter 1: Literature Review

Plea Bargaining

Plea bargaining has become an increasingly pervasive practice within not only the North American court system (Di Luca, 2005; McCoy, 2005) but also internationally (Turner, 2009). This section aims to provide a brief overview of the origins of the practice and the various ways plea bargaining is conceptualized in relation to criminal justice. In doing so, there will be a focus on literature from Canada and the United States. While this section will focus on the North American context, reference will be made to various sentencing and plea bargaining practices in Australia, New Zealand and the United Kingdom. Although the present study is interested in exploring defence lawyers' experiences with various aspects of plea bargaining in the province of Ontario, there is importance in discussing the ways justice is administered external to Canada. Although there will be limited discussion surrounding such practices external to the North American context, there is relevance in discussing Australia, New Zealand and the United Kingdom.

Defining and Describing Plea Bargaining

Plea bargaining is an umbrella term that is used to describe a number of proceedings within the criminal justice system (Di Luca, 2005). Di Luca (2005) discussed the Canadian context, by referencing Verdun-Jones and Hatch who outline fourteen different activities that lawyers engage in that can be recognized as related to negotiating plea agreements. These activities range from securing a reduction or withdrawal of a charge to negotiations resulting in a joint sentencing submission by the Crown and defence (Di Luca, 2005, pp. 18-19). Lafontaine & Rondinelli (2005, p. 113) indicated the importance of recognizing that an accused person is

pleading guilty in order to gain some kind of “tangible benefit”. Often this benefit is in the form of a reduced sentence (Lafontaine & Rondinelli, 2005).

Although plea bargaining encompasses a wide variety of activities, charge bargaining, fact bargaining and sentence bargaining are three of the more commonly engaged in practices. Drawing on Verdun-Jones and Hatch, Di Luca (2005) provided a brief discussion about what each type of bargain entails. Charge bargaining can be recognized as having occurred when the defence and Crown agree to reduce the charges laid against an accused (Di Luca, 2005). This often results in an accused person being charged with a lesser offence (Di Luca, 2005). In situations where an accused is charged with multiple offences, charge bargaining can result in the withdrawal of certain charges (Di Luca, 2005). Di Luca (2005) explained that fact bargaining has occurred when the Crown and defence have agreed to the facts that will be admitted to a sentencing judge. This benefits the accused by ensuring that any facts that may be regarded as aggravating will not be admitted.

Sentence bargaining involves the Crown and defence coming to some kind of mutual sentencing agreement, resulting in a joint submission (Di Luca, 2005). Di Luca (2005) explained that in the event that an exact sentence cannot be agreed upon, a particular sentencing range will be determined and each party will make submissions based on the decided range. Although Canada allows for Crown attorneys to enter into sentence bargains, it is interesting to note that New Zealand takes a very different approach. Unlike Canada, Crown attorneys in New Zealand are prohibited from engaging in a plea bargain on the basis of a particular sentence (Cole, 2018). Cole (2018) indicated that this means that Crown and defence do not enter into joint submissions, which is a procedure routinely done in Canada, and will be discussed at greater lengths below. Although Crowns and defence are prohibited from entering into joint

submissions, the practice can rarely occur, when both counsels are familiar with the judge's sentencing tendencies (Cole, 2018). However, because of the policies surrounding sentence bargaining in New Zealand, the majority of pleas revolve around the statement of facts that will be presented to the court (Cole, 2018). This type of plea discussion would be in accordance with what Di Luca (2005) describes as fact bargaining in the Canadian context.

In 1993 the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (hereafter referred to as the *Martin Committee Report*) was released. The *Martin Committee Report* was important for plea bargaining for numerous reasons. Foremost, the *Report* expressed the evolving nature of resolution discussions over time and highlighted that the term 'plea bargaining' had negative connotations. The public often associated plea bargaining as an unjust practice. However, the *Martin Committee Report* expressed that when done in an appropriate manner the benefits of plea agreements are multifaceted. Further, the *Report* indicated that the term 'resolution discussions' should be adopted in place of plea bargaining because the term 'plea bargaining' does not fully represent or encompass the complex process that Crown attorneys and defence lawyers engage in to resolve a case. In fact, the *Report* expressed that the process of resolving a case is often not that much different than the type of adversarial work a lawyer would do within a court room. It is also important to note that the *Martin Committee Report* encouraged judges to take part in the process, which is something that has occurred since.

One contention surrounding a guilty plea is the fact that accused persons have a right to go to trial. However, the *Martin Committee Report* indicated that having a right means that an individual has the agency to choose whether or not they want to engage that right. When an accused person is properly informed of the consequences of pleading guilty they should have the

ability to waive their right to trial. In order to ensure that an accused is properly informed, the *Report* indicated the importance of ensuring that full disclosure is provided in a timely manner.

Along with explaining the importance of expedited disclosure, the *Martin Committee Report* made several other recommendations regarding resolution discussions. Some of the recommendations will be discussed in this section. Paramount to maintaining the public's confidence and trust of the justice system is ensuring that 'miscarriages of justice' do not occur. In this way, the *Report* indicated that under no circumstance should a plea be accepted when an accused person is known to be innocent. Furthermore, although plea bargains unburden the justice system, a plea should not be based on the principle of expediency only.

While the *Martin Committee Report* indicated that a plea should not be entered solely for the purposes of expediency, this position is in contrast with that of England and Wales. Unlike Canada, England and Wales have predetermined sentencing guidelines for the sentencing reduction that will be attributed to a plea of guilt (Cole & Roberts, 2018). The basis for such reductions are dependent upon the time and resources that the accused's guilty plea saved (Cole & Roberts, 2018). Further, consideration is also given to the fact that the accused did not force witnesses and victims to testify (Cole & Roberts, 2018).

What is particularly interesting about England's utilitarian basis for determining the appropriate reduction to be given at sentencing for a plea of guilty is that it is not centered around the notion of remorse (Cole & Roberts, 2018). In Canada, in contrast, some case law exists that recognizes a guilty plea to be a sign of remorse, especially when that plea is entered at an early stage (please note this will be discussed at greater lengths below). However, it is both interesting and important to note that case law exists in Canada which supports the notion that an offender's sentence should be reduced on the basis of the time and resources a guilty plea saved

the court. Cole and Roberts (2018) identified and discussed numerous Canadian cases where the courts addressed the fact that sometimes an accused enters a guilty plea because it is inevitable that they will be convicted (see for example, *R. v. Faulds et al.* and *R. v. Sarao* as cited in Cole & Roberts, 2018). In these cases, the courts upheld that even when an accused was facing an inevitable conviction, they should receive mitigation in sentencing for the time and resources they saved the court, regardless of their remorsefulness.

While the *Martin Committee Report* expressed that a plea should not be based solely on expediency it did indicate that a plea of guilty, especially an early plea, should be treated as a mitigating factor. The *Report* linked an early plea to an expression of remorse and therefore the reduced need for an accused person's sentence to reflect rehabilitative objectives. While pleas of guilty are seen to be mitigating the *Report* indicated that a plea of not guilty should not serve to aggravate a sentence because an individual should not be punished for enacting their rights.

The *Report* also expressed that a judge should not “jump” a joint submission. Jumping a joint submission is recognized as occurring when a judge does not abide by the sentencing submission that was jointly agreed upon by both the Crown and defence (Di Luca, 2005). The exception would be rare circumstances where the agreed-upon sentence would call the nature of justice into question and result in negative public perceptions of the justice system. A 2017 Supreme Court decision in *R. v. Anthony-Cook* made it even tougher for a judge to “jump” a joint submission. Section 606(1.1)(b)(iii) of the *Code* stipulates that “the court is not bound by any agreement made between the accused and the prosecutor.” While s. 606(1.1)(b)(iii) gives the judge the power to jump a joint submission, the judge is unable to do so unless very specific circumstances exist, for example, where the administration of justice would be called into question.

In the case of *R. v. Anthony-Cook*, the Supreme Court found that the trial judge erred in judgment when he jumped the joint submission by applying a fitness test, as opposed to a public interest test. The public interest test indicated that no reason existed for the judge to have jumped the submission and ruled in favour of the accused, meaning that the accused would serve the original sentence. Thus, this case further reduces a judge's ability to jump a joint submission.

In short, plea bargaining is a complex process that encompasses numerous activities that lawyers engage in on a daily basis. Although the present study utilizes the terminology of plea bargaining, it is important to recognize that the phrasing is not meant to elicit the negative connotations that, at times, are associated with the word 'bargain'. The *Martin Committee Report* clearly demonstrated the various benefits of resolution discussions in an overburdened justice system. Further, the *Report* elucidated that the benefits are far-reaching and go beyond the saving of court resources. A plea of guilty benefits a community by ensuring that a behaviour is condemned in a timely manner and can also spare a community the pain of a trial. Further, witnesses are also spared the potential pain of coming to court and testifying. Thus, when done in an appropriate manner a plea resolution benefits the accused, the community and the justice system and should not be viewed as 'bartered justice' (*Martin Committee Report*, 1993).

A Brief History of Plea Bargaining

The above discussion centred around describing plea bargaining and discussing the importance of the *Martin Committee Report*. This discussion focused primarily on the Canadian context, but also discussed plea bargaining in New Zealand, England and Wales. However, the remainder of this literature review will discuss literature that addresses both the American and Canadian context. The first reason for drawing on both Canadian and American literature is that an overwhelming body of literature on plea bargaining that addresses Canada, and more

specifically Ontario, does not exist. In order to ensure a well-rounded discussion, it is necessary to draw upon literature from both Canadian and American sources. Secondly, there are both similarities and differences in the way that Canada and the United States handle plea negotiations. It is important to discuss the similarities but also to highlight the differences, because these differences could have implications for the future directions of plea bargaining within Canada. These similarities and differences will be addressed throughout the remainder of the literature that discusses plea resolutions, beginning with a brief historical discussion of plea bargaining.

Conducting an historical overview of the existence and practices of plea bargaining, Sanborn (1986) indicated that plea bargaining can be traced back to the Medieval Era. Specifically, he indicated that there is some evidence to suggest that Medieval England had some versions of plea bargaining (Sanborn, 1986). Drawing on literature from the legal historian Langbein, Sanborn (1986) indicated that in a “hunting provision from 1485...a defendant who acknowledged his offense to the justice of the peace was fined and sentenced on a misdemeanor level” (p. 125). Conversely, those who did not express acknowledgement of their wrongdoing went to trial (Sanborn, 1986). This particular example represents some essence of a modern-day plea bargain. Furthermore, Sanborn (1986) draws on another legal historian, Cockburn, who discovered records from the 1500s suggesting that there were instances in which charges were reduced. Once again, this bears some resemblance to modern day plea bargaining.

The extent to which plea bargaining became a frequent practice within the United States criminal court system was evident within the 19th and 20th centuries (McCoy, 2005; Sanborn, 1986). Sanborn (1986) indicated that although the practice existed prior to the mid-1800s, it was not until after the American Civil War that plea bargaining began to make a marked appearance.

By the 1880s plea bargaining became a staple within the criminal system (Sanborn, 1986).

McCoy (2005) indicated that by the 1920s, plea bargaining became a frequent method of dealing with felony cases. Skipping ahead to the 1970s, “about 90% of all felony cases were concluded through guilty pleas” (McCoy, 2005, p.8).

Within the context of Canada, Di Luca (2005) indicated that plea bargaining cannot be viewed as a recent practice. Although Di Luca (2005) does not provide as detailed an historical account of the practice as McCoy (2005) does in the context of the United States, he does reference cases and literature that demonstrated the practice was entrenched within the system in the latter half of the 20th century.

Recognizing the existence of plea bargaining historically is important to the debate that surrounds plea bargaining in the North American context. Generally speaking, in both Canada and the United States, plea bargaining is viewed in one of two ways. Speaking to the Canadian context, Di Luca (2005) indicated that there are people who support plea bargaining and think that there should be no change to the practice. Conversely, the opponents to the practice highlight that the operation of plea negotiations needs to be overhauled in varying degrees (Di Luca, 2005). Di Luca (2005) explained that those in opposition to plea bargaining can be categorized in two ways: they can either be abolitionists, believing that plea bargaining should be completely eradicated or they can be revisionists who seek to rework the way plea bargaining operates. An example of a revisionist within the American context would be Candace McCoy. In McCoy’s (2005) article *Plea Bargaining as Coercion*, she called for extensive reforms to the operation of plea bargaining within the American criminal justice system.

Although this debate exists, Di Luca (2005), focusing on the Canadian perspective, recognized that those in opposition to plea bargaining draw on theoretical evidence to suggest

that guilty pleas somehow undermine the workings of justice and due process. Essentially, they purport that plea bargains can lead to the conviction and subsequent punishment of the innocent (Di Luca, 2005). This argument is also relevant in the American context, because McCoy (2005) argued that plea bargaining is coercive and forces people to want to plead guilty to avoid receiving a harsher sentence after trial. However, Sanborn (1986) briefly addressed this debate, within the American context. Although he discussed both sides, he indicated that those opposing plea bargaining often link it to the idea of ‘corruption’ within the criminal justice system (Sanborn, 1986). Sanborn (1986) went on to say that this conception of plea bargaining views the practice as a modern entity, when in fact, he concluded his paper by saying that, “...plea bargaining has enjoyed considerable historical longevity” (p.135). Thus, those who argue against plea bargaining, but do not acknowledge its existence historically are not addressing the full picture (Sanborn, 1986). In stating this, Sanborn (1986) is not indicating that the longevity of plea bargaining necessarily refutes the claim that it is a corruption within the justice system. However, he voices the importance of recognizing that plea bargaining has a long-standing history and is a legal practice that has shifted and changed over time.

Understanding Plea Bargaining

When discussing plea bargaining in the Canadian context, Di Luca (2005) indicated that the term ‘bargain’ in plea bargaining has led to criticism of the practice. Generally speaking, ‘bargaining’ suggests a version of justice that shows favouritism to people who engage in criminal behaviour. However, in 1989 the *Law Reform Commission of Canada*, which Di Luca (2005) draws upon in his work, indicated that the term bargaining should be replaced with more neutral and appropriate terms. Specifically, the *Law Reform Commission of Canada* (1989, p. 40) recommended the use of the terms “plea agreement” and “plea discussions”. Although the

present study has used the term ‘plea bargaining’ throughout, I recognize that plea bargaining is interchangeable with the terms plea negotiations and plea agreements.

While plea bargaining is a pervasive practice, an accused person should not engage in a plea deal without careful consideration. In discussing the American context, McCoy (2005) recognized plea bargaining as the practice of accused persons negating their right to a trial by pleading guilty to an offence, for some kind of benefit to themselves. Since the accused, in both the Canadian and American context, is giving up a fundamental legal right to a trial, it is paramount that their defence lawyer and the courts take responsibility to ensure that the accused understands the consequences of such a decision. Accused persons who find themselves caught up within the criminal justice system may feel powerless (Ericson & Baranek, 1982). An important study conducted in Ontario by Ericson and Baranek in 1982 demonstrated that accused persons find themselves powerless within the criminal justice system because they do not have the specialized legal knowledge that criminal court actors do.

There are a variety of negative repercussions caused by an accused person feeling powerless within the criminal justice system. One concern is that an accused person may make a decision while feeling like they have no alternative. It is important that accused persons make decisions in conjunction with a lawyer who has the knowledge and experience to help an accused. However, because of the power differential between lawyers and accused persons, accused persons rely on their lawyer’s ‘expert’ knowledge to help make important decisions about their case (Ericson & Baranek, 1982). Alati (2015) addressed the issue of power imbalances within the criminal justice system as problematic for vulnerable accused persons who struggle to navigate the system and turn to their lawyer for help. This can be problematic in situations where a lawyer does not provide the accused with the best information regarding their

situation, or in scenarios where a lawyer encourages an accused to plead, but does not provide the appropriate information regarding the repercussions of engaging in a plea deal. It can also be problematic in situations where the accused's lawyer does not have their client's best interest in mind (Alati, 2015). These scenarios leave accused persons in a vulnerable and disadvantaged position. It is important that society has confidence in the criminal justice system. When society is presented with cases where accused persons have been vastly disadvantaged within the system, society's perception of the system is skewed and there is a loss of confidence.

One of the most notable situations where justice is called into question are cases where accused persons have falsely plead guilty even though they were innocent. This is why, ethically the client is the one who must enter into the plea of guilt. The Law Society Rules of Professional Conduct (2015) indicate that a lawyer may assist on a guilty plea when they have properly informed their client of their prospects if they were to take the case to trial (including the potential for an acquittal), the potential consequences of pleading guilty, and sentencing outcomes. The lawyer also must ensure that the client is voluntarily admitting the facts of the case (Law Society Rules of Professional Conduct, 2015). Although a lawyer may strongly advise the client to take the case to trial, it is ultimately the client's decision which route they will take, because they are the only person who truly knows the facts of the case.

It is important to recognize that every individual is unique and that power exists on a continuum. Although the majority of accused persons may not contain the specified legal knowledge that defence lawyers have, that does not mean they are a passive entity within the system. Pleading guilty can look increasingly appealing to individuals who want to get back to their 'everyday lives'. Further, some accused persons are chronic recidivists. It is arguable that these accused persons may be more knowledgeable about the justice system because they have

gone through it many times. Therefore, there is significance in acknowledging the complexity involved in an accused person's decision to plead guilty and the varying levels of knowledge, power and autonomy that accused persons have.

Individuals who do not have full citizenship in the country where they have been charged with an offence may experience one of the more severe consequences of pleading guilty. Cruz (2010) discussed the immigration implications of guilty pleas for Americans who do not have citizenship status. When a noncitizen pleads guilty to an offence there is a very serious risk of deportation and they may also face other consequences including experiencing an inability to apply for a visa (Cruz, 2010). Canadian noncitizens can also experience similar consequences. In 2017, the Canadian Bar Association released a report addressing the consequences of having a criminal record. The report, entitled, *Collateral Consequences of Criminal Convictions: Consideration for Lawyers*, discussed the various repercussions of a criminal record. One of the more detrimental consequences of a criminal record impacts individuals who do not have full citizenship. For example, the Canadian Bar Association (2017) indicated that an order for deportation could be issued against a permanent resident, by the Immigration and Refugee Board (IRB), in instances where an individual has engaged in organized crime or a serious offence. Thus, in these circumstances engaging in a guilty plea could have serious immigration consequences. Because of the severe immigration consequences of a criminal record, Legal Aid Ontario, and the Canadian Bar Association emphasized the importance of lawyers informing their clients of the immigration consequences of pleading guilty to an offence.

Within their report, the Canadian Bar Association (2017) also discussed a variety of other consequences beyond immigration. One such consequence of a criminal record is that an accused, upon conviction, may be required to submit DNA to a databank. Furthermore, the

Canadian Bar Association's report (2017) discussed the detrimental impact that a criminal record may have on child access and custody, especially in domestic situations. An individual's ability to travel outside of Canada can also be impaired by a criminal record. The John Howard Society (2017) reiterated much of the information listed within the Bar Association's report, indicating that a criminal record may prevent an individual from entering the United States. This consequence is particularly relevant for regions of Ontario that border the United States. In these localities, it would presumably not be uncommon for people to travel to the United States for various reasons, such as entertainment and shopping, but a criminal record would hinder an individual's ability to travel across borders. Therefore, before an accused engages in a guilty plea it is imperative that they understand the consequences of a criminal record.

An example of a recent Ontario case that emphasizes the importance of informed guilty pleas is *R. v. Quick* (2016). Quick appealed his sentence of dangerous driving on the grounds that he was not properly informed of the consequences of pleading guilty. Quick had previously been convicted of drinking and driving on two separate occasions resulting in a permanent license suspension under the *Highway Traffic Act* for his dangerous driving charge. Quick was not informed by his lawyer that he would have a permanent license suspension, which would severely impact his job as a truck driver. The judge ruled that Quick had not been properly informed, accepted his appeal, and granted a new trial for the dangerous driving charge. Although pleading guilty may have short-term benefits for an accused (i.e. avoidance of incarceration), the accused must decide whether short-term benefits outweigh long-term consequences and this must be done in an informed manner.

Although there is great importance placed on ensuring that an accused is engaging in an informed guilty plea, it is arguably difficult to know whether or not an offender is truly aware of

the repercussions of a criminal record, and thus a guilty plea. As aforementioned, some of the most detrimental consequences of a guilty plea relate to immigration. A 2018 Supreme Court ruling in *R. v. Wong* demonstrated the difficulty surrounding the informed nature of a guilty plea and its relationship to immigration. Wong was a Chinese citizen but held permanent resident status in Canada. After being charged with selling cocaine to an undercover police officer, Wong pled guilty and was sentenced to 9 months' imprisonment. However, by pleading guilty and being charged with a crime that carried a sentence of more than six months imprisonment, Wong was designated as having committed an offence of serious criminality under the *Immigration and Refugee Protection Act*. This meant that Wong was denied entry into Canada and also meant that he had no right to appeal. However, Wong argued for a withdrawal of his plea under the circumstances that he was not properly informed of the immigration consequences associated with pleading guilty.

In their ruling, the Supreme Court indicated that when evaluating whether or not an accused was properly informed of the consequences of a guilty plea, the court must evaluate whether or not an informed and reasonable individual in the same situation would have acted in the same manner as the accused. In the case of *R. v. Wong*, the Supreme Court ruled that a reasonable person, in Wong's position, who was informed of all relevant consequences associated with a guilty plea, would reasonably not have pled guilty. Thus, Wong's plea was withdrawn on the basis of the fact that he was uninformed of the serious immigration ramifications of such a plea. This ruling demonstrated both the importance of an informed plea, and the many issues that can arise, especially in the context of immigration, when an accused is not informed of all relevant consequences of pleading guilty.

To ensure that an accused person does not plead guilty while simultaneously maintaining their innocence, s. 606 of the *Criminal Code* outlines the circumstances in which the court has the ability to accept a guilty plea. A guilty plea can only be accepted if an accused willingly and knowledgeably pleads guilty to an offence within the *Code*. Section 606 (1.1)(b)(ii) indicates that the court can accept an accused persons' plea of guilty only when it has been satisfied that the accused understands the nature and consequences of the plea. Within this respect an accused person's lawyer has the responsibility of explaining the consequences of a guilty plea to their client. However, the true depth of an accused's awareness of the consequences surrounding a guilty plea may be difficult to fully assess, especially in cases where an accused was informed of the consequences through complex jargon that an average person would not fully understand. Although pleas can be reduced to writing, the language within these documents may not always be plain enough for an accused to fully comprehend.

Lawyers must also verify that their client is not maintaining innocence. If the client wants to plead but insists they are innocent, their lawyer cannot ethically represent them while they enter a guilty plea. However, their lawyer can ethically advise them to seek different legal representation. While s. 606 of the *Code* exists, there are cases where innocent people have plead guilty and been wrongfully convicted (i.e. *R. v. Hanemaayer*). Hence, plea bargaining is a pervasive practice but should not be exercised without caution.

Role of the *Canadian Charter of Rights and Freedoms*

In Canada, the creation of the *Charter* in 1982 impacted how accused persons can be treated within the criminal justice system. Sections 7 through 14 of the *Charter* identify the specific legal rights all Canadian citizens have. It is also important to acknowledge that the language used in the *Charter* also affords these rights to individuals who are residing in Canada,

even if they are not there permanently. These rights have implications for pleas of guilty. For example, s. 11(d) of the *Charter* indicates that everyone has the right to a fair trial. If a trial penalty exists in Canada, then this calls into question the justness of guilty pleas because an accused individual should not receive a harsher sentence for engaging their right to go to trial.

Conversely, the *Charter* acts as a justification for the use of guilty pleas because s. 11(b) indicates that all citizens must be tried within a reasonable time frame. The necessity for expediency outlined in s. 11(b) can result in numerous cases being thrown out if the court decides that there has been an unreasonable delay. A benchmark case that demonstrated the importance of s. 11(b) is *R. v. Askov* (1990). In this case, the appellant argued that he had been subjected to prejudice because of the unreasonable delay experienced in his case. Pursuant to s. 11(b) the appellant indicated that the lack of expediency in their case violated their *Charter* rights. After being dismissed in appellant court at the provincial level, the case was taken to the Supreme Court. The Supreme Court ruling sided with the appellant indicating that there had been an unreasonable delay and was in violation of their rights under s. 11(b) of the *Charter*. This ruling dramatically altered the necessity for cases to be resolved within a reasonable time.

Notably, a recent case, *R. v. Jordan* (2016), has once again demonstrated the importance for cases to be dealt with in a timely fashion. A 2016 Supreme Court ruling in *R. v. Jordan* saw the Court once again side with the appellant on the basis of s. 11(b) resulting in even more pressure for cases to be dealt with expediently. In this instance, the presiding judges provided guidelines to the court as to what is considered to be an unreasonable delay. Due to both *R. v. Askov* and *R. v. Jordan* the criminal justice system has to process cases expediently or there will be consequences. These consequences can include the dismissal of serious charges, such as those for indictable offences. In order to avoid future s. 11(b) challenges there is a heavy reliance on

the utilization of plea bargaining. Ultimately, courts do not have the resources to have the majority of criminal cases go to trial. This is the basic rhetorical justification as to why plea bargaining is a pervasive and necessary practice within the criminal system. It is also the most heavily relied-upon argument utilized by proponents of plea bargaining (Alati, 2015).

The efficiency argument, however, has its flaws. Di Luca (2005) explained that the necessity argument suggests that if plea bargaining was abolished there should be a significant increase in cases taken to trial, yet this argument does not have empirical evidence to support it. Referencing American literature, Di Luca (2005) discussed that in 1970 and 1980 Alaska banned plea bargaining so that prosecutors could not participate in charge bargaining or sentence bargaining. Similarly, New Orleans implemented a system to ensure that prosecutors were not using plea bargaining to resolve cases (Di Luca, 2005). In both scenarios, the cases going to trial did not skyrocket (Di Luca, 2005). Referencing Wright and Miller, Di Luca (2005) indicated that in the Alaskan context cases were disposed of through trials, through open guilty pleas and the refusal to prosecute certain cases, such as cases which were recognized as not having sufficient evidence to prosecute. Thus, there was not a significant increase in trials, except for in the early stages of the ban (Di Luca, 2005).

This section has focused mainly on the Canadian context, regarding the rights of accused persons and how plea bargaining in some circumstances could be viewed as offending those rights. However, there is relevance in briefly discussing the American context. The United States' Constitution affords American citizens legal rights in a similar manner as the *Charter*;

specifically, the Sixth¹ and Fourteenth² Amendments are relevant in relation to discussions of plea bargaining. However, unlike the Canadian context the U.S. Supreme Court has examined the tension between plea bargaining and the right to a trial. The American Bar Association's (ABA) Standards for Criminal Justice Pleas of Guilty (1999) indicated that the Supreme Court has held that plea bargaining does not offend the Constitution. Essentially, there is recognition that plea bargaining can place pressure on an accused because pleading guilty will provide a sentence reduction where engaging the right to trial will not (ABA Standards for Criminal Justice Pleas of Guilty, 1999). However, ABA Standards for Criminal Justice Pleas of Guilty (1999) demonstrated that the Courts do not equate this pressure to coercion and that it is not unconstitutional, thus indicating that allowing a prosecutor to negotiate with an accused is constitutional. Specifically, the 1978 Supreme Court ruling in *Bordenkircher v. Hayes* indicated that it is not unconstitutional for the prosecutor to try and get an accused to waive their rights to trial and is in fact in the interest of the prosecutor and the justice system as a whole, during the bargaining process.

The ways in which the United States has dealt with plea bargaining as a Constitutional issue has implications for the ways that plea bargaining as a *Charter* issue can be conceptualized. The United States has addressed plea bargaining at the Supreme Court level (i.e. *Bordenkircher v. Hayes*) to hold that the accused makes a choice to plead guilty. In the case of Canada, the argument can be made that although the accused receives a harsher sentence after trial than if he

¹ The Sixth Amendment in the American Constitution affords American's the right to a public trial in an expeditious manner. This specific Amendment also identifies an accused person's right to be informed of their charge and receive disclosure (Constitution of the United States of America as Amended, 2007).

² The Fourteenth Amendment is important in the context of the present study because it is the Amendment that affords American's due process rights, as well as, equal protection under the law (Constitution of the United States of America as Amended, 2007).

had pled guilty, he has still made the choice to go to trial. Further, it cannot be definitively said that the accused is penalized because of the trial; the argument could be made that he has just lost the sentence reduction often associated with a guilty plea.

Overrepresentation within the Canadian Criminal Justice System

While it is clear that the practice of plea bargaining has both negative and positive consequences for the workings of the Canadian justice system, the magnitude at which plea negotiations impact the lives of Canadian citizens cannot be understood without investigating the individuals who may engage in plea negotiations. In order to do this, it is important to discuss issues of overrepresentation.

In 1995 Ontario released a report that discussed a wide variety of factors related to race and the Ontario criminal justice system. Entitled *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (hereafter referred to as the *Commission*) the report focused on the way in which racism is present at the systemic level of the justice system. The *Commission* (1995) indicated that racialization of certain social groups occurs when individuals within these social groups are identified, categorized and valued based on factors relating to their appearance. Some racialized groups are attributed negative social perceptions compared to others (*Commission*, 1995). These negative perceptions may then enter into the various systems in society, such as the legal system, leading to differential treatment of some individuals over others (*Commission*, 1995).

Although Canada does not systematically collect, or make public, race-based justice statistics in the same way as the United States and England, there is some scholarship that discusses the issue of overrepresentation (Owusu-Bempah, 2014). Owusu-Bempah (2014) provided a review of some of the scholarship that exists on the issue of overrepresentation, while

simultaneously noting results they have collected through their own research. Because Canadian police departments do not systematically collect race related data, incarceration data must be looked at (Reasons, et al., 2016). Owusu-Bempah (2014) requested the race-based information from the Ministries of Corrections in each province. Although they did not receive the information from every province, Ontario provided a "...detailed racial breakdown of their 2010-11 correctional population" (Owusu-Bempah, 2014, p. 7). Data analysis yielded that "...[B]lacks are only 3.9 percent of Ontario's population, but constituted 17.7 percent of admissions to Ontario's correctional facilities in 2010-11" (Owusu-Bempah, 2014, p. 8). The Department of Justice Canada (2017) released statistics on both adult and youth Indigenous overrepresentation in the federal and provincial correction facilities, respectively. Provincially, Indigenous youth represented 37 percent of the incarcerated population in 2014-2015, but only made up 7 percent of the population on a whole (Department of Justice, 2017). While the Department of Justice Canada (2017) did not break the statistics down by province (rather they gave the average of all provincial admissions), Ontario was listed as a province in which the overrepresentation of Indigenous youth was especially prevalent.

The Department of Justice Canada (2017) also indicated that in 2014-2015 Indigenous adults accounted for 26 percent of the provincial prison populations. Further broken down by gender, the Department of Justice Canada (2017) indicated that Indigenous females were vastly overrepresented provincially, making up 38 percent of the adult female incarcerated population. Female Indigenous youth constituted 49 percent of the female provincially incarcerated population (Department of Justice Canada, 2017). Furthermore, adult and youth Indigenous males constituted a large proportion of the provincial admissions making up 24 percent and 34 percent respectively (Department of Justice Canada, 2017). While it is important to note that

these statistics are not solely representative of Ontario, they do demonstrate that on the whole, in Canada, Indigenous persons are overrepresented in provincial correctional facilities.

Although the incarceration rates of minority populations vary across provinces, Indigenous peoples and Blacks are highly overrepresented federally. Linden (2012, p. 147), referenced statistics from 2008-2009, which indicated that Indigenous people made up three percent of the population, but accounted for “18 percent of admissions to federal prisons”. However, data released by the Department of Justice (2017) demonstrated that this number had since gone up; in 2014-2015 Indigenous persons made up 25 percent of the federal prison population. This means that the population of Indigenous persons in prison was 9 times greater than their representation in Canada’s population as a whole (Department of Justice Canada, 2017). Reasons et al. (2016) indicated that Blacks represent six percent of the federally incarcerated population, while they only make up two percent of Canada’s population. These statistics demonstrate that racial minorities are far overrepresented within federal penitentiaries (it is important to note, however, that these statistics are not broken down by choice of crime).

At the provincial level, certain cities can be seen as having an overrepresentation of Blacks and Indigenous persons interacting with the criminal legal system. Reasons et al. (2016) indicated that the research existing on Black Canadians is limited, but suggests an overrepresentation of Blacks in regards to homicide offences in Toronto, Ontario. The *Commission* (1995) investigated the relationship between communities and policing. In regard to Toronto, the *Commission* (1995) issued a survey, which found that residents who identified as White, Chinese and Black all believed that police engaged in differential treatment towards Black people. Specifically, residents believe that Black people experienced worse treatment by law enforcement than White people (*Commission*, 1995). Linden (2012) provided an overview of

data concerning Black youth interactions with police in Toronto, demonstrating that Black high school students reported being stopped by police at a greater rate than White students. This suggests that certain populations and communities within Toronto may be less trusting of law enforcement, which could also result in negative perceptions of the criminal justice system as a whole.

Furthermore, Indigenous persons are also overrepresented as victims of crime. The Department of Justice Canada (2017) indicated that Indigenous persons were victims of homicide at a rate of around 7 times greater than their non-Indigenous counterparts. The rate of overrepresentation of Indigenous peoples as victims was especially concerning regarding females. The Department of Justice Canada (2017) expressed that Indigenous females were almost three times as likely to experience violent victimization than non-Indigenous females. Drawing on data from various studies conducted on race-based victimization in the 1990s and early 2000s, Owusu-Bempah (2014) indicated that within Toronto, Ontario, Blacks are overrepresented as victims of crime. Specifically, “young [B]lack males are particularly vulnerable to violent death” (Owusu-Bempah, 2014, p. 8). Thus, while both Indigenous and Black populations are overrepresented as offenders of crime, they are also overrepresented as victims of crime. Often the victimization experienced is violent in nature.

It is clear that Canada’s federal and provincial prison populations have a vast overrepresentation of Black and Indigenous peoples. Structural racism within the criminal justice and education systems can be cited as two contributing factors to this overrepresentation. Because of this, it is arguable that certain individuals may have a higher likelihood to engage in plea bargains, especially when they have not been released on bail. However, it is both important

and interesting to note that the *Commission* (1995) found that Black accused actually plead guilty less frequently than their White counterparts.

Bail and Pretrial Detention

The *Charter* stipulates in s. 11(e) that all accused persons are not to “be denied reasonable bail without just cause”. Accused persons are also afforded under s. 11(d) the presumption of innocence until proven guilty. Because of this, an individual should not be denied bail unless the prosecutor has sufficient grounds under s. 515(10)(a), (b) and (c) of the *Code* (Myers, 2017). Myers (2017) indicated that the prosecutor may also have grounds to argue that the judge presiding over the case should impose conditions upon the accused’s release. For example, a judge may choose to place restrictions upon the mobility of the accused under s. 515(4) of the *Code* (Myers, 2017).

Although pretrial detention is supposed to be reserved for the most serious of cases, evidence suggests that bail is being denied at an increasing rate within Canada and the United States. Internationally, both the US and Canada are above the median of 40 persons in pretrial detention per 100 000 (Myers, 2017). Further, Myers (2017) indicated that 35 percent of Canada’s prison population consists of accused persons being remanded to custody, pre-trial. Shockingly, Ontario has the highest number of accused persons being held in pretrial detention. Compared to the national average of 35 percent, “accused in remand comprise[s] 60.7 percent of the provincial imprisonment population” (Myers, 2017, p. 666). Based on this evidence, Myers (2017) argued that the continual increase of pretrial detention represented a diminishment in the assumption of innocent until proven guilty. A Canadian juristat report from Statistics Canada indicated that between 2004/2005 and 2014/2015 there was a significant increase in the number of adults in pretrial custody (Canada Centre for Justice Statistics, 2017). More specifically, on

any average day there were more adults in remand custody than there were serving sentences (Canada Centre for Justice Statistics, 2017).

Similarly, the John Howard Society of Ontario released a report in 2013, which discussed and provided recommendations for Ontario's bail system. Their study focused on the ways in which the presumption of innocence in Ontario is deteriorating through the heavy utilization of both pretrial detention and onerous bail conditions. Essentially, the system is setting accused persons up for failure in situations where very onerous and strict bail conditions are placed on an individual. For example, the John Howard Society of Ontario (2013) discussed that a condition of release may be that an accused person must abstain from consuming alcohol or drugs. This condition may be very difficult for an alcoholic or addict to adhere to. If the accused fails to adhere to all conditions they risk being charged with failing to comply and therefore have to deal with additional criminal charges beyond their initial offence (John Howard Society of Ontario, 2013). Their report also highlighted that offences which require the accused the onus of demonstrating why they should be released increase the number of individuals being detained pretrial. In short, the John Howard Society (2013) demonstrated that there are numerous reasons for the increased use of pretrial detention.

However, in 2016 the Supreme Court of Canada indicated in *R. v. Antic* the importance of imposing the least onerous bail condition possible on an accused person. The Supreme Court also emphasized the importance of the ladder principle. S. 515(1) to (3) of the *Code* lay out the sequence of options that an accused could receive for bail. S. 515(1) stipulates that when the Crown seeks a more onerous form of bail they have to justify why they are seeking the condition. In *R. v. Antic*, the Supreme Court ruled that the bail review judge had erred on the basis of granting the accused bail with both a surety and a cash deposit, which is one of the most onerous

conditions. Thus, the judge negated the ladder principle in this decision. Furthermore, the judge's insistence on the cash deposit was an error in judgement because it is not the judge's choice to enforce an onerous bail condition because they believe that the accused will not find a condition to be enforceable. While it is evident that both Ontario and Canada have had high rates of individuals being detained in custody pending trial, the decision in *R. v. Antic* has aided in changing the direction of pretrial detention. The Supreme Court's ruling in *R. v. Antic* suggests that contrary to what some have argued, there is still importance in the presumption of innocence and the right to not be denied bail without just cause.

Given the overrepresentation of Black and Indigenous persons incarcerated, it is clear that these populations are directly impacted by the increased use of pretrial detention. Reasons et al. (2016) discussed how racialized and minority accused persons are denied bail more often than White accused. Statistics Canada's Juristat report reiterates this point when they indicated that "[o]ne in four adults (25%) admitted to remand in 2014/2015 were Aboriginal persons..." (Canada Centre for Justice Statistics, 2017, p. 3). It is notable that Aboriginal persons only represented 3% of the population on a whole, but accounted for 25% of the population remanded to custody (Canada Centre for Justice Statistics, 2017). The *Commission* (1995) report also indicated that Black people are subjected to pretrial detention more than White people.

Racialized accused persons also have a lesser ability to retain legal counsel, which can significantly impact their court experience at the pretrial stage (Reasons, et al., 2016). Drawing on survey data from across North America and Britain, Wortley (2003) indicated that individuals who identify as a racial minority generally have negative perceptions of the criminal justice system. Further, research conducted by Wortley and Owusu-Bempah (2009) indicated that regarding the justice system, "[n]egative attitudes and perceptions of discrimination, in fact, are

most prevalent among racial minorities who were born and raised in Canada” (p. 467).

Interestingly, Wortley and Owusu-Bempah (2009) explained that minority individuals who recently immigrated to Canada generally do not have a negative perception of the justice system; however, the longer they reside in Canada the more their perception shifts.

It is also important to note that Wortley and Owusu-Bempah (2009) found that Black people were more likely to believe that courts treated low socioeconomic status (SES) people worse than people who were more affluent. While both White and Chinese people also believed that poor people were treated worse, it is notable that Black people indicated that they believed this to be true to a much greater extent (for example, 62 percent of White respondents indicated that poor people were treated worse whereas 74 percent of Black respondents indicated differential treatment) (Wortley & Owusu-Bempah, 2009).

Scholarship by both Wortley (2003) and Reasons, et al. (2016) suggests that the relationship between race and financial status may be the connecting factor as to why racial minorities experience disparity in their access to justice. Wortley (2003) explains access to justice as a broad term used to describe various processes in which an accused may engage, in order to aid their experience through the justice process. Legal aid is an example of one such mechanism that an accused may need to utilize (Wortley, 2003). The ability to access justice is directly related to the ability of an accused to engage their legal rights (Wortley, 2003). Thus, while racial minorities may experience an inability to retain legal counsel or access justice it is not necessarily solely dependent on their racial identity. Arguably, as both Wortley (2003) and Reasons, et al. (2016) expressed, the inability to retain legal counsel is also a consequence of an individual’s financial position. Therefore, it is likely that a Caucasian individual who is of low SES would also experience issues in trying to access justice. However, the intersection of race

and economic status further complicates the process, especially in circumstances where language barriers exist.

Remand and Guilty Pleas

Being held in custody for a lengthy period of time while awaiting a trial with an uncertain outcome arguably makes pleading guilty an appealing option. A recent doctoral thesis by Pelvin (2017) addressed the relationship between bail and pleading guilty. Pelvin (2017) conducted interviews with 120 accused persons who were in pretrial detention. Results from her study demonstrated that some accused persons indicated that they planned to plead guilty if they were unable to get released on bail (Pelvin, 2017). A study conducted by Kellough and Wortley (2002) also found that accused persons detained in custody awaiting trial were very likely to plead guilty.

Pretrial detention is onerous and accused persons feel incentivized to plead guilty as a way to get out of jail, especially if the accused thinks that they will not be sentenced to further incarceration (Kellough & Wortley, 2002). Kellough and Wortley (2002) also indicated that participants in their study expressed that being held in custody pending trial increased the feeling that they will be found guilty at trial. In this way, proceeding to trial with their case was characterized as "...a waste of time" (Kellough & Wortley, 2002, p. 199). In sum, Kellough and Wortley (2002) found that the longer an accused person was held in custody awaiting trial, the greater the likelihood of that accused person entering a guilty plea.

Credit for Pretrial Detention

The *Criminal Code* recognizes that the time an accused individual spends in custody before being found guilty after a trial should have weight at sentencing. The weight attributed to pre-trial detention at sentencing is in the form of a credit. Prior to 2009, the credit that an accused

received for time spent in custody pre-trial was a 2:1 ratio. However, in 2009 Bill C-25, known as the *Truth in Sentencing Act (TIS)*, limited the amount of credit an individual may receive at sentencing. Since the enactment of Bill C-25, s.719(3) and (3.1) of the *Code* indicate that an offender still may receive credit for the time they spent in pretrial detention. However, s.719(3) grants a 1:1 ratio for time spent in remand pretrial, whereas s.719(3.1) expresses that the maximum credit an accused may receive is a 1.5:1 ratio, based upon the circumstances surrounding the detention.

Since the enactment of Bill C-25 numerous cases have challenged the interpretation of s.719(3) and (3.1) of the *Code*. One such case, *R. v. Summers* (2014), raised issues surrounding the interpretation of s.719(3) and (3.1) in relation to the amount of credit an accused should receive. This Supreme Court case draws attention to a variety of factors surrounding pretrial detention. Specifically, *R. v. Summers* highlights that pretrial detention is onerous, given that the accused is seen as factually innocent and that the time spent in custody does not factor into parole eligibility. The sentencing judge originally held that Summers should receive a 1.5:1 credit for his time spent in custody pending sentencing, which the Crown appealed. The Supreme Court justices dismissed the Crown's appeal that Summers should receive 1:1 credit, mandating the 1.5:1 ratio for the time spent in custody prior to sentencing. Beyond *R v Summer*, subsequent cases (see, for example, *R. v. Carvery* and *R. v. Calliou*) have found the courts ruling in favour of the accused. Thus, case law since the enactment of Bill C-25 has mostly aided in making *TIS* relatively irrelevant regarding its 1:1 mandate.

Mandatory Minimum Sentences and Sentencing Ranges

A mandatory minimum sentence can be defined as “a sanction that requires sentencing judges to incarcerate an offender for not less than a prescribed period of time” (Sewrattan, 2013,

p. 122). In other words, when an offender is convicted of an offence that carries a minimum sentencing requirement, that individual will receive, at minimum, the predetermined punishment length. Michael Tonry (2009) demonstrated that mandatory punishments are seen historically when looking at the death penalty in England during the 1700s. Focusing on North America, mandatory sentences gained a significant presence in the United States during the twentieth century (Tonry, 2009). Tonry (2009) indicated that during the 1970s and 1980s the United States saw mandatory minimums frequently implemented. In the context of the US, mandatory sentences were used frequently for cases involving drugs, guns and violence (Tonry, 2009).

In 2012, the Canadian government enacted Bill C-10 the *Safe Streets and Community Act (SSCA)* which saw amendments made in favour of mandatory minimum periods of incarceration for certain drug-related offences. Furthermore, firearm-related offences can also carry minimum periods of incarceration (see *Criminal Code* under Firearms). However, it is important to recognize that the courts have since struck down some of this legislation. In the case of *R. v. Lloyd* (2016) the Supreme Court ruled in favour of the accused, indicating that the mandatory term of imprisonment imposed violated the accused *Charter* right to not be subjected to ‘cruel and unusual punishment’.

Mandatory minimums have an interesting relationship with the concept of judicial discretion. Witten (2017) indicated that judicial discretion is most prominently seen during sentencing when a judge has the task of developing an appropriate sentence for an offender. The *Criminal Code* outlines specific principles and objectives that must be taken into consideration when a judge crafts a sentence. However, the process of sentencing is complex and complicated; Witten (2017) encompassed this complexity by stating that “someone ultimately needs to apply abstract aims in a specific way to an individual offender” (p. 109). Given that Canada’s judicial

system works off of precedent, over time existing case law creates a situation where some offences correlate with an accepted sentencing range. Although this may limit a judge's discretion it does not eliminate it altogether as the judge ultimately has the discretion to determine where a specific offender would fall within a sentencing range for a specific offence.

Notably, although sentencing ranges do typically exist, case law supports that the decision to sentence an offender outside of the normative range for a specific sentence is not necessarily an error in sentencing by a judge. In *R. v. Lacasse* (2015) the Supreme Court stated when discussing sentencing ranges that "...they should not be considered 'averages', let alone straightjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case". This demonstrates that although sentencing ranges may exist, judges are not bound to sentence an offender within a given range at all times (unless a mandatory minimum exists).

It is also notable that, because the circumstances surrounding various cases are unique, there are times when no clear precedent exists. A recent Supreme Court Case, *R. v. Suter* (2018), demonstrated a case where the Court determined that the unique nature of Suter's case resulted in a situation where there were no cases in existence that were comparable, in terms of similar offender, offence or circumstance. An unfortunate driving error resulted in Suter killing a small child when his vehicle drove onto a restaurant's patio. On the advice of his lawyer, Suter refused to provide a breath sample to the police, even though he had not been impaired at the time. Suter pled guilty to the charge of refusing to provide a breath sample and was sentenced to four months imprisonment. The appellate Court sided with the Crown's appeal, sentencing Suter to 26 months' imprisonment. However, the Supreme Court sided with Suter because of the various mitigating factors surrounding the case, and the fact that his refusal to submit to a breath sample

was based solely on his lawyer's poor legal advice. In this instance, the Supreme Court explained that although the principle of parity is an important sentencing consideration, there existed no similar cases to Suter's with which to compare.

Witten (2017) also recognized that Crown attorneys exercise discretion in various ways, such as determining what cases to prosecute, and when to engage in a resolution or a withdrawal. Ultimately, a judge's discretion is very limited when sentencing an offender to a charge that carries a minimum penalty, because they are bound to the minimum sentence (Witten, 2017). Conversely, a Crown may exercise more discretion because, at times, they have the ability to agree to plead an accused to a lesser charge that does not carry a minimum penalty.

Mandatory minimum sentences thus arguably have a relationship to plea bargaining practices. Because some offences carry mandatory minimums, accused persons charged with an offence that has a mandatory penalty may find an incentive to plead to a lesser charge that does not carry a mandatory sentence. Witten (2017) addressed this by indicating that an accused may engage in a plea even if they are innocent in order to avoid the uncertainty of a trial and the potential for a harsh sentence upon conviction post-trial. While mandatory minimums may add extra pressure on an accused person to accept a plea of guilty, it is also important to recognize that offences carrying a mandatory penalty may act as an incentive for an accused to go to trial. If a Crown is not providing the option for the accused to plead to a lesser charge, it is arguable that the accused may feel that there is minimal risk involved in taking the case to trial because there is technically nothing to lose.

The Trial Penalty

There are arguments both in support of and against the heavy utilization of plea agreements within the Canadian and American criminal courts. Young (2013) addressed this

contention in the United States by indicating that academia has continually criticized the practice even though it remains as pervasive as ever. One of the most common criticisms surrounding plea bargaining is the concept of the trial penalty. Both Canadian and American literature conceptualize the trial penalty as existing when an accused person receives a harsher sentence after conviction at a trial than they would have had they pled guilty from the outset (McCoy, 2005; Chasse, 2009; Lafontaine & Rondinelli, 2005).

The trial penalty has also been referred to as an “entertainment tax” (Lafontaine and Rondinelli, 2005, p. 116). Lafontaine and Rondinelli’s (2005) definition of a trial penalty centred around the understanding that an offender receives a harsher sentence upon conviction after a trial because they made the system go through the motions. Generally speaking, running a trial places a drain on court resources and can have a negative effect on witnesses, especially in violent cases (Lafontaine & Rondinelli, 2005; Di Luca, 2005).

However, it is important to note that a recent 2018 case from Ontario’s Court of Appeal held that the accused in the case should not receive credit for his guilty plea. The facts surrounding the case of *R. v. F.H.L.* involved the sexual assault of a minor, in which the minor subsequently had F.H.L.’s child (court ordered DNA test confirmed this). Although the accused plead guilty, a *Gardiner* hearing was held to determine the facts of the case, during this hearing the victim was forced to testify. Furthermore, the guilty plea was recognized to merely be a recognition of the inevitable finding of guilt that would have taken place after trial. Based on these factors it was determined that the trial judge did not err in their decision to not give the plea of guilty mitigating weight at sentencing. This is a particularly interesting case because as Cole and Roberts (2018) indicated, the decision in *R. v. F.H.L.* actually runs contrary to existing case law from Ontario’s Court of Appeal.

The existence of a trial penalty or entertainment tax is not codified in law (Lafontaine & Rondinelli, 2005). Its existence runs contrary to fundamental principles of justice in instances where an accused feels coerced into pleading guilty or in circumstances where the accused pleads guilty even though they are innocent. The current justice system is based upon philosophical principles of justice. For example, Manson, Healey and Trotter (2000) discussed just dessert justification of punishment. Just desserts assumes that punishment should be equivalent to the harm caused by the offence (Manson, et al, 2000). With the exception of utilitarian theories of justice, all philosophical justifications of punishment do not condone the punishment of the innocent. In the case of a utilitarian justification, punishment of an innocent individual can only occur in a remarkably unusual situation that would rarely happen in the real world (Manson, et al, 2000).

The consequences of plea bargaining are contested. Scholars such as McCoy in the American context and Chasse in the Canadian context suggest that a penalty exists, although it is relevant to note that Chasse (2009) can be recognized as an outlier in his view. However, their arguments do not exist alone. Others argue that an accused person receiving a harsher sentence post trial than if they plead guilty does not equate to a trial penalty. For example, Young (2013), discussing the American context, explained that there is a valid argument in discussing sentencing ranges. For every offence within the *Code* there is an acceptable range of sentences that a judge may hand down. In this way, an accused person who pleads guilty may receive the lower end of the sentencing range whereas someone who is convicted after a trial may receive the higher end (Young, 2013).

Further, Young (2013) does not characterize plea bargaining as a coercive force. Instead, Young (2013) indicated that one cannot assume that the accused has no choice in whether or not

they plead guilty or take their case to trial. However, O’Hear (2008) provided evidence to suggest that there may be times in which the nature of the accused person’s ‘choice’ is called into question. For example, prosecutors in the United States can use what is called ‘high pressure tactics’ (O’Hear, 2008, p. 453). O’Hear (2008, p. 453) indicated that a ‘high pressure tactic’ is anything that would cause an accused to feel coerced to plead guilty (such as using threats or constraining time limits on offers). If an accused feels forced to plead guilty, it is arguable that they had limited choice in deciding the fate of their case. However, going back to the earlier discussion regarding *Bordenkircher v. Hayes*, prosecutors are not violating the Constitution by trying to get an accused to plead guilty. Ultimately, even under a time constraint the accused has still made a choice regarding whether or not they go to trial or plead guilty.

To make the debate more complicated, judges consider a wide variety of factors when determining an appropriate sentence. Factors a judge takes into consideration can either be mitigating or aggravating in nature. A mitigating factor would be considered something that is beneficial to the accused (i.e. being remorseful), whereas an aggravating factor is something negative that could equate to a judge giving a harsher sentence (i.e. resisting arrest) (Winterdyk & Smandyck, 2016). Guilty pleas are recognized to be a mitigating factor at sentencing for a variety of reasons, one of which being the communication of responsibility on behalf of the accused, and typically the demonstration of remorse on behalf of the offender (Lafontaine & Rondinelli, 2005). If an offender is seen as acknowledging responsibility and being remorseful they can avoid receiving as harsh a sentence because there is an understanding that they do not need to be rehabilitated in the same way that a non-remorseful offender would be.

Case law supports the notion that the expression of remorse is deserving of mitigation at sentencing; and that guilty pleas can be a demonstration of remorse (see *R. v. Arcand*). However,

it is important to recognize that there are numerous reasons why an accused may receive a reduced sentence by pleading guilty that have little to do with remorse. As noted earlier, guilty pleas positively benefit the administration of justice in numerous ways. A guilty plea reduces the amount of cases that need to proceed to trial, which in turn reduces the court delay, saves court resources, saves court time, and spares witnesses and victims the burden of testifying (*Martin Committee Report*; Cole & Roberts, 2018). For example, Cole and Roberts (2018) discussed the 1994 case of *R. v. Faulds, et al.*, in which the judge explicitly indicated that a guilty plea is deserving of a reduced sentence regardless of whether or not the guilty plea came from a place of remorse within the offender. Instead, the offender is deserving of a reduced sentence on the basis of the time and money the administration of justice saved (Cole & Roberts, 2018). In this way, the saving of court time is recognized to be a mitigating factor.

In short, when focusing specifically on the Canadian context, the existence of a trial penalty is unclear. Alati (2015) indicated that no empirical evidence exists that can definitively identify whether or not a trial penalty exists in Canada. Lafontaine and Rondinelli (2005) suggest the existence of a trial penalty or entertainment tax, but they do not provide evidence to support their discussion. Chasse (2009) also discussed the trial penalty without providing evidence that the phenomenon exists. Therefore, there is no way to distinguish the credit an accused receives when pleading guilty as a separate entity from the lack of that credit if the accused were to have proceeded with a trial.

The Concept of Remorse

Understanding and defining remorse is a complex task, especially as it relates to the criminal justice system. Bennett (2016) described remorse as an emotion elicited in someone when they reflect on their own behaviour. By this it is meant that if someone does something

they perceive as wrong the emotion of remorse may be elicited within them (Bennett, 2016). However, Bennett (2016) noted that in order for someone to feel remorseful for their actions, they must believe or be able to comprehend that their actions were wrong. Remorse can be seen as a different entity than shame or guilt because remorse is intrinsically linked to the feeling one gets when they realize they have hurt another individual (Bennett, 2016). Therefore, it is clear that in order for an individual to feel remorseful for their actions they must possess empathy. If an individual does not possess empathy than they will not be able to understand the pain they caused to another.

Remorse, as an emotion, takes an individualistic approach in recognizing how remorse relates to the criminal justice system. It focuses on the individual nature of an offender and their empathetic capacity to feel remorseful for their own actions. However, remorse within the criminal justice system moves beyond the individual. Weisman (2014), in his book *Showing Remorse: Law and the Social Control of Emotion*, approached remorse as a communicative function within the criminal justice system. In this way, his focus was not reflective of remorse as an individualistic emotion; instead, the focus was on remorse "...as a communication to an audience" (Weisman, 2014, p. 8). Therefore, the act of an offender displaying remorse goes only so far as the believability of this display, as conceptualized by an audience (Weisman, 2014). An offender may display remorse, but if their remorse is not recognized to be genuine than it does little to help mitigate their role in the crime committed.

For the purposes of the present study, remorse will be understood both individually and as a communicative function. Although, the focus will centre on the communicative role that remorse plays within the criminal justice system, it is relevant to understand remorse at the individual level as well. This is because defence lawyers' explanations of the role of remorse

within the criminal justice system will be constructed both in the context of the individual offender, and in the broader communicative role that remorse has within the system.

Remorse, especially as a communicative function, can be recognized as having a significant role within the criminal justice system (Weisman, 2014; Bandes, 2014; Bennett, 2016). At times, remorse can impact the sentence an offender receives. However, the present study recognized that a guilty plea is not intrinsically linked to remorse, nor is remorse inherent when an accused pleads guilty. Furthermore, the present study acknowledges that the *Criminal Code* does not explicitly link a guilty plea to the accused showing remorse. Specifically, S. 606 of the *Code* focusses on the validity and acceptance of guilty pleas. However, case law supports the understanding that a guilty plea, especially one done in the early stages of proceedings can act as a mitigating factor at sentencing for a variety of reasons. In *R. v. Keeping*, the Court notes in paragraph 32 that an early guilty plea will award the accused mitigation at sentencing and that this is supported by numerous cases. One such case is *R. v. Arcand*; in paragraph 293 it is noted that mitigation is reserved on a guilty plea when the accused “spontaneously acknowledge[s] their culpability”. It is also noted that ‘genuine’ expressions of remorse should be seen as mitigating (*R. v. Arcand*). Therefore, while the *Code* does not explicitly link remorse to guilty pleas, the legal argument has been made that remorse, acknowledgement of responsibility, and guilty pleas have a relationship. This relationship is supported by various case law that recognizes these factors to be deserving of mitigation during sentencing.

Guilty pleas can be recognized as one way remorse is communicated to the court. However, the communication of remorse can be recognized as much more complex than an admission of guilt or responsibility. Weisman (2014) discussed the ways in which remorse can impact an offender’s sentencing outcome through a compilation of Canadian court cases, which

demonstrated the important role and communicative function that remorse plays in judicial proceedings. Bennett (2016) and Bandes (2014) also expressed the important role that remorse plays in criminal proceedings, indicating that when an offender does not express remorse they may be designated as psychopathic. Bandes (2014) expressed that those who do not show remorse and are subsequently designated as psychopathic will experience the consequences of this designation during sentencing. Specifically, a “...lack of remorse can lead to more punitive sentences, more restrictive prison conditions, and denial of parole or a pardon or clemency” (Bandes, 2014, p. 4).

Weisman (2014) discussed the historical progression of the designation of ‘psychopath’. Of particular relevance to the present discussion is the modern understanding of the psychopath, as it relates to criminality and the legal system. Weisman (2014) indicated that the contemporary psychiatric and psychological understanding of psychopathy is that the psychopathic individual understands that their behaviour is both wrong and morally condemned, yet they continue to engage in such behaviour. Further, the psychopath has an inability to engage in true interpersonal relationships because they do not have the emotional capacity (Weisman, 2014). In this way, the psychopath lacks the ability to experience any empathetic emotions, thus, “...lacks remorse, guilt or shame for the harm that he or she may inflict on others” (Weisman, 2014, p. 57).

The incapacity for an individual to feel such emotions becomes equivalent to the inability for that individual to be rehabilitated, whereas the accused person who is not deemed to be psychopathic, because they can experience and subsequently express the emotion of remorse, is recognized as someone who could be rehabilitated. When an individual is deemed as psychopathic, with no prospects of rehabilitation, that individual is then characterized as someone who cannot be allowed to live amongst society (Weisman, 2014). Because the

psychopath is recognized as lacking a moral compass they do not have the capacity to belong to a society which holds the moral view that a person cannot callously harm another.

In sum, the offender who is seen as not genuinely expressing remorse, or lacking remorse altogether risks being deemed psychopathic. Such a designation has both short-term and long-term consequences for the offender. Short-term consequences being that the offender will receive a harsher sentence than they most likely would have had they been able to genuinely demonstrate that they are remorseful for their actions. A long-term consequence could be that the offender will not be able to receive parole (Bandes, 2014).

Whether or not an offender fully communicates remorse for their wrongful actions within an open court setting can impact the sentence they receive (Weisman, 2014). Weisman (2014) indicated that remorse goes beyond an understanding that one is ‘sorry’ for what they have done. Rather, remorse is communicated and expressed in a variety of ways by an offender that is verbal, emotional and physical (Weisman, 2014). For example, Bennett (2016) draws upon the South African case of Oscar Pistorius; Pistorius attempted to communicate remorse through physically “retching in the courtroom as evidence was being presented” (p. 4). In this instance remorse is communicated at a much deeper level than had Pistorius only communicated his remorse verbally.

In order for an offender to be seen as truly remorseful they have to convincingly display their remorse in a way that separates themselves from their criminal behaviour (Weisman, 2014). However, the offender’s display of remorse is also dependent on the audience’s expectation of how the offender should perform. In the case of Pistorius, his performativity was analyzed on a global platform (Bennett, 2016; Surette, 2015). Surette (2015) discusses how in the 21st century, the existence of various media platforms allows for the sharing of high profile criminal trials.

Globally known celebrities, as well as notable sports figures, become instantly recognized internationally when they are involved in serious crimes (Surette, 2015). Surette (2015) categorized Pistorius as a sports celebrity whose criminal case gained international recognition, with the likes of OJ Simpson. In this way, there was a global audience evaluating whether or not Pistorius' performance of remorse was genuine or contrived. Weisman (2014) demonstrated that an offender will only be seen as truly remorseful when they have successfully achieved a recognized moral character that is not associated with the wrongful acts that they have done. In this way, the offender must be seen as separate from the acts that they commit in order to receive mitigation at sentencing.

Weisman (2014) indicated that an offender must communicate a variety of things in order to be seen as truly remorseful. First, they must assume full responsibility for their actions. Weisman (2014) drew upon court cases of offenders who indicated they committed the crime they were charged with because of an external factor (i.e. drug addiction). In these instances, the offenders were not recognized as being remorseful (Weisman, 2014). Secondly, Weisman (2014) indicated that the offender must demonstrate their 'true feelings'. An offender must go beyond verbally communicating remorse by demonstrating how they truly feel about their actions through emotion. Thirdly, Weisman (2014) discussed how the offender must demonstrate that they are remorseful and thus have an ability to adjust their behaviour in the future. If the offender has the ability to adjust their behaviour in the future they do not need to be punished as harshly because they understand that their behaviour was wrong.

The final thing an offender must do is develop a 'crime narrative' that indicates that, though they committed an offence, they are not necessarily different than any other member of society (Weisman, 2014). When an accused can create a narrative that they committed a

wrongful act, but that act does not define them, they are more likely to receive mitigation (Weisman, 2014). In total, these factors combine to create an offender who either has a criminal character or a remorseful character. If the offender has fully demonstrated true remorse for their actions they will be shown more leniency by the court when their sentence is determined.

Remorse is not easily definable, especially when it concerns criminality. Bennett (2016) indicated that remorse is a complex emotion. Given the complexity of remorse, there are various ways in which individuals may conceptualize remorse regarding criminal justice. Bennett (2016) discussed that the role that one believes remorse should play in sentencing relates to what philosophical beliefs that individual holds regarding the criminal justice system. For example, Bennett (2016) indicated that if an individual believes that deterrence is a central principle in sentencing, then remorse will be related to an offender's capacity to commit future crimes. Conversely, if rehabilitation is the reason for sentencing an offender, then communication of remorse is seen as relating to the capacity the offender has to engage in pro-social behaviour (Bennett, 2016). Therefore, Bennett (2016) addressed the contention surrounding remorse in the criminal justice system.

Given that remorse can mean different things to different people and also can be conceptualized in a variety of ways regarding punishment and sentencing of offenders, some questions can be raised about the role of remorse in criminal justice (Bennett, 2016). Although it is evident that remorse plays an important role in criminal justice, Bennett (2016) raised questions surrounding how much of a role it should play and how remorse should be evaluated. In this way, Bennett (2016) indicated that there are arguments to support positions on either side of the debate. This is important for the present study because lawyers are asked what they think about remorse as a concept, and the link that it has to guilty pleas. When asking lawyers these

questions it is important that they are encouraged to discuss their understanding of remorse. Because the purpose was to gain insight into how lawyers conceptualize the role that remorse plays in the criminal justice system, they must indicate what remorse means to them. This is important because as Bennett (2016) and Weisman (2014) indicated a consensus does not exist on what remorse means, especially in relation to criminal justice.

Punishment as a Communicative Function

It is evident that remorse has value as a communicative function within the criminal justice system. However, the criminal justice system as a whole has a communicative function within society. Garland recognized that the relationship punishment has to society is both symbiotic and dialectical in the sense that punishment both shapes and is shaped by society (as cited in Manson, Healey & Trotter, 2000). In various ways punishment symbolically shapes society's understanding of what is considered acceptable and unacceptable behaviour; at times, the reverse is true in the sense that punishment can be recognized as a reflection of society's needs, because certain acts are considered innately immoral (Garland, as cited in Manson, et al, 2000). However, Garland indicated that punishment also acts as a moral determinant of what behaviours are considered immoral, and by extension, who is given this label (Manson, et al, 2000).

The severity of a punishment is an especially relevant feature within the communicative function of the criminal justice system. For example, Garland indicated that when an offender is handed a lenient sentence for a "...particularly heinous rape, its comparative leniency might be taken to symbolize a denigration of women's rights..." (Manson, et al, 2000, p. 53). In this way, accused persons are always sentenced within the context of the broader society and thus, the sentence itself becomes a symbolic representation of what a particular deviant act means.

However, one important caveat that Garland does not address is the way society perceives sentencing versus the reality of how punitive actual sentences are. Public opinion studies conducted in both Canada and England suggest that the public perceives sentences to be more lenient in length than they actually are (Roberts, Crutcher & Verbrugge, 2007; Hough, Bradford, Jackson & Roberts, 2013). A 2013 report from the Ministry of Justice England, conducted by Hough, et al., examined public attitudes towards sentencing in England and Wales. Entitled *Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for England and Wales*, the report examined a variety of issues surrounding public confidence in sentencing, the administration of justice and law enforcement.

Some interesting findings were that on average, people believed sentences were too lenient, while simultaneously underestimating the actual severity of sentences (Hough, et al., 2013). Furthermore, the public indicated that they believed crime was on the rise nationally, but did not indicate that it was on the rise locally (Hough, et al., 2013). Similarly, Roberts, et al. (2007) demonstrated that Canadians' opinions regarding the severity of sentences indicated that the public has maintained the stance, for multiple decades, that sentences are too lenient. One attributing factor as to why the public may hold this opinion is the way crime and sentencing is portrayed in the media (Roberts, et al., 2007).

While it is evident that sentencing is expressive, communicative and has a symbolic relationship to society, Garland oversimplifies the unique quality of each criminal case. While his assertion is not false, he does not take into account that the comparative leniency of a sentence may not have actually been lenient at all. Furthermore, his assertions negate the way that the public perceives sentencing and the role that the media has in influencing such perceptions. Although dated, a 1989 study conducted by Cohen and Doob assessed public

attitudes towards plea bargaining. What is important to note from this study is that the public's confidence in sentencing and plea bargaining improved when transparency existed through an explanation of what was occurring (Cohen & Doob, 1989). Because this study is dated and there has been significant change, especially since the *Martin Committee Report*, in regard to plea resolutions, the public's perception of plea bargaining in 1989 is not relevant to the present study. However, what is relevant is that public confidence in the administration of justice and sentencing increases with explanation and justification. Thus, a sentence is only as lenient as the lack of explanation given to justify it.

Marinos (2005) indicated that punishment acts as an expressive function within society. Similar to Garland, Marinos (2005) explained that the type of sentence an accused received is expressive. The inability of various initiatives to reduce the use of incarceration is thus a byproduct of the communicative function of punishment (Marinos, 2005). Examining the use of 'penal equivalents', which can be recognized as punishment alternative, but equivalent to incarceration, Marinos (2005) found that society is more open to using punishments other than prison in non-violent offences.

Given that punishment often significantly reduces a person's freedom and liberty, it needs to be justifiable (Manson, et al, 2000). There are many philosophical justifications for punishing an individual who has engaged in criminal behaviour. Historically, the two predominant justifications for punishment are utilitarian and retributive (Manson, et al, 2000). However, theories such as "just desserts," or the idea that a punishment must be equal to the crime, are relevant to the current organization of the criminal justice system. Philosophical justifications of punishment are reflected in the both the *Criminal Code* and the *YCJA*, under sentencing purpose and principles. The purposes of sentencing within the *Code* are especially

relevant to the present study. Sentencing objectives can be found under s. 718(a) through (f) of the *Code*. Aside from protecting the safety of the public and the maintenance of peace within society, sentencing objectives include: denunciation, deterrence, removal of offenders from society, rehabilitation, reparation and responsibility (*Criminal Code*, s. 718).

It is clear that the objectives of denunciation and deterrence are especially relevant to the discussion of the communicative function of punishment. Sentencing an accused to some form of punishment denounces the behaviour. Garland recognized that judges engage in ‘speech acts’ when sentencing an offender (as cited in Manson, et al., 2000). The verbal act of sentencing an accused, and the simultaneous denunciation of the unlawful behaviour that the accused engaged in, communicates to society that the behaviour is wrong and deserving of punishment.

Concurrently, deterrence also has communicative value. While punishing an offender is meant to deter that individual from engaging in similar behaviours in the future, it is also meant to send a message to the community more generally. It is meant to communicate to society that if they engage in the same behaviour they will be punished in a similar manner. Thus, it is evident that the communicative function of punishment is found within various sentencing objectives within the *Code*.

With respect to the present study, it was important to briefly address the relationship among the philosophical dimensions of punishment, sentencing objectives, and the communicative function of the criminal justice system. When an accused enters a plea of guilt they will eventually be sentenced. It is evident that the process of sentencing is complex and multidimensional. Every court case has a unique set of circumstances and facts. Although there are often ‘similar’ cases that can be referred to when deciding a sentence, the process is still highly individualized and dependent on the discretion of a judge. Once again, the Supreme Court

decision in *R. v. Lacasse* eloquently highlights the complexity of sentencing, in stating that “[t]he determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation”. When conducting research on the trial penalty and the concept of remorse it is important to consider the complexity of sentencing and the multitude of factors that play into the decision to hand down any particular sentence to any particular offender.

Chapter 2: Method

Theoretical Framework

The present study utilized a social constructivist framework. Social constructivism assumes that individuals create their own knowledge through experiences (Savin-Baden & Major, 2013). Creswell (2013) indicates that individuals want to understand the world in which they live. This is done through an active process whereby individuals create meaning (Creswell, 2013). This meaning making often occurs through interactions with other individuals within the social world (Creswell, 2013). Schwandt (2007) indicates that knowledge is not something that is ‘found’; rather humans attribute meanings to objects and symbols. For example, a stop sign has no meaning other than the symbolic meaning that humans have given it. The colour, shape and words on the sign have been constructed to symbolically mean that a driver must stop.

Historically, a social constructivist theoretical framework has been used in a variety of qualitative research. Denzin and Lincoln (2011) indicate that within the latter half of the 20th century qualitative researchers have increasingly employed a social constructivist framework to a wide variety of qualitative methodologies. While Denzin and Lincoln (2011) caution that social constructivism should not be used in every study, it is an appropriate fit for many qualitative methodologies. Because of the exploratory nature of the present study, and the focus on understanding how lawyers conceptualize, understand and construct the concepts of the trial penalty and remorse, social constructivism is the logical theoretical framework to employ.

Utilizing a social constructivist theoretical framework is appropriate for the present study. Because the purpose of this study will be to explore defence attorneys’ understandings of a trial penalty and remorse as a mitigating factor during sentencing, there is importance in recognizing that each lawyer may construct these issues differently. Lawyers have “recipe knowledge” about

the criminal justice system in which they work (Ericson & Baranek, 1982, p. 22). Ericson and Baranek (1982) argue that while lawyers graduate from law school with a specific set of legal knowledge, their ability to successfully negotiate the inner workings of the criminal justice system is dependent on whether or not they can “acquire recipe knowledge” (p. 22). This insider knowledge includes the organization of the criminal system (i.e. courthouse etiquette) and the ways in which a defence attorney navigates their relationships with Crown attorneys and police officers, as well as, knowledge of particular judges (Ericson & Baranek, 1982). Thus, defence attorneys construct their understanding of the trial penalty and the role of remorse as mitigation through their interactions with others as a privileged ‘actor’ in a complex system.

Methodological Framework

Given the lack of Canadian literature on the topic, the present study employed a descriptive exploratory methodology. Elliot and Timulak (2005) indicate that this methodological approach is appropriate for studies that look at topics where little-known research exists, and the topic is complex in nature. Because the present study explored defence lawyers’ understandings of the trial penalty and the role of remorse in an in-depth way, an exploratory approach was appropriate for this study.

The specific research questions the lawyers are asked are both definitional and descriptive. Elliot and Timulak (2005) indicate that a definitional question seeks to explore the various features of the topic being researched, which may lead to some kind of definition of the topic. The present study’s use of a semi-structured interview design allowed the participants room to elaborate beyond the initial question. Given the use of social constructivism as a theoretical framework, the focus of the questions was to understand how lawyers construct the concepts being examined. Concurrently, the questions being asked were also recognized to be

descriptive. Elliot and Timulak (2005) indicate that descriptive questions ask: “what kinds or varieties does the phenomenon appear in? What aspects does it have?” (p. 149). When asking lawyers about the trial penalty, they were asked to provide examples from their practice of when they believed a trial penalty existed. In asking lawyers this question they were essentially being asked to elaborate on their constructions of the trial penalty with examples. This then translated into an in-depth description of the lawyers’ constructions of the concepts.

Study as Part of Larger Research Project

The present study is part of a larger research project conducted by Dr. Voula Marinos in the department of child and youth studies at Brock University. Marinos’ (2013) overarching research project focuses on a wide variety of topics related to plea bargaining practices within the criminal justice system. The initial research project first received clearance through Brock’s Research Ethics Board (REB) in 2013. I joined the research project in September 2015 as an undergraduate student completing an honours thesis. At this time, I received ethical clearance to be an active member as part of the research team. At the undergraduate level, I was involved in scheduling and attending interviews with defence attorneys, transcribing interviews and analyzing data.

In September 2016, I continued my work on Dr. Marinos’ project as a Masters student. Although the larger project examines multiple topics surrounding plea bargaining, including the process of plea resolutions, specific questions about plea resolutions and the concept of penal equivalency, it was my decision to ultimately focus my research project on the topic of the trial penalty and remorse. Because I joined this research project, I did not create the concept nor did I design the interview questions or sampling method. Due to this, I also did not have the responsibility of finding participants myself. Furthermore, I also had the benefit of being able to

access data that was collected before I joined the project. However, I did actively choose what component of the research project to focus on, as well as the theoretical and methodological frameworks to be employed for my project. Although I was not present for all of the interviews that were conducted over the course of Dr. Marinos' study, I individually transcribed 18 of the 25 interviews and organized the data for all interviews. Further, I developed my own data analysis process to manually code the interviews.

Sampling Method

For the purposes of the present study defence attorneys were chosen to participate through a convenience sampling strategy. Convenience sampling can be defined as a nonprobability strategy used to decide participants on the basis of availability (Berg & Lune, 2012). Berg and Lune (2012) demonstrate that a specific type of convenience sample is snowball sampling. Snowball sampling can be recognized as a sampling method where participants provide referrals of other individuals within the community who may be interested in participating in the study (Berg & Lune, 2012). Snowball sampling was the specific sampling method that this study used to obtain participants.

Snowball sampling was chosen based on the inability for the present study to obtain the contact information of all practicing defence attorneys in Ontario. Berg and Lune (2012, p. 52) explain that snowball sampling "...is sometimes the best way to locate subjects with certain attributes or characteristics necessary in the study". This was relevant to the present study because the sample consisted of defence lawyers from across Ontario. Furthermore, Berg and Lune (2012, p. 52) explain that once the researcher has identified and interviewed the initial participants they are "...then asked for the names (referrals) of other people who possess the

same attributes they do—in effect, a chain of subjects driven by the referral of one respondent to another”. In this way, the sample essentially generates itself.

Snowball sampling was also chosen on the basis that the current study must be conducted within a time frame. Savin-Baden and Major (2013) indicate that when deciding on a sampling method the researcher must take the amount of time they have to complete their study into consideration. In instances where the researcher is under a time constraint a convenience sampling strategy is beneficial (Savin-Baden & Major, 2013). For the purposes of this study, lawyers were contacted via email. The initial email consisted of a script that invited the lawyer to participate in a study on plea bargaining (see Appendix A). Within the script the potential participant was informed that Dr. Voula Marinos, an associate professor at Brock University, designed the research project they are being asked to participate in. I indicated that I am a research assistant and provided information regarding the nature of the study, including potential benefits and that Brock’s REB had approved the study. At the end of the script each lawyer was asked whether or not they consented to participate in the study [formal consent was received at the time of the interview].

Each potential participant was also asked whether or not they consented to providing the name and contact information of a lawyer who they thought might be interested in participating in the study. It was explained that the lawyer’s name would be provided as the individual who referred the next potential participant, however, they were informed that they would not be told whether the person participated. A snowball sampling technique was used when each participant was asked for a referral. This was beneficial to the present study because the sample essentially generated itself. Throughout my involvement in the research project there were times where the research process became stagnant. In these circumstances, potential participants were found

through the internet. Many lawyers provided contact information online, and often this included an email address.

Participants

The overall sample was heterogeneous in nature and consisted of 25 defence attorneys from across Ontario. The sample consisted of both female (n=4) and male (n=21) lawyers. Further, the sample is unique in the sense that the clientele of the lawyers was diverse. For example, some lawyers indicated that their practice focused its work on clients whose mental health directly related to their engagement with the criminal justice system. In other instances, lawyers spoke about doing a lot of legal aid work, working with low socioeconomic status clients or clients with addictions. Lastly, the vast majority of the lawyers indicated that they represented clients from various racialized backgrounds. Given the nature of the present study, the types of clients each lawyer represented acts to further diversify the sample, because lawyers' constructions of the way the criminal justice system operates may, in some instances, be informed by their clients.

In their responses to questions three, lawyers indicated, on average, the demographics of their clients. Although each lawyer in the sample (N=25) described what their client base consisted of, it is important to note that not every lawyer described every detail about their client's demographics (for example, some lawyers focused on the ethnicity of their clients, but did not discuss gender and vice versa). When asked about the ethnicity of their clients, lawyers' responses varied. The majority of the participants (n=10) indicated that their clients were mostly racialized, while only a couple (n=2) lawyers stated that their clients were typically Caucasian. A small number of lawyers (n=3) stated that their clients came from a wide range of ethnic

backgrounds, whereas some participants (n=3) indicated their clients were predominantly Indigenous. The remaining lawyers (n=7) did not explicitly indicate the ethnicity of their clients.

When asked about their clients' financial status, 19 of the 25 lawyers gave an in-depth and clear response. The majority of the lawyers who responded (n=11), indicated that their clients were predominantly of low SES. Many lawyers (n=8) indicated that they did legal aid work. Because many of the participants did legal aid work, it is clear that their client base would be low SES. However, it is also important to note that the lawyers indicated that their private clients were typically financially stable and employed. Not surprisingly, the majority of the participants indicated their clients were male (n=18). Only one participant (P14) clearly stated that they had female clients; it is interesting to note that this participant also indicated they had a wide array of Indigenous clients. Six (n=6) participants did not comment on the gender makeup of their clients. Regarding age, many participants (n=13) did not explicitly state what the average age of their clients were. However, the majority of the lawyers who responded indicated they did mostly adult cases (n=6), while some (n=5) expressed they did both youth and adult cases. Only one participant (P2) appeared to mostly do youth cases.

Further, in order to achieve a heterogeneous sample, it was important that lawyers were interviewed who practiced in both rural and urban areas. Because of the locality of the researchers, there were more participants from urban regions. However, it is important to note that the 'culture' of each court can be different depending on whether or not the lawyer was practicing in a big or a small city. Due to this, variance still existed regarding the population size of the jurisdictions the participants practiced criminal law within.

The sample size of 25 defence attorneys was appropriate for the present study for a number of reasons. Foremost, the sample size was in adherence with the study's use of a

descriptive, exploratory methodology. Elliot and Timulak (2005) highlight that when conducting qualitative research, the sample size can vary greatly, but what is important about the size of the sample is whether or not saturation occurs. Saturation can be recognized as having occurred when participants are no longer providing new answers (Guest, Bruce & Johnson, 2006). A study conducted by Guest, et al. (2006) indicated that when conducting qualitative research, saturation can be met when the number of participants in a study ranges from six to twelve. It is important to recognize that their study only provides a guideline for when saturation can be met, as qualitative studies vary. However, the number of participants in the present study greatly exceeded twelve, and it was clear in the latter interviews that participants were no longer providing answers to questions that had not been previously discussed.

The sample was also in accordance with the present study's use of a descriptive exploratory methodology because participants were drawn from across Ontario. One of the purposes of using descriptive exploratory methodology is to gain in-depth insight into the complex topic being studied (Elliot & Timulak, 2005). The topic of the present study has many complex intricacies, and because this study has a diverse sample, these complex intricacies were able to be explored in a meaningful way. Furthermore, having a sample of 25 lawyers was reasonable for this study because saturation was reached without having an overwhelming amount of data to comb through. If the sample were much larger than 25, the ability to ensure that all participants' voices and constructions of the justice system were heard and recognized would be more challenging. Thus, the sample size of 25 lawyers was both reasonable and sufficient for the purposes of the present study and also met the saturation criteria.

Method of Data Collection

In order to gain an in-depth understanding of how lawyers conceptualize a trial penalty and remorse as mitigation during sentencing, the method of data collection used was semi-structured interviews. Semi-structured interviews can be recognized as a type of interview that lies between an open-ended interview style and a structured interview design (Berg & Lune, 2012). By this it is meant that semi-structured interviews are governed by a predetermined list of questions usually organized by topic (Berg & Lune, 2012). However, unlike structured interviews the interviewer has the ability to move beyond the predetermined set of questions to probe the participant on answers that may be of particular interest (Berg & Lune, 2012). This type of interview is beneficial because the researcher has a predetermined interview structure, but is not bound to it.

Utilizing a semi-structured interview was beneficial for gaining an in-depth understanding of how lawyers conceptualize the trial penalty and remorse as mitigation. Because the present study was employing a constructivist framework, there was an underlying assumption that the participants would construct their understandings of the trial penalty and remorse differently. By being able to deviate from the preset questions, the researcher was able to probe deeply and ask lawyers follow up questions to their answers.

The interview consisted of 32 questions that addressed various topics related to plea bargaining practices within the criminal justice system. The present study examined two of the 32 questions, in an in-depth way. These two questions were located under the section entitled ‘Trial penalty, Plea of guilty and Remorse’. The first question analyzed was question 27, which asked the participant:

Do you think that the “trial penalty” exists in Ontario criminal courts? Why or why not? If so, can you give me some examples from your work with clients (no personal identifiers please)?

The second question that was analyzed was question 28, which asked the participant:

What do you think about the use of guilty pleas as a sign of remorse and therefore mitigation in sentence? Is this a fair practice? What are the implications for the accused? For you as an advocate?

It is important to recognize that I was not interested in how many lawyers in Ontario believed that the trial penalty does or does not exist, rather I was interested in how lawyers understand the trial penalty and remorse as concepts. I was also interested in understanding the implications of these concepts within the criminal justice system. In this way, the importance was in examining the workings of justice in relation to these concepts in an in-depth way.

The present study also analyzed one other question for contextual purposes. Because of its relationship to question 28, the third question analyzed was question 12, which asked lawyers:

In your experience, are your clients more willing to accept a plea bargain when they are in custody? If so, why? And if so, are there times when you think they may do better if they waited some time and perhaps received a better offer from the Crown, or went to trial?

This question was briefly analyzed for contextual purposes because lawyers’ responses to questions 27 and 28 drew upon some of the content that they were asked to discuss in question 12. In order to fully understand how lawyers constructed their responses to questions 27 and 28 it was relevant to explore the relationship these questions had to question 12.

It is also important to note that the phrasing of question 28, indicating that a guilty plea is used as a sign of remorse, was meant as a starting point for the participant to elaborate on their answer. As aforementioned, the present study acknowledges that a guilty plea is not intrinsically linked to remorse, nor is remorse inherent when an accused pleads guilty. Furthermore, the present study acknowledges that the *Criminal Code* does not explicitly link a guilty plea to the

accused showing remorse. However, case law supports the understanding that a guilty plea, especially one done in the early stages of proceedings can act as a mitigating factor at sentencing for a variety of reasons.

Data Analysis

Using a qualitative research design gives the researcher the opportunity to analyze data in a variety of ways. Savin-Baden and Major (2013) indicate that when conducting qualitative research, the researcher can choose to code their data manually, or they can utilize digital software. For the purposes of this research project, data was manually coded. The choice to use a manual coding strategy was made for various reasons. Foremost, manual coding worked well with both the theoretical and methodological frameworks employed in this study. Descriptive exploratory research, in accordance with other methods of qualitative research, indicates that coding can be done manually. Further, because the purpose of descriptive exploratory methodology is to get an in-depth understanding of the phenomenon or topic being examined, analyzing the data manually became the logical choice. The ability for the researcher to fully immerse themselves in the data in a hands-on manner allowed for an in-depth exploration of the data.

The utilization of a social constructivist framework also supported the use of a manual coding strategy. It was important that I was able, to the best of my abilities, to ensure that the themes that emerged through data analysis captured how the defence attorneys conceptualized the trial penalty and the concept of remorse. Again, the use of manual coding allowed me the opportunity to analyze the data in a hands-on manner and thus, I was able to fully immerse myself in the data and understand the ways that the participants constructed their experiences.

When manually coding data, it is important that the researcher develops an organized, systematic and rigorous method of analysis. Elliot and Timulak (2005) emphasize that when using a descriptive exploratory methodology, data analysis should be carried out in an organized and systematic fashion. In order to ensure that data was analyzed in a rigorous manner, the present study utilized a multi-step process of analysis. The process of analysis used reflects some components of the process that Elliot and Timulak (2005) describe using when they conduct descriptive exploratory research. However, in order to ensure the process was as rigorous as possible, the present study went beyond their guidelines by incorporating various coding techniques. In the following sections I describe the process of data analysis used to code the data for the present study.

Data Organization and Preparation

When conducting semi-structured interviews, the interviews were digitally recorded. Hand-written notes were also taken in conjunction with the recordings for each interview. This left the researcher with a host of media files. Elliot and Timulak (2005) identify data organization as the first step towards analysis. For the present study, the interview recordings were transcribed and the typed transcripts were later organized. The transcripts were organized so that the data was broken down by question. Because this study is part of a larger research project, on average each transcription consisted of 32 questions. Given that this research project only analyzed certain questions, it was convenient to organize each transcript by question so that the researcher could easily find the questions to be analyzed. It is relevant to note that due to multiple factors inherent in the intricate process of qualitative research, not every interview contained all 32 questions. Furthermore, out of the 25 interviews, three interviews did not have digital recordings. In the instance of these three interviews, the hand-written notes taken during

the interview were typed and organized by question. Once all of the interviews were transcribed and organized, hard copies of each interview were printed.

Process of Analysis

Once the data was organized it was ready to be analyzed. Coding was done in multiple phases. Van den Hoonaard (2012) suggests that when analyzing data the researcher should read through the data in its entirety numerous times. Each time the researcher reads through the data it should be read from a different perspective (Van den Hoonaard, 2012). This was the first step I took to analyze the data for this research project. I read through the data two separate times before I began to make any type of marks on the transcript. The first time I read through the data I did not read it from any particular perspective. Instead, I read it through to familiarize myself with the content of the interview. Although I had transcribed the vast majority of the interviews, I had been involved with the study for a number of years and had not read some of the interviews in over a year. During this familiarization process, I tried to read the interview as neutrally as possible, by this it is meant that I read the content without any preconceived notions about what the lawyer might say. The second time I read through the data I did so from the perspective of the lawyer, in order to try and understand how they conceptualized and constructed their experiences through what they were saying. In this way, my second read through was done from the perspective of the lawyers, which meant that I simultaneously read through the data with my theoretical perspective in mind. Given that this study used a social constructivist framework, I understood that each lawyer constructed their answers to the questions based on the meanings they had constructed in their interactions as a lawyer.

Open Coding

During the third read through of the data I began the process of open coding. Van den Hoonard (2012) indicates that open coding is commonly associated with grounded theory. Creswell (2013) explains the process of open coding as occurring when the researcher codes “the data for its major categories of information” (p. 86). Grounded theory can briefly be defined as a methodological framework whose main premise is the development of theory from data (Savin-Baden & Major, 2013). Although the methodological framework used for this study is not grounded theory, the process used for coding the data were very similar to that of grounded theory. This is because the data analysis process in grounded theory and descriptive exploratory methodology share commonalities. Elliot and Timulak (2005) refer to the ‘open coding’ phase as the process of organizing. Because of the similarities between the ‘open coding’ and ‘organizing’ process, the present study chose to utilize the terminology interchangeably.

During open coding, I used only a pencil to begin ‘marking up’ the transcripts. Coding was thus done by circling and underlying words and phrases that either seemed relevant or were repeatedly appearing. When engaging in the open coding phase the researcher should not try to narrow the scope of the data (Van den Hoonard, 2012; Berg & Lune, 2012). Because of this, I was circling and underlying a significant amount of the data. Van den Hoonard (2012) indicates that during open coding the researcher should not worry about trying to make the data fit together. Furthermore, it is important that the researcher does not overanalyze what they are doing. Instead, Van den Hoonard (2012) indicates that there should be a level of spontaneity during this stage. Therefore, while engaging in open coding the process was done in a relatively quick manner, and this limited my ability to ‘over analyze’ what I was doing and ensure that I did not narrow the data down too prematurely.

Focused Coding

After completing the process of open coding, I began to narrow down the number of codes. Berg and Lune (2012) use the analogy of a funnel to explain the process of coding, indicating that you begin with many codes and as the process goes on you end up with fewer and more specific codes and themes; essentially you ‘funnel’ the information. Van den Hoonard (2012) recognizes the condensing of codes to take place during the phase of focused coding. This is when the researcher reassesses the open codes to condense them into themes (Van den Hoonard, 2012). At this stage, I went back through the data and began utilizing a colour coding and symbol system to identify codes that fit together to create a broader theme. It is important to note that from the point of my initial read-through, to the point of focused coding I worked through each transcript individually. Therefore, at the stage of focused coding I was developing themes inherent to each interview independently. However, as I repeated these stages for each interview it became apparent that there were overlapping themes across interviews. These themes were recognized as categories. Elliot and Timulak (2005) indicate that when conducting descriptive exploratory research the process of open, and then focused coding is one of “categorizing the categories” (p. 155).

During focused coding, I recorded reoccurring themes, or categories on a master list. When I had finished the process for each interview I was left with a large list of categories. Thus, I began the task of re-categorizing the data. At this stage, it was apparent that many of the themes listed could fit together and create overarching themes or categories. Elliot and Timulak (2005) indicate that this organizing process can be recognized as the researcher creating domains. This process can also be identified as a form of axial coding (Elliot & Timulak, 2005). While engaging in axial coding, I created a variety of broader themes that encompassed many of the

categories I had discovered during the process of focused coding. Essentially, I collapsed and categorized the data in a meaningful way.

Validity of Themes

In order to ensure that the themes created were a reflection of the lawyers' constructions of the trial penalty and the concept of remorse, the themes were checked by the study's supervisor. This step added a level of rigor to the process of analysis. Elliot and Timulak (2005), when discussing axial coding and the creation of domains, state that the "...framework for meaningfully organizing the data should be flexible and tested until it fits the data" (p. 154). Because the themes generated during the phases of coding were checked over by a seasoned researcher, some themes were restructured to better fit the data. Furthermore, the restructuring and reworking of the themes was an ongoing process to ensure that the complexity of the participants' responses was portrayed in a way that reflected their in-depth constructions of the criminal justice system.

Ethical Issues

The present study did not pose any significant ethical issues. However, there was the potential for minimal harm to the participants regarding the controversial nature of the questions being asked. To ensure the mitigation of risk various factors were taken into consideration to ensure ethical standards were met and that participants felt as comfortable as possible. To begin, each defence lawyer was required to sign a consent form. This consent form outlined that they had the right to withdrawal from the study at any time. It also indicated that when they were providing examples, as part of their answer to a research question, they should not give any details about a case that may lead to the identification of a client. Further, all participants'

identities were kept confidential. In order to keep the participants' identities confidential a number was assigned to each transcript.

Given that each interview was digitally recorded, the participants were asked to consent to having the interview recorded. If the participant consented, the interview was recorded on a smartphone device. The smartphone was password protected to ensure that the data could not be retrieved from anyone other than the owner of the phone. Following the completion of the interview the recording was transferred from the smartphone to a secure laptop. The laptop was also password protected so that the recordings remained accessible only to the researchers.

Chapter 3: Results

The results that will be discussed below are themes that emerged from the data during analysis. These themes are based on the in-depth analysis of participants' answers to questions 27 and 28 of the interview. The themes were organized in two predominant domains of the trial penalty and the concept of remorse. Elliot and Timulak (2005) recognize that in descriptive exploratory methodology the organization of themes into domains often reflects the structure of the interview questions. In the context of the present study, this was predominantly the case; however, some overarching themes were found to have a connection and relationship to both the trial penalty and the concept of remorse. It is also important to recognize that because of the complexity of both the topic and lawyers' responses, many participants' answers fall into multiple themes and subthemes. At times, the themes that the lawyer's responses fall under may appear to be contradictory. This is because, at times, lawyers were working through their own thoughts in relation to the questions they were asked, thus their answer shifted throughout their response. This further explicates the complexity of both the trial penalty and the concept of remorse. The remainder of this section will focus on discussing these themes. These themes will be discussed by domain, beginning with the themes that became inherent based on question 27 of the interview.

Trial Penalty

A variety of themes emerged that related to the trial penalty. These themes were (1) Not a penalty but something else (2) A trial penalty exists and (3) The trial penalty is justifiable. Each theme and subsequent subthemes will be discussed below.

(1) Not a Penalty but Something Else

Of the sample (N=25), 23 participants explicitly discussed whether or not they believed a trial penalty existed (n=23). In their responses, one of the more predominant themes that emerged was the notion that it was not necessarily a penalty, but rather *something else* (n=13). This was interesting because the participants were not denying that, at times, an accused person could receive a harsher sentence after trial. However, their understanding of why an accused may receive a more severe sentence was explained in a variety of ways. It is also relevant to note that many participants who indicated that a penalty did not exist, but explained the harsher sentence post-trial as *something else*, provided explanations that incorporated more than one factor. These ‘factors’ can be seen as reasons why an accused may receive a harsher sentence after trial. These explanations are discussed below as subthemes:

(A) No Mitigation. An explanation that many lawyers (n=6) gave as to why a client may receive a harsher sentence after trial was that the accused had lost the benefit of mitigation that is inherent in a guilty plea. As one lawyer (P21) stated: “It’s-it isn’t a trial penalty, it uh, it’s a misnomer to call it a trial penalty, its simply that there is an absence of a mitigating factor”. In this response, it is clear that the lawyer does not think that a trial penalty exists, rather they explain that their client no longer has the benefit of mitigation that they would have received had they plead guilty. This understanding of why an accused may receive a harsher sentence is related to the concept of remorse. After explaining that it is not a penalty, but rather a loss of mitigation, the lawyer (P21) indicates that: “it’s the absence of a mitigating factor of a guilty plea, implicit with- because implicit with a guilty plea is remorse”. Therefore, inherent in this conceptualization of a trial penalty the lawyer believes that going to trial does not result in a penalty; rather, the accused loses the benefit of receiving a credit. In this situation, the lawyer indicates that the credit lost is the communication of remorse to the courts.

Similarly, another participant explained that a penalty does not exist, rather once again, the accused is seen as losing the benefit of mitigation after a trial. Further, in their explanation, they also link a guilty plea to remorse. This lawyer (P20) stated:

No, I've never had the trial penalty thing...normally if I go into trial, I tell my client, if you get convicted you're gonna get 18 months to 2 years—you're gonna get 18 months to 24 months, you're gonna get 18 months to 30 months, this is what you're going to get and by going to court and not expressing remorse on a guilty plea, that's what you're gonna get. At that point, the Crown's probably already said that on a plea I want 18 months.

This lawyer is therefore indicating that by going to trial the accused person will get a sentence within a particular range. This range may be higher than the sentence a Crown would be seeking on a plea of guilty because the accused will not have the benefit of mitigation through the expression of remorse.

Although it was clear through participants' answers that an accused loses the benefit of mitigation when going to trial, one lawyer highlighted an important distinction between loss of mitigation and going to trial as aggravating a sentence. In this particular explanation, the participant explains that when an accused goes to trial they could receive a harsher sentence because they lose mitigation; however, they make it clear that going to trial is not judicially seen as an aggravating factor. The lawyer (P4) demonstrated this by stating:

The way it works, and judges will often say it this way, is that it's not an aggravating factor that you went to trial. You don't have the benefit of it being a mitigating factor that you didn't have the trial. So I mean, it's a bit artificial I think. So I guess, what everyone does is you get a discount if you don't have a trial and you don't get a discount or you don't get a penalty if you had a trial...I mean, it's hard to say, I mean [sigh] I guess the best way to put it is, you lose out on the benefit of saying you avoided the trial process.

On the surface, the lawyer is indicating that it is not aggravating to run a trial, but that running a trial will result in the loss of mitigation during sentencing. The fact that the lawyer stated that "it's a bit artificial" is noteworthy. This represents some skepticism regarding how receiving a

harsher sentence post-trial is conceptualized within the justice system. Arguably, a judge would indicate that running a trial is not aggravating, because under the *Charter* an accused has the right to go to trial and therefore should not be penalized for engaging that right.

At the end of the lawyer's statement they did explain that the harsher sentence is a result of the accused losing the benefit of not avoiding going to trial. This lawyer's response differs from that of the previous two participants in the sense that this individual did not attribute the loss of mitigation to be due to the fact that their client did not express remorse through a guilty plea. Rather, they chose to explain the loss of mitigation as due to the fact that their client did not "avoid the trial process". The relevance of 'avoiding the trial process' will become apparent in the following sections.

(B) Aggravating, Mitigating Factors and Sentencing Ranges. Although the previous subtheme addressed a lack of mitigation as a reason why an accused may receive a harsher sentence after trial, this subtheme differs because it examines the relationship that both aggravating and mitigating factors play regarding sentencing. Further, this subtheme addresses sentencing ranges and their relationship with aggravating and mitigating factors. Of the participants who believed a trial penalty did not exist (n=13), a subset (n=3) indicated that sentencing ranges and aggravating and mitigating factors were the reason why clients may receive a harsher sentence post-trial. One lawyer (P2) elucidated this relationship:

...Let's say the range of sentence is anywhere between five to ten years. Now if someone goes to trial, the expectations would be five to ten. Maybe the Crown could easily ask for ten...It's not so much a penalty as much as—I think the way you look at it is, you start at the top end and you take mitigating factors like: a plea of guilty is a sign of remorse, witnesses did not have to testify, so you give that person credit for that. So that's why it's five [years]. Not so much, looking at it, well, there was a tax the person paid because he went to trial. I mean some people talk about it that way and look at it that way. I tend not to look at it that way. There's a range and a-after trial, you can't then turn around and say 'well, why not give the minimum?' And at that point, what's the mitigating factors?

Cause that's what a judge will look at. What's the mitigating factor, what's the aggravating factor, and come down with the appropriate sentence.

This response is important for multiple reasons. First, the lawyer is indicating that the reason they believe an accused may receive a harsher sentence after trial is because there is a lack of mitigation. This is similar to some of the responses from the participants that indicated clients lose the benefit of mitigation inherent on a plea of guilt. However, unlike other participants, this lawyer indicates that various charges carry different sentencing ranges. When an accused pleads guilty there is more incentive for the justice system to hand down a sentence that is at the bottom end of the range. This may occur for numerous reasons, and similar to other lawyers this participant links a guilty plea to remorse, but also indicates that the accused has saved court resources. The saving of money and court time in and of itself is recognized as being a reason why an accused may receive a sentence at the lower end of the range. Further, the lawyer also demonstrates that it is not simply enough to believe that the accused loses the benefit of mitigation; they also indicate that the judge will be taking aggravating factors into consideration.

Another important point to highlight in this participant's conceptualization of the trial penalty is that they clearly indicate that some people choose to look at the situation from the perspective that their client was taxed. This is interesting because their response is demonstrating that there is not a definitive answer regarding the existence of a trial penalty. Rather, there are different ways that one can explain why an accused may receive a harsher sentence post-trial. Often, lawyers who believe a trial penalty does not exist provide numerous and overlapping reasons to justify their position. Because of the complexity of the trial penalty, lawyers' answers often fell into multiple themes which represents the interwoven and complex nature of the criminal justice system.

(C) New Facts Emerge During Trial. Participants reported that running a trial is a gamble because there is no ability to predict the outcome. While lawyers spoke about ensuring that they inform their clients, to the best of their ability, of the various ways that the trial could go, there is always the chance that the case becomes worse at trial. This perspective was cited by participants (n=5) as a reason why a sentence may be harsher after a trial. This could happen for various reasons. For example, lawyers explained that sometimes the facts do not seem bad on paper, but when the case is taken to trial a human aspect occurs. As one lawyer (P10) explained: “Sometimes you get penalized by trial because the trial facts are worse than they were in the ah- or it comes out the complainant’s very sympathetic and you, your client is just a jerk”. This quotation demonstrates that during a trial both the accused and the complainant may be present in court, and this means that the accused will be placed under scrutiny. If the accused appears to be “a jerk” as this lawyer stated, then there is a higher chance that they may receive a harsher sentence, especially if the victim [complainant] is recognized to be genuine.

Similarly, the types of charges that a client is facing can also impact the judge’s view of a client and victim. Some cases, such as sexual assault cases, involve a very personal aspect. As one participant (P10) stated: “I’m [the judge] going to sentence the client based on what I saw. If they see the complainant, you know, what she had to go through to testify in a vicious sexual assault case—that’s going to impact the sentence”. Furthermore, another lawyer (P6) explained a very similar situation:

...The judge had the opportunity over two days to watch the complainant testify. And I think there is something to be said to watching a live person—especially when you accept their evidence and you believe them about abuse or something like that—I think that, whether the judge intends to or not, there’s something to be said about that that is aggravating. That you know maybe it was hard for a judge to say “well I’m giving you time served after watching the girl testify for two days about all the things you did to her”.

In both situations, the lawyers are indicating that during a trial, especially trials that involve sexual deviance or abuse, the case may become a lot more personal than it would have appeared on paper. Bringing a case to trial where a victim has to testify about facts that may cause re-victimization adds another complexity to the situation. Although a judge is an impartial court actor, in circumstances of this nature, lawyers indicated that because judges are humans they will inevitably consider the harm caused to the victim during a trial.

During the process of analysis, it became evident that lawyers often could not provide definitive answers as to whether or not a trial penalty existed. Although some lawyers would begin their answer by either stating that a trial penalty existed or did not exist, they would often either contradict their earlier position or indicate that they, in fact did not know whether or not it existed. For example, one participant originally said a trial penalty did not exist, but throughout their answer changed their position to indicate that they did not know whether it existed. This was a common occurrence, and often in these situations the lawyer would provide arguments for both sides of the debate. In one case a participant (P21) indicated that loss of mitigation was the cause of harsher sentences after trial. However, by the end of their explanation they stated:

I don't know that there's a trial penalty per se, but it is very very easy to see how things can be made much worse a-after trial, like during a trial and therefore the consequences after trial being much more dramatic

What was also very interesting about this participant's conceptualization of a trial penalty was the way they ensured that their client's case would not sound worse at trial than it did on paper.

The lawyer (P21) stated:

I try to get an agreed statement of facts from crowns, because I want to bleed as much life out of it as possible. I don't want them to show the video. I don't want the 9-1-1 tape of the person screaming as they're being smashed. I'm happy with a synopsis 'he hit the complainant 6 times'. Okay, we don't need to hear the sounds of it, it's like you want to

make it less sensational, you want to de-sensationalize it as much as possible and sometimes trials by their nature are very sensational. And judges are human beings and they're going to look at what happened, look at what this rotten person did to this poor person and they're going to want to lay the lumber on more than if it had been a nicely sanitized, and agreed statement of fact, without audio, without video, without people crying.

In their answer the participant is indicating that there are various legal methods that a lawyer can employ to ensure that there are no 'surprises' at trial. Essentially, taking measures to reduce the 'emotional content' of a trial minimizes the chances that a judge is going to sympathize with a complainant and therefore sentence a client more harshly at sentencing. Therefore, while it was clear that one reason why an accused may receive a harsher sentence at sentencing is due to the way a trial plays out, there are techniques that a lawyer can use to try to reduce the likelihood of this. However, it was also clear that sometimes it is unavoidable.

In some cases, even when these lawyers did indicate that it was not a trial penalty, they would sometimes make reference to an 'entertainment tax'. Again, they did not necessarily explain that going to trial resulted in their client being penalized; instead, they explained the entertainment tax as occurring on the basis of the facts that emerged during the trial. This explanation is different than indicating that a trial penalty does exist because these participants are not saying that the mere fact their client went to trial resulted in a tax; rather, they are explaining that various elements that arise during the trial resulted in their client receiving a harsher sentence. One of the participants (P10) who indicated that "sometimes your client is just a jerk" indicated that: "Um there are reasons why the, I joke, I say look you want to go to trial sometimes you pay the entertainment tax". At face value it seems like this lawyer is indicating that a trial penalty does exist. But if one delves into the latent content of this statement, in conjunction with the lawyer's explanation as to why their client may get a higher sentence, they

are not explicitly stating that a trial always results in a penalty. Instead, the reason a client would get ‘taxed’ would be based on external factors (such as the client not appearing sympathetic) that arise during the trial process.

In short, it is evident that each subtheme is closely related to one another. It is also clear that the majority of the lawyers who indicated that a harsher sentence post-trial was due to ‘something else’ had explanations that changed throughout their answers, or indicated that the existence of a trial penalty was a matter of opinion.

(D) Unclear if Penalty, or Two Sides of the Same Coin. The final subtheme categorized under the theme of ‘not a penalty, but something else’, was that some lawyers (n=3) simply could not decide. It is important to note, as mentioned earlier, that many lawyers’ answers shifted between whether or not a penalty existed. The inability to choose in those circumstances, sometimes led lawyers to indicate that penalty and benefit are ‘two sides of the same coin’. Essentially, the penalty does not necessarily exist because its existence is dependent on the loss of a benefit, and there is no way to choose definitively which one it is. As one lawyer (P10) stated:

I think benefit and penalty are just two sides of the same coin. Whether you characterize it as a case is normally worth X, but I will only give you Y if you plead guilty, but if you go to trial you’re getting X...I think it’s just two sides of the same coin.

This characterization demonstrates that the existence of a trial penalty is dependent on how someone views the justice system. This lawyer recognizes that the existence of a trial penalty is based on perception and therefore, they choose to explain the situation by indicating that penalty and benefit are just two sides of the same coin.

The notion that the trial penalty is a matter of perspective is further demonstrated by another participant (P9). In their response to question 27, they stated that:

I guess that's where-that's where it becomes a matter in respect to, is it a penalty or is it a discount? If it's a discount if you plead early, or is it a penalty if you go to trial? It's a matter of perspective.

This lawyer's response again demonstrates the inability to definitively argue whether or not a harsher sentence post-trial is a penalty or loss of a benefit. While this participant does not characterize it as two sides of the same coin, they do indicate that there is no clear distinction between the two because there are valid arguments for both sides of the debate.

(2) A Trial Penalty Exists

There were some lawyers (n=11) who explained that a trial penalty did exist. What is interesting about this theme is that some of the participants who fall under this category also provided reasons as to why a penalty did not exist. In this way, these lawyers (P24, P22, P15, P6) can be recognized as working through their own understanding of the trial penalty in their responses to question 27. Thus, their responses exist on both sides of the argument regarding whether or not a penalty exists, and thus, their explanations are presented in both the present and previous theme. The lawyers who believed a trial penalty did exist could be divided into three groups. The first group believed a trial penalty existed because they had experienced it (n=2). These participants gave examples of cases they had taken to trial that resulted in their client being 'taxed'. The second group of lawyers reported they believed a trial penalty existed in Ontario Superior Court (n=5). A third group of lawyers indicated that a trial penalty did exist, but they did not provide examples (n=4). Instead they discussed how a lawyer could avoid the penalty. These subthemes will be discussed in greater depth below.

(A) A Trial Penalty Exists, Because I've Experienced It. A very small subset of lawyers (n=2) reported that a trial penalty existed within Ontario criminal courts. These lawyers provided examples of cases in which they believe that their client got 'a little something extra' for taking

their case to trial. While this viewpoint was not a dominant voice within the sample, it was a strong one. One particular lawyer (P11) explicitly stated “Um, the uh, the trial penalty, yeah it does exist. If you play you pay expression has application”. In saying this, the lawyer truly believes that if a client takes a case to trial and is convicted, they could be sentenced more severely. When asked to elaborate through an example of a case where a client received a trial penalty, the lawyer (P11) somberly explained:

I’ve seen it happen, in fact, and how I can support that is I had a [client]...[I] ran a trial and he was charged with a series of offences...if he had pleaded guilty uh he would have picked up 12 months I think was the penalty. The judge in the end gave him two less a day on that, and he picked up another 12 on something else...I know what he would’ve got had he pleaded guilty—he didn’t [plead guilty] we ran a trial and avoided convictions on the most serious offences he faced but uh, he ended up with three years in the penitentiary.

This participant is indicating that because they ran a trial their client received a much harsher sentence than what was being offered on a plea agreement. This lawyer’s example is important because they specifically indicate that they knew what the offer on the table was and what the charges were “worth”, and the sentence their client received after trial was significantly higher. Another important caveat to this specific case was that the lawyer (P11) indicated: “...we went over it [the plea deal] in great lengths...his account of what had taken place left me with no option, we had to run a trial”. Even though this lawyer believes a trial penalty exists, they still recognize the importance of taking triable cases to trial. The fact that he perceived his client to be given a good offer, yet resulted in a much harsher sentence clearly perturbed the participant.

Another lawyer indicated that they had experienced the trial penalty. Unlike the participants who indicated that they believed a trial penalty always or often exists, this lawyer saw the existence of a trial penalty occurring in only some cases. Although they believed the trial

penalty was case dependent, they described a time where their client received a harsher sentence after trial. This lawyer (P24) stated:

I'm working on a case right now, where a Crown offered a discharge for a plea to an assault and which is not—its not—it's a provision that doesn't require a conviction—and I took it to trial, the client was willing to plead to one count, which he was guilty of, the assault he wasn't willing to plead to...we took it to trial on the assault charges, the assault charges which was the more serious charges. Umm, and then the judge uh gave him a higher sentence after for the lesser charge, I think that was in part because he never said it, but I think it was in part because the judge umm felt like he kind of did it, but had to give him the reasonable doubt on the assault charges-so he ended up giving him a higher sentence on what he did plead guilty to.

This example has multiple aspects to it. The lawyer indicated that their client agreed to plead to one count that they were guilty of but was not willing to plead to the assault charge, and because the client was not willing to plead, the lawyer had to take the case to trial. At trial, he beat the assault charges, but at sentencing the judge ended up giving the client a higher sentence on the charge he had plead guilty to. Because the client received a higher sentence on the count that he plead guilty too, even though he was not convicted on the assault charge, the lawyer believed that this constituted a trial penalty.

(B) A Trial Penalty Exists in Superior Court. Some participants (n=5) indicated that a trial penalty did exist, but that they only saw it in Superior Court. Cases that are heard at the Superior Court level were recognized to be more serious, and as a result, they were recognized as taking up more court time and valuable court resources. For these reasons, lawyers believed that losing a case at this level would result in an accused receiving a trial penalty. One lawyer (P22) explained:

Umm and I would say though that I have definitely heard of, yes sure—once certain cases make their way up, for example you have preliminary hearing and then you have a trial and then you're sentenced in Superior Court that there is actually a trial penalty.

What is interesting about this lawyer is that they did not indicate that a penalty would occur in lower level courts, they instead indicated that a more lenient sentence on a guilty plea was a result of mitigation. However, when they discussed Superior Court, they indicated that it was known within members of the bar that sentences were harsher post-trial. Other lawyers had similar sentiments when asked whether or not they believed a trial penalty existed.

One lawyer expressed that in Superior Court the charges are more severe and therefore so are the penalties. When asked about the trial penalty, this participant (P3) stated:

I think in Superior Court there is a bit of a tax for going to trial...In high—in higher court where there's more serious charges I'd say that—where they think in higher numbers—I'd say there is a bit of a tax for taking things to trial.

This lawyer expressed that the connection between the trial penalty and Superior Court was based on 'numbers'; essentially, when the charges become more severe so does the tax.

However, what is implicitly indicated in this construction is that the more severe the charges, the more resources are used during a trial. This sentiment is expressed when the lawyer (P3) indicated that by going to trial "...you're making the court go through the motions". In other words, going to trial uses valuable court time and resources. At sentencing the court may 'tax' the accused through sentencing them to a harsher sanction because of the wasted time and resources.

Similarly, another lawyer discussed the higher penalties that Superior Court has begun imposing. This lawyer (P15) stated:

...the Superior Court has become much more, much less forgiving as it used to be. You pay a certain price now, umm it used to be that I might expect a better offer after a preliminary hearing in Superior Court, I'm finding its going in the other direction. I think its uh a court delay tax, I think they feel that their system is too busy...

In discussing that there is a court delay, the lawyer goes on to express that because the courts are so overburdened they have the choice to either offer better deals before trial, or to give penalties after trial in order to reduce the caseload. This participant believes that the courts are giving harsher penalties after trial. Thus, a trial penalty is constructed as existing in this context. In a similar explanation, another participant highlighted the connection between court resources and an entertainment tax in Superior Court. This lawyer (P6) explained:

...in Superior Court they really urge you to resolve...if a case can resolve, so they know- they know there's going to be a portion of cases up here that are not going to resolve, but anything else, if there's a possibility of a resolution they are going to encourage it...they emphasize the weight put on saving court resources and court times.

Again, because of the types of cases heard at the Superior Court level, there is a greater amount of court resources and time taken up by running a trial. This lawyer is explaining that the court is emphasizing the importance of resolutions, and that the time and money the accused saved the court will be considered favourably at sentencing. Conversely, the accused will receive a penalty, in the form of a harsh sentence when running a trial for a case that could have been resolved.

(C)The Trial Penalty can be Avoided. The final group of lawyers (n=4) who indicated a trial penalty existed did so by explaining the ways one could *avoid* the tax. This was interesting because these participants did not give explicit examples of times that they believed their client had received a penalty; instead their discussion focused on the ways that a penalty could be avoided. Reputation and organization were cited as the ways in which a lawyer could avoid the tax. Further, a small subset of these participants (n=2) expressed that the trial penalty was actually justifiable. This subcategory is an extension of the present subtheme because it is based on the premise that a penalty exists and can be avoided.

Reputation. Participants expressed the importance of their reputation. Although none of the lawyers in the present study indicated that they did this, many participants spoke about lawyers

who would take cases to trial to make money. Because these lawyers were not recognized as having their clients' interests at heart, the cases they would take to trial were not always viewed as ones that had triable issues. Lawyers who engaged in this type of behaviour developed a negative reputation and would be more susceptible to having a client 'taxed' after trial.

Concurrently, many participants discussed that they had worked towards cultivating a positive reputation with Crowns and judges. Because of their professional relationships, these lawyers indicated that Crowns and judges trusted them to only take cases to trial for valid reasons. One lawyer spoke about the importance of not taking a case to trial if there is nothing to defend. This lawyer (P15) stated:

...if there is really nothing to defend, you might not want to do that because if your judge is sitting there for three weeks and there is nothing, you don't have anything to say and there is no real defence, I mean its not our-you may have lost, you can define it as losing the inducement, but also potentially anger a judge.

Therefore, when taking a case to trial it is important that the lawyer is not seen as wasting the court's time, because that could result in an angry judge who might be more willing to tax a client at sentencing. Further, if this is something a lawyer often does then their reputation will precede them every time they do take a case to trial.

Organization. Various lawyers indicated that a key to avoiding the trial penalty is to be organized. If the lawyer looks like they have taken time to prepare for the case there is less likelihood that the trial is going to turn into a disaster. As one lawyer (P7) phrased it:

If I have, you know, an angle and I present it in an organized and coherent fashion and there's substance to it, I'm not going to be punished, my client hopefully is not going to be punished that much more for presenting that. If you're going in with absolutely no game plan, there's going to be what we call an entertainment tax.

This incorporates the notion that if a lawyer takes a case to trial and presents their arguments in a way that is disorganized and lacks substance, there is a higher chance that their client will receive a tax after trial. For example, a client would receive a trial penalty if the case turned into a ‘disaster’. However, an overarching understanding existed that the existence of a tax should never deter lawyers from taking a case to trial because they could avoid the tax through the presentation of coherent and organized arguments.

The final way that participants indicated that the trial penalty could be avoided was through ensuring that the cases they took to trial had triable issues. Taking triable cases to trial ties into the subtheme of organization because if a case does not have triable issues there is no way to present an argument in an organized fashion. This was an interesting, but not necessarily surprising topic that emerged during coding. For obvious reasons, lawyers must ethically assist in taking cases to trial if there are triable issues. This was a sentiment that many participants expressed. However, what is interesting about this finding is that many of the lawyers who discussed that triable issues must be taken to trial believed that a trial penalty did exist. Although the existence of a trial penalty was recognized, it was not seen as a reason not to take cases to trial. Instead, in these lawyer’s constructions of the administration of justice, the trial penalty almost began to act as a marker for when a case should be taken to trial. Because the tax could be *avoided*, only cases that needed to be tried should be taken to trial. One lawyer spoke about the need to take cases to trial, their comments regarding the trial penalty can be recognized as encompassing both the present subtheme, and subtheme of organization. This participant (P7) stated:

If you’re going in with absolutely no game plan, there’s going to be what we call and entertainment tax...I mean if I’m reading the sentencing case law I’m looking at, you know saying well here’s, that’s what makes this case different than mine. Well we had

triable issues, they didn't have triable issues, you're going to be able to get down the ladder, back to a closer sentence, closer to if you had of plead.

In this construction of a trial penalty, the lawyer indicates that there is a variety of legal arguments one could make to try to ensure their client avoids the tax. In this case, the participant indicates that if their client is convicted after trial, they try to discuss sentencing case law to differentiate their case by demonstrating how the case was distinguishable. In doing so, they are trying to get their client a sentence that would be on the lower end of the sentencing range, closer to what they would have received had they plead guilty.

(D)The Trial Penalty is Justifiable. This was a particularly surprising sentiment that arose through data analysis. Although this characterization of the trial penalty was explicitly expressed by only a small subset of participants (n=2) it is still notable to discuss. Because of the overburdened court system, participants explained that cases should only be taken to trial when they have to be. If a lawyer is seen as wasting court resources then there should be a mechanism in place to penalize the client for the wasted time and money. For example, one participant (P14) explained:

...depending on the factors of a trial, they should never serve to aggravate a sentence, because that's a right and it's a matter of perception. I mean if it's an out and out uh disaster where uh a person is charged with a break and enter and he's caught in someone's home and it's an overwhelming case, you will get a trial penalty and he should because he's wasting everyone's time...there are some cases that need to be litigated whether you win or lose and there's some cases that need to be resolved. When evidence is overwhelming and you go to trial it doesn't serve anyone well.

In this explanation, it is clear that an accused should be taxed when an unnecessary case is taken to trial. However, what is also important about this explanation is that the lawyer is indicating that sometimes cases need to be taken to trial, regardless of the outcome. This explanation also

relates to some of the participants' responses that were discussed under the subtheme that addressed that the trial penalty is avoidable. Most notable is the notion that triable cases have to be taken to trial regardless of the possible existence of a tax.

Another lawyer (P8) gave an example of a case where their client had been charged with robbery. This lawyer indicated that during a judicial pretrial the judge made it very clear that their client should not elect to have a jury trial, but rather should elect to have a judge alone. The participant explained that if their client did not do this then they would receive a more severe penalty after a trial. When asked to further explain the lawyer (P8) stated:

...I would say it has to do with how much, in terms of resources the system needs to process an accused like that. So a jury trial is obviously taking a lot more time and a judge trial taking less time. But if a judge has to go through a trial for a lengthier time with a jury and the jury finds him guilty then that person is going to go to jail for a longer period of time.

Although this lawyer is not necessarily stating that the existence of a trial penalty is justifiable, their example does elucidate the fact that court resources are valuable and if they are seen as wasted, an accused can be taxed.

In sum, many participants believed there was a trial penalty. However, the trial penalty was not seen as a hindrance for many of the lawyers because they demonstrated that through reputation, organization and only taking cases to trial that had triable issues, the tax could be avoided. Further, inherent in all explanations as to why a trial penalty existed was the understanding that a judge would never justify a harsher sentence post-trial as a client receiving a tax. However, even though lawyers discussed this, many still believed that the harsher sentence after trial was because of wasted court resources, and therefore was viewed as a tax.

Remorse

The second overarching category that emerged within data analysis were themes that related to remorse. These themes included: (1) No connection to remorse for clients (2) Remorse is a hollow concept (3) Remorse should be thought of along a continuum (4) Triable issues. These themes will be discussed below.

(1) No Connection to Remorse for Clients

Many lawyers (n=11), when asked about the relationship between pleas of guilt and the expression of remorse, indicated that remorse had little relationship with guilty pleas. Instead, the reason that accused persons should, and do, receive a discounted sentence when pleading guilty had more to do with saving court time and resources. The explanations that lawyers gave fell into three categories: (A) Guilty pleas are worth a credit regardless of remorse (B) Legal arguments can be made beyond remorse (C) Guilty pleas are linked with an acceptance of responsibility, rather than remorse. These subthemes will be discussed and expanded on below.

(A) Guilty Pleas are Worth a Credit Regardless of Remorse. Some lawyers (n=4) expressed little concern over whether or not their clients pleaded guilty because they were remorseful. These participants believed that the importance of an accused receiving a credit for pleading guilty went beyond the expression of remorse. For these lawyers, the fact that their client is giving up their right to go to trial means that they deserve to have a reduced sentence. Furthermore, in giving up their right to trial, the accused is simultaneously saving court time and resources.

Another important factor that lawyers expressed was when a client pleads guilty and witnesses do not have to come to court, and victims do not have to testify. This reduces the chance for a victim to be re-traumatized through the experience of testifying at court. As one

lawyer (P6) stated: "...forget the remorse factor, but just the sparing of witnesses and the court's time is huge". Evidently, this lawyer expressed the importance of realizing that a guilty plea has value beyond remorse. The fact that an accused is not forcing witnesses to come testify and is saving court resources means that they should receive a credit. Another participant (P19) expressed the relevance of a guilty plea beyond remorse, when they stated:

...an early guilty plea comes with a number of benefits to the court they save on a number of resources, uhh it saves the complainant, if there is one in the matter, from testifying and also it demonstrates remorse.

While this lawyer is still explaining that a plea of guilty demonstrates remorse, they are also indicating the benefits of a plea beyond remorse. They recognize its importance by explaining that court resources are saved and no one has to be brought to court to testify.

Given that a guilty plea benefits the court system in many ways, accused persons should receive every benefit for giving up their right to trial. One lawyer (P8) stated: "...if a person does want to plead guilty they should be given every benefit of the system. Sometimes they're not given enough benefit I have to say". In stating this, the lawyer expressed the importance of a guilty plea without linking a guilty plea to remorse. This sentiment was also expressed by another participant (P7) who indicated: "...what are you giving the client for giving up his right to trial and it has to be substantial...there has to be incentive to plead". Again, this explanation goes beyond the expression of remorse. Instead, the fact that the accused is giving up their right to trial is enough to be worthy of a credit. This particular lawyer is arguing that the benefit has to be substantial enough in order for any incentive for their client to plead.

(B) Legal Arguments can be made Beyond Remorse. Similar to the last subtheme, some lawyers (n=5) believed that there were many arguments that could be made as to why their client should receive a more lenient sentence on a plea. These arguments went beyond the typical

notion that a guilty plea expresses remorse. Some lawyers discussed how they rarely, if ever, made the argument in court that their client was pleading guilty and therefore was remorseful. More often, the argument focused on saving court time and resources. For example, one participant (P7) stated: “I’d make the argument more that, look your Honour he’s pleading guilty, he’s saving the court’s time, resources...I’m not clogging up a court for two weeks”.

Similarly, another participant (P25), when asked about remorse and guilty pleas, indicated:

...you have to recognize umm that someone is just not for the hell of it taking their chance at trial, even if they know that they don’t have the sense just to do it right, cause some people do and waste the court’s resources and I think it’s the only way umm to have a functional justice system because if there is no uh kind of credit given to people pleading guilty instead of just going to trial and then everybody goes to trial and the system collapses.

In this explanation, the onus is, again, not placed on the connection between a guilty plea and remorse, but rather the fact that their client is not wasting court time and resources. Furthermore, this participant demonstrates the necessity of having credits for guilty pleas because if there no incentive existed to plead guilty, the majority of people would take their case to trial. Similarly, another participant expressed the idea of recognizing a credit for a guilty plea rather than a guilty plea representing a sign of remorse. This lawyer (P11) stated:

I think we can move away from the concept of remorse and go to credits for a guilty plea, there is reason for that...whether a conviction is a certainty or not, um it is still worthy of credit, never mind remorse, just worthy of a credit. The um, they set up for trial and how uh that on the day of somebody is not going to show, or not deliver that is a possibility. A guilty plea denies the accused of that, and the system is given a certain conviction and um, as opposed to a conviction that would in all probability occur, but not certainly.

The fact that an accused is giving up their right to trial denies the accused the possibility that an unforeseen circumstance could lead them to an acquittal. Given this factor, an accused should

receive a credit for pleading guilty. This further demonstrates the understanding that various participants believed that a guilty plea was worthy of a credit regardless of remorse.

(C) Guilty Pleas are Linked to an Acceptance of Responsibility, Rather than Remorse.

Some participants (n=2) expressed the understanding that guilty pleas are recognized as an accused taking responsibility for their actions, rather than a sign of remorse. Although it is arguable that the acceptance of responsibility is closely linked to expressing remorse, sometimes lawyers saw acceptance and remorse as distinct entities. For example, one lawyer (P25) stated: “I would not say that [pleading guilty] is an automatic sign of remorse, but rather a sign of taking responsibility and I think...there’s an important difference between the two”. This particular participant explained that there had been times where they had indicated that their client was remorseful, but explained that in those situations the client’s ‘remorsefulness’ was not demonstrated through a plea of guilt. Instead, pleading guilty was recognized as a sign of an acceptance of responsibility, rather than a sign of remorsefulness. Another participant (P24) indicated:

Pleading guilty is an acceptance of responsibility and almost always referred to in cases as just sort of a throw away, like he’s plead guilty, he’s accepted responsibility, umm so to that extent I mean, it’s-it’s probably not synonymous with remorse.

Again, it becomes clear that remorse is not directly associated with pleading guilty, instead pleading guilty is recognized as an acceptance of responsibility.

(2) Remorse is a Hollow Concept

Some lawyers (n=4) reported explicitly that, in terms of their clients, remorse is a hollow concept. Although they may make the argument in court that their client is remorseful, they do not believe that the majority of their clients are remorseful, or that remorse is even a factor in their decision to plead. As one participant (P15) phrased it: “I mean, you’re sorry you’re in this

situation? Or are you sorry that you did something bad, like what does it mean to be sorry?"

Here, it is clear that their client could be sorry, but that does not necessarily mean that they are sorry for what they have done; rather, it is more likely that they are sorry that they were caught and are now dealing with the repercussions.

Some lawyers believed that for a lot of their clients, remorse would not be considered a factor in their decision to plead guilty because there are too many other factors to consider. For instance, spending money on a lawyer is expensive and the cost only increases if their case is going to trial. Unfortunately, many of the lawyers (n=11) interviewed for the present study represented clients that had a low socioeconomic status and could not afford a lawyer. Furthermore, some lawyers (n=8) interviewed discussed that they did a lot of legal aid work and that the regulations around legal aid made it difficult for clients to get the best representation possible. Because of the disadvantaged economic and social position of a lot of clients, financial factors play a large role in the decision to plead guilty. One lawyer (P8) stated:

...it is very expensive and it has to be an opportunity cost. If I'm going to trial it's going to cost me \$10 000 if I don't go to trial it's going to cost me \$1500...I may want to minimize my cost and minimize even my end sentence...

In sum, taking a case to trial is like rolling dice: the outcome could be predicted but it is never for certain. When a client does not have the financial means to risk the chance that they will be convicted, pleading guilty becomes an enticing option. In some situations, accused persons may decide to plead guilty because they are incarcerated pretrial. As one lawyer (P15) explained:

I don't think anybody pleads guilty because they feel badly for what they've done. They plead guilty because it's their best option...and in some cases a guilty plea is quite coerced. They're being offered a get out of jail for their guilty plea.

When an individual has been denied bail, and will be released from custody on a guilty plea, it is hard to believe that that person is showing any form of remorse. Furthermore, as this lawyer indicated, it is hard to even believe that the accused had a choice; being held in custody is an onerous condition and having the opportunity to get out of jail, even at the expense of a criminal record, becomes strongly influential.

Another participant explained that sometimes, accused persons consider a guilty plea because they know they are going to get a lower sentence. In these circumstances, it does not necessarily have much to do with the fact that an accused is remorseful. For example, the lawyers (P5) stated: “I think that the reality is that most people are just doing the math and know that, well, okay, and are incentivized to plead guilty by virtue of a lesser sentence”. In this characterization, the lawyer does not believe that the majority of accused persons are remorseful. Instead, the decision to plead guilty becomes an instrumental and mathematical calculation where the accused determines what avenue will provide the least onerous sentence. In sum, the lawyers who recognized remorse to be an empty concept explained that accused persons often make the decision to plead guilty in the context of their own circumstances.

(3) Remorse Should be Thought of Being Along a Continuum

In their responses to question 28, various participants (n=6) expressed that a guilty plea as a sign of remorse was fair when the expression was genuine, with some expressions being more genuine than others. In this way, remorse was viewed as existing on a continuum. For example, when asked about pleading guilty as a sign of remorse, one lawyer (P11) responded:

Well it is and it is not. It is where the accused um could reasonably expect a successful challenge to the Crown’s case, or could be stated as whether there is a real question as to if the Crown can prove guilt and the accused says, ‘alright I did it’. That’s a more genuine expression of remorse as to when his hand is firmly in the cookie jar. And the Crown has a case that he describes as a slam dunk, and the guy says, ‘alright I did it’ and

well, I know you did and so do the other 15 people who were standing around watching you do it.

In this example, the lawyer clearly explains that remorse is conceptualized as being on a continuum. At one end, the accused is expressing a more genuine sense of remorse when they plead guilty, even though there was a reasonable chance they could beat the case. Conversely, the accused who pleads guilty because the case against them is overwhelming is on the other end of the continuum, because entering a guilty plea could be recognized as a calculated decision. Similarly, another lawyer (P7) stated: “um you know are they pleading guilty because they’re truly remorseful or are they pleading guilty because after trial they’re going to get whacked?” This lawyer goes on to explain that often times one does not know the true reason why an accused is deciding to plead guilty. However, if they did choose to plead because they are going to get ‘whacked’ after trial, their guilty plea is not a genuine expression of remorse.

Other participants also expressed that their clients’ expressions of remorse could be viewed as existing somewhere between the two extreme poles of the continuum, where some accused plead because they do feel somewhat remorseful but also consider their own benefit. When discussing that by pleading an accused is saying that they are ‘sorry’, one lawyer (P10) stated: “sure, you can be sorry for what happened. But at the same time uh I can be sorry that I had one too many beers and I drove down the road, but I’m going to plead”. In this context, ‘sorry’ is not necessarily simultaneous with remorse. As the participant also discussed, sometimes an accused is sorry, but sometimes the deal being offered is too good and that impacts their decision to plead. Further, one participant indicated that there are times when it is clear what end of the spectrum an accused person falls under. This was indicated when the lawyer (P14) stated:

Okay, uh in a case of a husband and wife, it's an emotional situation that got them there. And it's important for remorse to be considered as a dynamic, especially if they're going to resume their relationship. In the case of a drug addict, who is committing crime to um to feed their addiction, remorse may be suspect, it may be genuine, because by the time they enter their plea they're sober, they're not stoned anymore and I think it's important that the community knows that that person has some genuine goodness about them and the way to express that is through remorse because sometimes we see people who will show nothing. They'll enter a guilty plea but they will show nothing but contempt through the entire process and you can see distinction between the two.

This example clearly illustrates that the way an accused expresses remorse demonstrates whether or not their guilty plea can be taken as an genuine communication of remorse. Another participant (P16) stated:

I've had guilty pleas of people who were truly remorseful, who really wrote letters to the court, wrote letters to the complainant so on and so forth, that you know and um even if it ended up in a withdrawal and a peace bond, they would've still been incredibly remorseful for their actions, even if there hadn't been a guilty plea so to speak...and then I've had you know a more, guilty plea and there was no remorse. Right, it's I'm sorry I got caught and I have to pay the piper.

Similar to the example describing the difference between a client who showed remorse, and one that showed contempt, this lawyer indicated that they have represented clients on both ends of the spectrum. In short, a vast proportion of the lawyers interviewed indicated that they have represented clients on both ends of the spectrum, and that there are clients who are genuinely remorseful. However, there are also many clients who, for a variety of personal factors, are not pleading guilty because they are genuinely remorseful for their actions. Some clients exhibit some remorse but are also considering the benefits of pleading guilty early in the process.

(4) Triable Issues and the Importance of Setting a Trial Date

The fourth theme that emerged was that regardless of remorse, triable issues must be taken to trial. The importance of trials was latently present within many participants' discussions. However, some lawyers directly discussed the importance of taking cases to trial (n=4). This

sentiment was very similar to some of the discussions that surrounded the trial penalty. While the majority of the participants indicated that guilty pleas were mitigating (either because of remorse, or because of the saving of court resources and so forth), many expressed that this does not mean that cases should not be taken to trial. Of course, there were many responses to both questions where lawyers expressed the importance of only litigating *triable* cases in court.

Yet, it was clear that there was an overarching sentiment that expressed the importance of trials and that lawyers who only pleaded out cases, known as “dumptrucks”, did not have a good reputation. When discussing setting trial dates one lawyer discussed dumptrucks. This participant (P15) stated:

That’s what we call them, we call them dumptrucks and everybody knows who they are and there’s three or four of them at each court, and we all know, generally speaking, who they are. Rarely they actually run a trial, most of them don’t even get to trials, most of them aren’t setting trials...

This description indicates the negative reputation associated with lawyers who do not run trials.

Participants indicated a wide variety of reasons as to why a case should be taken to trial. Some of the broader reasons included: issues with evidence that must be defended or there were *Charter* or due process issues. These reasons were self-explanatory and the lawyers did not go into depth in their discussions regarding the necessity to litigate cases that included these factors. Beyond these factors participants discussed mandatory minimum sentences, ethical issues, “witness poker”, and the fact that clients could receive better offers closer to trial, as reasons to support setting trial dates. These reasons will be discussed as subthemes below. Although lawyers did not necessarily always bring up witness poker in their responses to questions 27 or 28, they were asked about it in question 20. In this way, lawyers’ answers to question 20 will be briefly discussed because an important relationship exists between witness poker and taking cases to trial.

(A) Mandatory Minimums. Cases that involve a charge that carried a minimum sentence were brought up by a few lawyers (P5, P6, P16) as cases that should be taken to trial. Lawyers indicated that when a case carries a minimum penalty there is no harm or disincentive in taking it to trial because the outcome is known and for the most part, cannot get worse. Essentially, if convicted after trial the penalty will most likely be the minimum sentence. For example, one lawyer (P6) explained:

If it's a case with a mandatory minimum, like an impaired driving, or possession of a firearm, what difference does it make? It doesn't make a difference. You know what the punishment is gonna be, so you have a trial, the Crown-the judge is going to know that at the end of a trial for possession of a firearm with a person with no record, if they ask for more than the minimum, they [the Crown] are just asking because of the entertainment tax and the judge is not going to go along with that necessarily.

In this explanation, the lawyer is indicating that there is no risk in taking a case to trial that has a minimum penalty attached to it because the outcome is already known. However, the participant is indicating that the Crown can ask for a higher sentence than the minimum; but as the explanation indicates, there is not a high likelihood that a judge would go along with the proposed sentence.

In their discussions around taking cases to trials, some lawyers addressed domestic violence and sexual assault cases specifically. While these cases do not always have a mandatory minimum, lawyers conceptualized these matters in a similar way. Various participants indicated that these types of cases often do not get resolved before trial, and if there is an offer on the table, in general the sentence is not significantly more lenient than what would be received at trial. For example, one lawyer (P5) indicated:

Um sexual offences, you know, say, you know, the issue is straight consent, lack of consent adult. Adult accused, adult victim. Uhh, again, the-the penalty on a plea is probably not going to be a whole lot [lower] than after trial, I mean, sexual offences are

generally treated very uh uh-jail is almost always mandatory, I mean you might get a marginal case, where there then becomes a big incentive to resolve.

This explanation demonstrates that because a period of incarceration is typically the sentence received in a sexual assault case, the risk of going to trial is not high. Given that there is not a significant variation between the sentence received on a plea compared to the sentence received after trial, there is minimal risk by taking the case to trial. Although this would not be a case that carries a mandatory minimum, the sentencing range for this particular offence, in all likelihood, includes a period of incarceration. Therefore cases where the sentence will be very similar on a plea or after trial are generally cases that lawyers indicated should be taken to trial.

(B) Ethically Wrong. When asked about remorse, some lawyers expressed the importance of ensuring that their client is not trying to plead guilty while simultaneously maintaining their innocence. In some situations, lawyers spoke about clients who would indicate that they were either innocent, or would present information that suggests the case has triable issues. In these circumstances, many participants indicated that there were times where they could not assist an accused in a plea deal for ethical reasons. One lawyer (P23) indicated:

I personally will not plead anyone guilty if I think they're providing me this information [that they are innocent]. But if they tell me that I go with them, I say listen, okay what your options are—I can't plead you guilty if you're not—both professionally and personally I will not do it. This is why we have a trial system in place, I want to go to trial, I want to do what I am trained to do.

This demonstrates that regardless of what incentives may exist for a client to plead, there are times where pleading guilty is not an ethical option. Although the lawyer could have ethically advised the client to seek other legal representation, this participant strongly expressed the importance of trials. With regards to triable cases, various lawyers expressed that while the majority of cases resolve by way of guilty plea, the criminal justice system is still adversarial at

times. While pleading guilty spares witnesses, saves court time, court resources and can be conceptualized as an acceptance of responsibility or remorse, lawyers will not jeopardize their practice ethically when there are triable issues.

(C) Better Offers Closer to Trial. An interesting theme that emerged from the data was that accused persons could receive a better offer either closer to their trial date, or on the day of trial. This was a theme that began to emerge in lawyer's responses to question 27 and 28. Although some lawyers (n=10) explicitly indicated in their responses to question 27 that an accused could, for various reasons, receive a harsher sentence after trial, there were other participants who expressed that this had not been their experience. Various participants (P7, P12, P19, P20, P24), explicitly indicated that the difference in the sentence their client would receive after trial was minimal, or their client would do better closer to trial or at trial. This was recognized as another reason for a lawyer to set a trial date, especially if they felt as though a Crown was being unreasonable.

In order to explore this theme further, question 12 of the interview was briefly analyzed to explore whether or not lawyers felt as though their in-custody clients could receive a better offer by waiting. There was important in examining their responses to this question because participants brought up various issues regarding bail. When a client is denied bail, and waiting in custody pre-trial, this can often act as an incentive for an accused to engage in a plea.

Of the total sample of participants (N=25), 18 explicitly answered question 12 during their interview (n=18). When asked whether or not their clients were more willing to accept a plea bargain if they are in custody, and if they thought that their client could have received a better offer if they waited, 88% indicated yes to both questions (n=16). It is notable that two participants did not explicitly state 'yes'; however, both lawyers (P15, P16) expressed that they

always encourage their in-custody clients to set trials because the offer will be better closer to trial. However, participants also discussed that being detained is onerous and that it is hard for a client to want to wait for a trial when they know that they can get out by pleading. Further, some lawyers (n=5) indicated that the Crown has leverage when an accused is in custody; they know that if they offer them a deal there is a greater chance that the accused will take it. One participant (P20) indicated:

I think the guys in custody want, unless they're serving sentences for other matters, guys in custody want to get out as quick as possible, so the fact of the matter is they'll take a plea bargain, even if it may not be in their best interest, to get that incarceration over with.

While some participants (P8, P11, P18) indicated that they did have the odd client who was willing to wait in custody for a trial date, this is not the majority of clients. In most instances, accused persons will jump on the first opportunity to get out of jail, and that decision can have various consequences for the accused. One lawyer (P9) explained the detrimental consequences when they stated:

Um, I have a client who is currently charged with his fourth domestic assault, he's in custody, because he's now-no justice of peace will release him. Um, the other three times he plead guilty to get out of jail fast. And he succeeded, except now he has a record *laughs* and now he has a problem, he's sitting there waiting for trial, and he's probably spent way more time in custody than he would ever get in a sentence but because he now finally understands that there are repercussions to plea bargaining and uh-the problem when you are in custody is you don't really have much bargaining power.

This particular case demonstrates the important relationship between custody and plea bargaining. When an accused is sitting in jail they are more willing to accept a plea, but having the charge on their record will be considered if they are charged again. In this particular case, the lawyer is expressing the irony of the situation by explaining that the accused has spent more time incarcerated than they originally would have if they had been sentenced after trial initially.

Therefore, cases like the one this lawyer described represent the cyclical repercussions of plea

bargaining – the accused pleads guilty and therefore has a record and because of that record they will be denied bail if they are charged again.

Notably, domestic cases were brought up by various lawyers (P7, P9, P21, P24) when asked about bail. Although this only represents 22% of the lawyers who responded to question 12, their discussions are notable. In particular, these participants indicated that domestic cases are often cases where the client may be denied bail and feel very incentivized to plead guilty. As one lawyer (P7) characterized it:

Obviously, people want out of jail if they get an offer. You know um, Suzie, it's a domestic, and Suzie says I hit her, um my wife says I hit her, but I'm not going to wait six months to go to trial. I want out today, I have a job. A lot of domestics are people who are working...so they're losing money and freedom, so why wouldn't I say I did it and get out.

It is important to also recognize that this particular participant explained that they would not be able to ethically assist a client if that client had previously maintained their innocence. However, this quotation explains that beyond a client losing their freedom, pretrial detention has a ripple effect on a client's life. Therefore, the client may feel forced to plead guilty on the basis of the short-term repercussions of being detained (i.e. loss of a job), even though having a criminal record has significant repercussions in the long term.

In every lawyer's response to question 12 it was clear, either explicitly or implicitly, that bail is one of the most important aspects in a case. Clearly, lawyers expressed that when an accused is detained pre-trial, they are more greatly incentivized to plead guilty, even when it is not in their best interest. Because participants realized that accused persons will do whatever it takes to get out of jail, they expressed that it is very important that a client makes bail. One lawyer (P4) explained:

So, that's the frustrating part for me, and I think many lawyers where you see so many angles from which to defend a case, and you can see umm Charter violations by the police or you can see inconsistencies with witness statements that you think would perhaps be great to explore at trial and get your client maybe a great result, but they're just not willing to sit and take that chance if they've been denied bail. So, I'll often say that to my clients when they're at the stage when they're applying their bail hearing, I'll reiterate how important it is to find the best sureties that we can put before the court to make a really, really tight plan because you want to do it right. If you lose your bail hearing, it can really change the approach that the client wants to take.

This explanation demonstrates that when an accused does not make bail they will change the approach that they want to take with the case. This can mean that they may be more likely to plead guilty, even though there are triable issues within their case. Thus, taking the time to ensure that their client will make bail becomes a huge factor.

Some lawyers expressed that they had clients who were chronic recidivists and there was no way that they would ever make bail because of their record. For these clients, pleading guilty to get out of jail faster is not as detrimental, especially when they have a significant number of charges. However, when the client does not have a record or does not have an extensive record, pleading guilty has greater consequences. In sum, many lawyers expressed that the first offer is not always the best offer and that clients can often benefit by setting a trial date (n=16). However, when an accused is denied bail and awaiting trial in custody, there is a greater likelihood that they will engage in a plea deal, even when it is not in their best interest.

Chapter 4: Discussion

Paramount to the workings of justice in Canada is the rights that citizens are afforded within the *Charter*. Plea bargaining has routinely been negatively characterized in relation to the criminal justice system (*Martin Committee Report*; Di Luca, 2005; Cohen & Doob, 1989). Within the context of North America, scholars who problematize and critique the current workings of plea bargaining often cite it as contradicting an individual's right to trial (Chasse, 2009; McCoy, 2005). Yet, to conceptualize plea bargaining as a negative practice that calls into question the meaning of justice disregards the multifaceted benefits that plea resolutions afford the criminal justice system. The *Martin Committee Report* identified that when done properly, plea resolutions benefit the administration of justice, victims and witnesses, as well as the broader community. Furthermore, literature existing on plea bargaining has not been able to specifically indicate that a penalty exists or is a separate entity from the sentence reduction that is often associated with pleading guilty. Although some literature purports its existence, the lack of evidence to support these claims demonstrates that no one knows whether the perceived penalty after trial is different than the benefit of mitigation on a guilty plea.

The results from the present study shed light on the ways criminal defence lawyers within Ontario perceive and construct the trial penalty, the concept of remorse, as well as plea bargaining more broadly. The findings will be discussed in-depth below, and will demonstrate, that from the perspective of lawyers, it is not simply that a trial penalty either 'exists' or 'does not exist'. Rather, their voices point to the deep and complex layers that exist within the practices of plea negotiations, trials and sentencing. There is no simple formula that a lawyer can use to determine how things will turn out at trial. Instead, various factors, such as the nature of the offence, the offender, witnesses, complainant, court time, court resources and the economic and

administrative demands of an overburdened justice system interact together to create a complex dynamic that the lawyer must assess and present to the client. Ultimately running a trial is presented to the client as a gamble; yet, in many instances taking the gamble was constructed as being worth the risk. Furthermore, the findings from the present study are relevant regarding policy, practice and theory. The present study will conclude by discussing these relevancies and identifying future research directions.

The Trial Penalty as a Matter of Perspective

The literature that addresses plea bargaining often centers around whether or not the legal practice should be revised, abolished or left unchanged. Although there is not a significant amount of scholarship that addresses the topic within Canada, and more specifically Ontario, the literature that does exist within North America can be recognized as being divided. Discussing Canada, Chasse (2009) equated plea bargaining to institutionalized coercion, which forces accused persons to negate their fundamental right to trial in order to avoid being penalized after a conviction, regardless of their innocence. In the American context, McCoy (2005) shared a similar view, asserting that a trial penalty existed and that the current organization of plea bargaining should be overhauled. Conversely, in referencing the American context, Young (2013) took the stance that a trial penalty does not exist; rather, harsher sentences after a trial can be equated to sentencing ranges. At the heart of this debate is the understanding that, especially within the Canadian context, no one has been able to provide hard evidence to prove that the trial penalty exists.

Interestingly, the lawyers' constructions of the trial penalty in the present study – including what it means and whether it operates in practice – suggest that the existence of a trial penalty is a matter of perspective.

Legal Explanations for a Harsher Sentence Post-Trial

Lawyers who indicated that a harsher sentence after trial was not a penalty shared Young's (2013) position, when they indicated that a more punitive sentence was a result of sentencing ranges. Given that Canadian law is based on the principle of precedent; the appropriate sentence an accused should receive is determined in relation to existing case law. This case law creates a body of authority that is utilized in determining what an appropriate sentence is for a particular offence. Young (2013) indicated that the mitigating nature of a guilty plea typically merits an accused a sentence on the lower end of the range. Whereas, the sentence may be on the higher end of the range, post-trial because less mitigating factors exist (Young, 2013).

Although sentencing ranges exist, the Supreme Court ruled in *R. v. Lacasse* that the judge still ultimately has the discretionary power to hand down a sentence outside of the range. This means that there are times where a case is unique and that handing down a sentence within a particular range would ultimately be an error in judgment. This was made particularly clear in *R. v. Lacasse* when the court indicated that a sentencing range should not be considered an "average" or a "straightjacket" confining a judge to a particular sentence. This ruling is particularly relevant to the present discussion because it highlights the uniqueness of every criminal case. Further it exemplifies the complex nature of sentencing.

The recent Supreme Court decision in *R. v. Suter* (2018) demonstrated that there are times when a case comes before the courts, where the nature of the offender, offence and circumstances are so unique that there are no similar cases to which it can be compared. When a case like this comes before the courts, the principle of parity diminishes because the nature of the case hinders the ability for a judge to base their sentence on precedent. The case of *R. v. Suter*

also demonstrated how complex the process of sentencing can be. Lawyers' responses within the present study reflected this complexity, in not only sentencing, but also the operation of the criminal justice system more broadly. In this way, literature that merely deduces whether or not a trial penalty exists or does not exist fails to highlight and account for the innate complexity of the criminal process. These arguments also fail to explicitly address the various legal arguments that could be made to explain why the harsher sentence after a trial is not due to a penalty.

Loss of Mitigation. Findings from the present study that identify a harsher sentence post-trial as being linked to a loss of mitigation is in accordance with some of the literature on the topic of plea bargaining. Guilty pleas are recognized as being mitigating at sentencing for numerous reasons. Case law has maintained that a guilty plea, particularly one done at an early stage in the process is a demonstration of remorse, especially when the offender “spontaneously acknowledges their culpability” (*R. v. Arcand*, 2013, para. 293). Beyond remorse, a guilty plea is mitigating because the accused saves court resources and time and spares victims and witnesses from testifying (Cole & Roberts, 2018; Lafontaine & Rondinelli, 2005). In their responses, participants cited all of these as reasons why their client would receive a reduced sentence on a guilty plea.

New Facts Emerge During Trial. An interesting finding that has not been discussed in the existing literature on the trial penalty is the understanding that the harsher sentence an accused received after trial was because the facts were worse at trial. In general, lawyers often used gambling analogies when discussing running a trial. Essentially, running a trial is akin to rolling dice. One may know that they are going to roll a number between one and six; yet, the exact number that will emerge is unknown. In a similar sense, a lawyer may prepare their client for all the probable outcomes that may occur by running a trial; yet, the exact outcome cannot be

predicted. In essence, there is no clear formula that a lawyer can use to determine what will occur during or after a trial.

In some cases, the facts of the case may not appear to be bad on paper, but during a trial the case can take on “a life of its own” (P10, P21). Further, the nature and content of the case may lend itself to be more aggravating in nature. For example, a sexual assault case where the victim is underage is arguably more disturbing than a simple assault case where the victim and the accused got into a minor altercation outside of a bar. Depending on the facts of the case, if the accused is found guilty, it is logical that a judge will most likely hand down a sentence at the top end of the range if a witness had to provide traumatic testimony. This demonstrates the complexity of the criminal justice system and sentencing; especially as it relates to particular offences, the offender, witnesses and the complainant.

In the recent case of *R. v. F.H.L.*, the judge refused to give credit to the accused for their guilty plea for a variety of reasons, one of which being that an underage victim had to testify in a *Gardiner* hearing to determine the facts surrounding sexual assault. Although a *Gardiner* hearing is not the same as a trial, the proceedings are similar in the sense that court resources are used, and, in the case of F.H.L., a young complainant had to provide traumatic testimony. The fact that the accused was not given any credit at sentencing for their guilty plea may speak to the emotional capacity of watching someone provide graphic and disturbing testimony.

Ultimately, lawyers in the present study explained that going to trial, in and of itself, never serves as an aggravating factor; rather, the actual running of a trial may serve to aggravate the circumstances of a case. Therefore, they did not believe that the fact that their client engaged their right to go to trial somehow led their client to be penalized during sentencing. Rather, running a trial reduced the mitigating factors that the judge would consider during sentencing

and thus their client received a sentence that was within the middle to high end of the sentencing range.

However, it is both interesting and important to note that while cases could be worse at trial, they also could have the opposite effect. Sometimes, a case may appear on paper to have various aggravating circumstances, but when the case is taken to trial the facts are proven to be much less aggravating than initially thought. The concept of the trial penalty is refuted in cases where the accused actually does better after trial.

The findings from the present study suggest that explaining the discrepancy between the sentence an accused may receive on a guilty plea compared to post-trial as a ‘trial penalty’ is overly simplistic. The process of sentencing an accused is complex and each offender is unique, and so are the circumstances and facts surrounding the case. This sentiment is one reflected by Witten (2017) who expressed that sentencing is a complex process. In many cases a judge has the discretionary power to apply specific sentencing objectives and aims to each individual case, within the context of precedent (Witten, 2017). However, even in cases where precedent suggests that a certain sentencing range exists for a given offence, it was indicated in *R v. Lacasse* that a judge is not necessarily erring in judgment if they sentence the accused outside of the range.

Given that the present study involved interviews with defence lawyers to examine their constructions of the trial penalty in an in-depth manner, the findings demonstrated the complexity of the issue. Literature that explains the trial penalty (Lafontaine & Rondinelli, 2005), or purports its existence (Chasse, 2009), does so without speaking to the court actors who actually experience the inner-workings of the justice system. Thus, the findings from the present study elucidate that the interrelations of rights, running trials, and sentencing cannot be clearly deduced to either a ‘penalty’ or ‘not a penalty’.

Implications for Accused Persons

The relationship between the results from the present study and the implication for accused persons are interesting because they are both positive and negative. A positive finding from the present study was that lawyers did not construct plea bargaining as a coercive entity that causes accused persons to plead guilty out of fear. The *Martin Committee Report* (1993) explicitly indicated the importance of ensuring that innocent people do not plead guilty, for the sake of societal confidence in the administration of justice. The plea comprehension section (s. 606) within the *Criminal Code* also illustrates the importance in ensuring that innocent people do not plead guilty. Yet, even with these mechanisms in place, there are times where miscarriages of justice do occur. These miscarriages of justice are often cited as reasons for why plea bargaining must either be abolished or significantly reformed, the latter of which both Chasse (2009) and McCoy (2005) call for. Further, Chasse (2009) and McCoy (2005) suggest that the current organization leaves accused persons with little choice other than to plead guilty.

Lawyers within the present study did not construct the accused as being coerced into pleading guilty. They did express that a plea of guilt generally affords the accused a benefit at sentencing, in the form of a sentence reduction. The link between an accused receiving a benefit for pleading guilty has been made by numerous scholars (see Di Luca, 2005; Lafontaine & Rondinelli, 2005). However, the existence of a benefit for pleading guilty was not recognized by participants to be a reason to engage in a plea bargain, unless the benefit was *significant* enough that it would warrant the accused to give up their right to trial.

Although going to trial was constructed by participants as a risk, it was recognized to be a risk that was worth it, especially regarding matters related to an accused person's rights. While it is arguable that an accused person may feel incentivized to plead guilty because of the certainty

in the outcome, the claim that plea bargaining extorts guilty pleas out of accused persons was not a sentiment routinely expressed by lawyers. In the instances that lawyers did construct a guilty plea as coercive, it was in relation to their clients who were held in remand, which can be recognized as a separate problem that will be addressed in greater depth below.

However, the findings from the present study also suggest that some accused person may be more disadvantaged than others by plea bargaining, not because plea bargaining is coercive, but because going to trial is a gamble. Although lawyers in the present study expressed that they always encourage their clients to go to trial when it is warranted, there was an understanding that some clients do not want to take that risk. In this way, the accused person who would be most disadvantaged is the one who has triable issues within their case, but wants to plead guilty to avoid the uncertainty of a trial.

Unlike the concern illustrated by Chasse (2009), where innocent people will plead guilty—these accused persons are in an interesting position because they are factually guilty, but their right to trial is one that should be exercised because of issues within their case (such as, weak evidence or improper evidence collection). These are the accused persons who would be most likely to fall between the cracks because they do not represent a miscarriage of justice in the same way that a case of an innocent person pleading guilty would. Yet, their right to trial is arguably just as important because fundamental to the foundation of justice is that accused persons must be found guilty beyond a reasonable doubt and that due process rights have been properly adhered to.

In these types of cases pleading guilty has serious repercussions. As both the John Howard Society, the Canadian Bar Association and Legal Aid have indicated, a criminal record has numerous lasting implications. The Canadian Bar Association's report (2017) on the

consequences of a criminal record cited child custody and access, DNA databank submissions and immigration consequences as some serious repercussions of having a criminal record. While the known short-term punishment of pleading guilty may be enticing to individuals, the risks are far-reaching.

There is also significant importance of an accused being informed of the various consequences of a guilty plea. Uninformed pleas have resulted in cases where the courts allowed a withdrawal of a guilty plea (see *R. v. Quick* and *R v. Wong*). It is important to note that the lawyers within the present study emphasized the importance of working ethically and adhering to s. 606 of the *Criminal Code*. However, even within an ethical framework an accused who has a triable case can engage in a plea of guilty and suffer the long-term consequences of having a criminal record.

Implications for Disadvantaged Accused Persons. Beyond the consequences of a criminal record, some accused persons may be more disadvantaged than others. Within the present sample, many lawyers (n=8) indicated that they often represented legal aid clients. Even more participants (n=11) indicated that the majority of their clients could be characterized as low SES. This raises concerns about the ability for these individuals to access justice in the same way as a more affluent individual would be able to. Wortley (2003) explained that accessing justice refers to an individual's ability to utilize various legal mechanisms to assist in their criminal justice process. Wortley (2003) indicated that the ability to retain a lawyer, either privately or through legal aid is an example of accessing justice. The lawyers in the present study who indicated that they represented clients with varying degrees of financial security, can be recognized as acting as a gateway for accused persons to access justice.

However, it is not always clear when an accused has truly had ‘access to justice’. Even if an accused person is able to get a lawyer, financial consideration may still play a role in the route that the client wants to take with their case. Running a trial is expensive and the outcome is unknown, because of this, an accused may determine that pleading guilty is a better option for them. Although lawyers in the present study continually expressed the importance of running trials, there was an understanding that this was not a reality for every client.

The Entertainment Tax

Lawyers typically used the term ‘entertainment tax’ or ‘tax’ in reference to the trial penalty. Participants also often explained the trial penalty as a tax for perceived wasted court resources and time. What is particularly interesting about the findings from the present study is that only two lawyers (P11, P24) indicated that a trial penalty existed ‘because they had experienced it’. Contrary to what some scholars, such as McCoy (2005) and Chasse (2009) indicated, participants in the present study did not share the view that the trial penalty was a demonstrable entity within the justice system.

Lawyers who spoke about a trial penalty at the Superior Court level did so with reference to an ‘entertainment tax’. Within their constructions of an entertainment tax in Superior Court, the participants (P3, P13, P15, P18, P22) indicated that the types of cases being tried at the Superior Court level are serious and therefore the amount of resources needed to run a trial becomes more onerous than in lower level courts. Because the stakes are higher at this level losing at trial could result in a client receiving a tax on their sentence.

The existence of a tax was also linked to the understanding that the court system is overburdened with cases. One lawyer (P15), when discussing a trial penalty at the Superior Court level, referred to it as a ‘court delay tax’. Again, this reiterates that the participants in the present

study constructed the tax at the Superior Court as being correlated to court resources.

Concurrently, participants also discussed that at the Superior Court level, there is a lot of encouragement for cases to be resolved without running a trial.

These findings are consistent with literature by Lafontaine and Rondinelli (2005), who, unlike most scholarship on the topic, referred to the trial penalty as an ‘entertainment tax’. This was the terminology utilized by many of the participants, especially those who discussed its existence at the Superior Court level. Lafontaine and Rondinelli (2005) also suggested that an early guilty plea by the accused would negate the tax, because the system would not have to go through the motions and waste resources (Lafontaine & Rondinelli, 2005). In this way, Lafontaine and Rondinelli’s (2005) explanation that an accused could avoid the entertainment tax by saving court resources was reflected in participants’ answers when they spoke about Superior Court. This also demonstrates that the economic and administrative demands of an overburdened justice system have an impact on the weight that is given to plea resolutions.

The Trial Penalty is Avoidable and Justifiable. This was a particularly interesting finding because it is contrary to much of the literature that discusses a trial penalty. Scholarship addressing the trial penalty often paints it as a coercive entity that causes accused persons to plead guilty for fear of being penalized on a conviction after trial (McCoy, 2005). Conversely, some participants (n=2) took the perspective that if a lawyer takes a case to trial and there are no triable issues their client will be taxed, and in fact they should be taxed because they wasted valuable time and resources for no reason.

Although running a trial is not aggravating and an accused has the right to trial, this right should not be engaged when there is no need for a trial to be run. However, there are cases that should be taken to trial because there are issues inherent within the case that need to be tried. In

these instances, even if the accused is found guilty the threat of a tax was not constructed to be of a concern. There are techniques lawyers could employ to reduce the chances of their client receiving a much more punitive sentence than they would have received on a guilty plea.

Reputation and organization was cited as two ways a lawyer could avoid an entertainment tax. Lawyers spoke about their reputation as a professional and the benefits of this in terms of running a trial. Lawyers who were viewed as continuously running unnecessary trials were recognized as being more susceptible to receiving a trial penalty because they continuously waste time and resources. On the same note, lawyers who had a reputation of only taking cases to trial where triable issues existed were less likely to be taxed because their reputation and professional relationships with judges and Crowns preceded them positively.

This is an interesting finding that relates to those discussed by Ericson and Baranek (1982), regarding the professional relationships between court actors. In their study, they found that judges, Crowns, police and lawyers worked together for the benefit of institutional priorities (Ericson & Baranek, 1982). Ericson and Baranek (1982) also found that an accused person's fate was ordered because of these priorities. The findings from the present study suggest that, from the perspective of the participants, Crowns, judges and defence lawyers still work together for institutional priorities, but that these priorities were not conceptualized as undermining the rights of the accused. By this it is meant that institutional goals, such as the administration of justice were constructed as important to the lawyers who spoke about the trial penalty as justifiable and avoidable. However, these goals were never constructed as a reason for their client not to engage their right to trial. The participants demonstrated that there is importance in maintaining a good reputation with Crowns and judges because this will only serve to benefit their clients. Therefore,

the importance of reputation and institutional priorities were not seen as being detrimental to accused persons.

Penalty and Benefit as Two Sides of the Same Coin

In sum, the findings from the present study suggest that according to the lawyers, there is no clear way to distinguish benefit and penalty as separate entities regarding the disparity in the sentence an accused would receive on a guilty plea versus after a trial. While some lawyers did construct the existence of a trial penalty, this cannot be taken as hard evidence to support that it exists. Rather, the findings from the present study reinforce the complex nature of the criminal justice system.

Court Resources and Court Delay

Participants' focus on discussing court delay and court resources also reinforce that the judicial system is overburdened and because of this, a strong relationship exists between credit for a guilty plea and the saving of court time and resources. This is especially important regarding court delay since *R. v. Jordan*. Although the focus on the issue of court delay and court resources is by no means a new discussion, *R. v. Jordan* arguably brought these issues to the forefront once again. Given the Supreme Court set strict guidelines as to what constitutes as a 'reasonable' amount of time for an accused person to be tried, concerns around court delay and the lack of court resources have again become a point of concern. This is especially relevant given that cases can be thrown if they go over the predetermined set of time outlined in *R v. Jordan*.

The issue of court delay and court resources can be recognized as one of the fundamental arguments made as to why plea bargaining is a necessary entity (Di Luca, 2005). Although there have been instances where jurisdictions have successfully banned plea bargaining, such as the

Alaskan example discussed by Di Luca (2005); abolishing the legal practice does not seem reasonable or necessary. The results from the present study support the notion that plea bargaining is an important component of the criminal justice system. Further, participants did typically support the argument that plea bargains are necessary to ensure that the overburdened justice system does not collapse. However, the importance of trials, regardless of court resources, was a continual and recurrent theme by lawyers. It was constructed that court resources and court time should never trump an accused person's right to proceed by way of trial.

Remorse

Lawyers described the relationship between pleading guilty, remorse and mitigation at sentencing. The demonstration of remorse through a guilty plea has been identified as a mitigating factor at sentencing in literature (Lafontaine & Rondinelli, 2005) and case law (for example, *R. v. Arcand*). However, lawyers' responses suggested that the link between mitigation and a credit for a guilty plea goes beyond rewarding an accused's acknowledgement of responsibility or providing an expression of remorse; it is fundamentally tied to saving court resources.

The findings regarding question 28 further demonstrate that there is no simple formula that a lawyer can use to determine how things will turn out at trial. Instead, various factors, such as the nature of the offence, the offender, witnesses, complainant, court time, court resources and the economic and administrative demands of an overburdened justice system interact together to create a complex dynamic that the lawyer must assess and present to the client. Ultimately running a trial is presented to the client as a gamble; yet, in many instances taking the gamble was constructed as being worth the risk.

No Connection to Remorse for Clients

Participants were relatively divided in their responses about the role of remorse within the criminal justice system. However, a dominant voice within the sample indicated that credit for guilty pleas go beyond expressions of remorse. These lawyers explained that the practice is rooted in a utilitarian justification for the reduction in sentence when an accused pleads guilty. In this way, lawyers were not concerned about whether or not their client was remorseful. Rather, their constructions of why an accused should receive mitigation at sentencing related to the fact that their client was giving up their right to trial and was therefore deserving of credit.

Recent literature by Cole and Roberts (2018) discussed numerous Ontario court cases where offenders were awarded credit for a guilty plea, even though the evidence in their case would have resulted in a conviction after trial. This demonstrates that lawyers in the present study recognized that if their client enters a guilty plea, regardless of remorse, their client should receive some mitigation because of the numerous benefits pleading guilty affords the administration of justice. Thus, the credit an accused is entitled to receive on a guilty plea was constructed as having little to do with expressing an apology or being sorry for their actions.

This discussion is particularly relevant and interesting given the ruling in *R. v. F.H.L.* (2018), where the Ontario Court of Appeal upheld that F.H.L. would not receive credit for their guilty plea. The ruling in that case not only contrasted existing case law, but also highlighted the important question of why anyone would want to plead guilty if no benefit existed (Cole & Roberts, 2018). Although the ruling in *R. v. F.H.L.* is somewhat of an outlier, it has a relationship to the participants' discussions of rights and credit for guilty pleas. Essentially, the lawyers within the present theme believed that their clients' right to trial was important and that they would only encourage their client to give that right up if it was to their benefit.

A Utilitarian Basis for Sentence Reductions for Guilty Pleas

In Canada, the *Martin Committee Report* (1993) explained that beyond remorse guilty pleas have a multifaceted benefit to the criminal justice system and warrant mitigation because of these various benefits (i.e. saving of court resources, sparing of witnesses). Although this is reflected in case law, Canada does not have a set guideline for the appropriate credit that an accused should be awarded for entering a guilty plea.

This is not the case in England and Wales. Cole and Roberts (2018) indicated that since 2004, England and Wales have utilized a “guilty plea guideline” (p. 45). This guideline indicates what the appropriate credit is for an accused who enters a guilty plea, dependent on when that guilty plea was entered (Cole & Roberts, 2018). In this way, an accused who enters an early guilty plea would receive a much more substantial sentence reduction than an accused who enters a guilty plea much later in the process or on the day of trial (Cole & Roberts, 2018). Furthermore, the structured nature and utilitarian underpinnings of this type of model of plea reductions does not take into account remorse (Cole & Roberts, 2018).

What is interesting about the results from the present study was that half of the participants indicated that they did not connect a guilty plea to an automatic demonstration of remorse. Instead, these participants believed that guilty pleas were deserving of a credit because of the time, money and resources that a guilty plea saves the court, as well as the sparing of victims and witnesses. These are all recognized as factors that are taken into consideration to determine the sentence reduction an accused should receive in the English model. Although the English model is structured, the rigidity of that structure was not something necessarily reflected in the participants’ construction of the reasons why a guilty plea should merit a reduction at sentencing, beyond remorse. However, the fact that many lawyers believed that there was little

connection to remorse for both the system and their clients suggests that remorse was not conceptualized as being inherent in a guilty plea.

Guilty Pleas as an Acceptance of Responsibility, Rather than Remorse

A small number of participants (n=2) indicated that they did not believe that a guilty plea was linked to remorse; rather, it was seen as an acceptance of responsibility. Although this was a minority view within the present study, it is interesting to briefly discuss. Two participants (P24, P25) characterized an acceptance of responsibility as a different entity than remorse. This is an outlier view with regard to both case law and scholarship on remorse. For example, in *R. v. Arcand*, it was indicated that a guilty plea demonstrates that an accused has accepted responsibility for their actions and in doing so they have also expressed some degree of remorse. This demonstrates that remorse and acceptance of responsibility are characterized as being related. Weisman (2014) also demonstrated in his study that in order for an accused to be recognized as genuinely remorseful by a judge, acceptance of responsibility was a key component.

Given the existing case law and scholarship that directly addressed the link between acceptance of responsibility and remorse it might be the case that these lawyers view remorse and acceptance of responsibility as external, but still related entities. In this way, an accused may acknowledge their responsibility, but not necessarily be remorseful for their actions. Drawing on Weisman's (2014) findings, it is plausible to assume that a client who committed a crime because of their addiction acknowledged responsibility for their actions by pleading guilty. However, they may not be remorseful for their behaviour because, although they may have accepted responsibility, they still do not view themselves as being fully culpable for their actions. The problem in this scenario, as Weisman (2014) indicated, is that if the accused is not viewed

by the judge as fully acknowledging their responsibility, they will not be afforded the same degree of mitigation at sentencing.

Remorse is a Hollow Concept

Some participants (n=4) conceptualized remorse as being essentially meaningless in regard to their client's decisions to plead guilty. Instead, these lawyers indicated that their clients make calculated decisions regarding whether or not to plead guilty. Reasons impacting an accused's decision to plead guilty were recognized as often being related to their financial means. As briefly aforementioned, eight lawyers within the present study indicated they frequently represented legal aid clients, while 11 indicated that their clients were typically low SES. This demonstrated that a lot of lawyers in the present study had clients who were financially constrained, which impacted the way they wanted to proceed with their case. For example, one lawyer (P8) elucidated the significant difference in cost between pleading guilty and going to trial. This suggests a disparity in access to justice based on socioeconomic status.

Wortley (2003) and Reasons et al. (2016) both connected race and financial status as factors which may hinder an accused's ability to access justice. Within the present study many participants (n=13) indicated that they predominantly represented racialized clients (please note that, of the 13 participants, 3 explicitly indicated they represented Indigenous clients most frequently). However, it is not within the scope of this study to generalize whether or not race played a specific role in the route an accused would want to take with their case. This is because participants did not specifically address race in their answers. Yet, it was evident that participants, at least the ones who fell under the present theme (n=4), discussed the impact that client's economic means could have on the direction of a case. In this way, it is appropriate to

indicate that SES could play a significant role in the direction an accused chooses to take in their case.

Beyond financial considerations, pleading guilty provides the accused with a known outcome. Therefore, it is also fair to say that this could play a significant role in an accused's decision to plead guilty. Whatever the reason may be, these lawyers did not believe that remorse played any role in an accused's decision to plead guilty.

Remorse as a Continuum

A number of lawyers (n=6) conceptualized remorse as existing on a continuum. Inherent in this view, was the understanding that remorse, as a mitigating factor, was fair when genuine. However, remorse was not always perceived as genuine by the lawyers. By indicating that remorse exists on a continuum it was meant that an accused person's expression of remorse, as constructed by their lawyer, was either recognized as genuine, non-existent or somewhere in between. Therefore, one end of the spectrum would include clients who expressed, what their lawyer conceptualized, as genuine remorsefulness for their actions. Whereas, on the opposite end of the spectrum a client would show no remorse for their actions and have blatant disregard for the harm that their behaviour may have caused. One participant (P14) indicated that they have had clients who show contempt throughout the whole court process. Other participants, indicated that their client's expressions of remorsefulness could not be characterized as genuine, nor could it be characterized as non-existent or contrived; these clients can be seen as falling somewhere in the middle of the spectrum.

Weisman (2014) spoke about the performative role that remorse plays in the criminal justice system and the relationship between the performance of remorse and an audience's evaluation of that performance. It was clear, through lawyers' constructions of their clients'

expressions of remorse, that participants held some expectation, as an audience member, of what constitutes an acceptable expression of remorse. In this way, the lawyers who discussed remorse as existing on a continuum were engaging in an evaluation of their client's performativity of remorse. In some instances, the way their client expressed remorse could impact the type of arguments that a lawyer would make in court. For example, if a client was characterized as expressing little to no remorse, then the lawyer may choose to focus on the court resources their client saved by pleading guilty versus the notion that their client's guilty plea is a demonstration of remorse.

Lawyers (n=6) who described remorse as existing on a continuum, perceived the genuine nature of their client's remorse by evaluating their behaviour and actions. For example, one lawyer (P16) indicated that they had represented clients who would have been remorseful for their actions, even if their charges were withdrawn. This example demonstrates that the lawyer perceived the performativity of remorse as being genuine and not contrived. Whereas another participant (P11) gave the general example of clients who plead guilty when the case against them is overwhelming. This lawyer is describing that their client pled guilty because they knew it was their best option; not because they felt remorseful for their actions. In this way, these participant's constructions are recognized as existing on opposite ends of the continuum.

Interestingly, one lawyer who fell under this theme (P14) indicated that remorse is a dynamic that should be considered, dependent on the nature of the case. This participant gave the example of domestic cases, and cases stemming from addictions, where there is importance in considering remorse as a dynamic. This participant highlights the way remorse, within the criminal justice system, is always evaluated on the basis of an audience. As Weisman (2014) indicated, remorse is always viewed within the context of what the audience expects. Lack of

remorse is especially detrimental in the face of an audience that expects some communication of remorse or acknowledgement of responsibility.

In this way, the understanding of remorse as existing on a continuum reflects the complexities of remorse as a communicative function performed for an audience. It also reflects the innate complexity of the criminal justice system. Depending on the type of offence, the offender, the victim, and witnesses, remorse will have a different meaning. Because remorse is an emotion that is elicited within the individual offender, the audience is only able to understand how the offender feels through their performance of the emotion. Lawyers within the present study can be recognized as holding their own preconceived expectations of what they believe constitutes as genuine expressions of remorse. This results in lawyers evaluating their own clients' expressions of remorse to determine whether or not they would characterize their clients' expressions as genuine, contrived or non-existent.

Connecting Guilty Pleas, the Trial Penalty and Remorse

The results from the present study suggested a connection existed between guilty pleas, the trial penalty and remorse. This connection will be discussed further below and emphasizes the understanding that there is no simple formula that a lawyer can use to determine how things will turn out at trial. Instead, various factors, such as the nature of the offence, the offender, witnesses, complainant, court time, court resources and the economic and administrative demands of an overburdened justice system interact together to create a complex dynamic that the lawyer must assess and present to the client.

Further, the results from questions 27 and 28 of the present study can be understood as having a relationship to one another. This relationship was an inherent feature in every lawyer's construction of how the criminal justice system operates. Essentially, each lawyer's answer

harkens back to the simple understanding that pleading guilty affords an accused a reduced sentence and running a trial does not. Yet, the importance of running a trial was still a continual feature in lawyers' constructions of how they advocate for their clients' rights. This relationship will be explored further in the following discussion which addresses the importance of trials.

Triable Issues and the Importance of Setting Trial Dates

Even with the understanding that a guilty plea affords an accused person a credit that is not afforded through the running of a trial, some scholars such as McCoy (2005) in the American context and Chasse (2009) in the Canadian context would argue that this is coercive. For example, Chasse (2009) indicated that the fear of the uncertainty of a trial and the fact that an accused may be punished more harshly after trial would cause an accused to plead guilty even though they are innocent. What is particularly important and interesting about the findings from the present study was that lawyers, regardless of whether or not they believed a trial penalty existed, continuously voiced the importance of running trials. Participants also indicated that lawyers who only ever plead cases out were not viewed favourably, and were referred to as 'dumptrucks'.

Rather than the threat of a trial penalty being a deciding factor in whether or not lawyers encouraged their client to plead guilty, participants discussed the trial penalty, sometimes comedically, as an 'entertainment tax'. Further, this was seen as having little to no bearing on whether or not a case should be taken to trial. Lawyers indicated that their client's right to trial was seen as paramount to how a case should be dealt with. Lafontaine and Rondinelli (2005) expressed that pleading guilty must award an accused a tangible benefit. Similarly, lawyers within the present study indicated that this tangible 'benefit' must be significant enough for their client to give up their right to trial.

Although the importance of running trials was expressed there also existed a sentiment that the cases that are taken to trial should have triable issues because wasting court time and resources serves no one well. Interestingly, many participants were interviewed for the present study after the *R. v. Jordan* decision. Having experienced the detrimental impacts of court delay themselves, could explain why many lawyers discussed the importance of distinguishing between cases that should be taken to trial and those that should not. Further, being conceptualized as wasting valuable court resources could result in angering a judge, which would result in their client receiving a harsher sentence.

Wasted court resources were highlighted by Lafontaine and Rondinelli (2005) as a reason why an accused person would receive an entertainment tax. Interestingly, lawyers used the term ‘entertainment tax’ in a joking manner with regards to a case being taken to trial simply to ‘entertain the court’ because there were no triable issues. Thus an ‘entertainment tax’ was more of a joke than an actual threat that impacts the route a case should be taken. Participants also indicated that sometimes, even when a case is one that should not necessarily proceed to trial, lawyers still set trial dates as a strategic move. In this way, setting a trial date and actually *running* a trial were conceptualized as two different things.

Mandatory Minimums. Although much of the mandatory minimum legislation has been struck down by the Supreme Court (see for example *R. v. Lloyd*, 2016), interviews from the present study were conducted as far back as 2013, which explains why some participants (P5, P6, P16) may have explicitly discussed them. Lawyers indicated that if the Crown does not offer the accused a plea to a lesser charge, which does not carry a mandatory sentence, then going to trial becomes the logical option. Witten (2017) indicated that mandatory minimums reduce the discretionary power of the judge, but increase the discretionary power of the Crown. The Crown

now has the ability to engage in charge bargaining, which Di Luca (2005) cited as a main form of plea negotiations. However, in these types of circumstances Crowns are still constrained in their ability to offer an accused a lesser sentence when their initial charge carries a mandatory minimum (Witten, 2017). This arguably leaves the accused with minimal reason to plead guilty and explains why lawyers indicated that cases that carry a mandatory sentence should be taken to trial.

One participant (P5) also discussed that even in cases where a mandatory minimum does not exist, but the usual sentencing range for their client's offence is a period of incarceration, the case should generally be taken to trial. An example would be sexual assault cases where there is a very minimal chance that an accused would be offered some type of early plea deal or receive a sentence that does not involve incarceration.

Underscoring this rationale is the understanding that running a trial is a gamble because the outcome is always unknown. However, lawyers explained that when they present their client with the options for their case, they will ensure they identify the potential outcomes for each option. If running a trial has minimal risk, then taking the case to trial is a logical option because the unknown outcome has a higher likelihood of being positive rather than negative.

Ethically Wrong. One of the predominant arguments made by scholars who oppose the current workings of plea bargaining is that the fear of a trial penalty will cause innocent people to plead guilty (Chasse, 2009). Contrary to this, lawyers felt very strongly about not pleading a client guilty if they had any indication that their client was either innocent or their client's case had triable issues or a significant defence. Although mechanisms are in place to ensure that an innocent person does not plead guilty, such as the plea comprehension section in the *Code* (see

s.606), there have been cases where innocent people have plead guilty. The importance of conducting ethical work and preserving clients' rights were emphasized by participants.

The fact that lawyers spoke about their ethical obligations as justice professionals and highlighted the importance of their clients' rights has positive implications for accused persons. Ericson and Baranek's (1982) study found that accused persons are the most powerless of all actors within the criminal justice system. They referred to defendants as "dependents" because accused persons were recognized as being dependent on their lawyer to navigate through the justice system (Ericson & Baranek, 1982). Although results from the present study suggest that some accused persons, especially chronic recidivists, have more knowledge of the criminal process, it is still clear that many accused persons depend upon their lawyer to provide guidance and insight. Lawyers have specialized knowledge of the legal system, which Ericson and Baranek (1982) refer to as 'recipe knowledge'. Conversely, accused persons typically do not have this knowledge. Because of this, Ericson and Baranek (1982) found that a lawyer could potentially guide their client in a direction that is not in their client's best interest.

Results demonstrated that the lawyers in the present study placed great value in representing a client in the most ethical and responsible manner possible. Participants' continual insistence on the importance of accused persons' rights suggested that lawyers valued representing their client to the best of their ability, within the scope of the client's best interest. Beyond setting trials, ethics were considered important when explaining options to their clients; for example, ensuring that they were speaking to their client in plain language so that their client fully understands what is being said. This is something that is extremely important when explaining the consequences of pleading guilty to an accused.

Even though lawyers in the present study emphasized the importance of using plain language with clients, there have been cases where accused persons have engaged in uninformed plea bargains (see *R. v. Wong*, *R. v. Quick*). An uninformed guilty plea is especially detrimental to accused persons who are not Canadian citizens, such as in the case of *R. v. Wong*. These accused persons are in a particularly disadvantaged position because they risk being deported under various immigration legislation. Because ethics was constructed as governing the ways lawyers advocate for their clients, the results from the present study suggest that although accused persons may have limited power within the justice system, they are not necessarily ‘dependent’ in the same ways as they were in 1982. This is a particularly positive finding for all accused persons, but especially accused persons who are in a disadvantaged position due to immigration concerns.

Better Offers Closer to Trial. One of the most important findings from the present study was that some participants (n=5) indicated that their clients could receive better offers closer to trial. This number increased when lawyers were asked about in-custody clients. The majority of participants (n=16) indicated that they believed that an in-custody client could do better by setting a trial date and waiting. Further, it was indicated that there were times where clients had actually done better after trial than they would have had they pled guilty. This sentiment completely refutes that of the trial penalty by indicating that the client would have actually been disadvantaged had they engaged in a guilty plea rather than gone to trial. Although it must be acknowledged that this was not something expressed by all lawyers, it is still relevant because literature on plea bargaining does not often focus on the fact that accused persons can do better after trial. An accused person may do better because they either are acquitted after trial, or because the facts of the case were worse on paper and were proven to be less aggravated in

nature over the course of a trial. Lawyers also expressed that there were times where setting a trial date and waiting till the date drew closer had resulted in their client being offered a lower sentence by the Crown.

Unlike the United States, where O'Hear (2008) indicated that prosecutors frequently use high pressure tactics to get an accused to plead, lawyers did not indicate that Crowns regularly engaged in this practice. However, this sentiment changed when discussing in-custody clients. Some participants (n=5) explicitly indicated that Crowns had leverage over an accused when that accused is in pretrial detention. This was especially true if the Crown offered the accused an enticing 'time served' deal. This finding is in accordance with results from a study by Kellough and Wortley (2002) which found that accused persons awaiting trial in custody were extremely willing to plead guilty if they believed that they would not have to serve any more time in prison.

Findings from the present study also demonstrate the hierarchy of power within the criminal justice system. While many findings from the present study suggest that accused persons are in a much better situation than they were found to be by Ericson and Baranek in 1982, accused persons still experience a lack of power. Specifically, the results from the present study suggest that an accused person who is awaiting trial in custody is in the position of least power. A study by Pelvin (2017) also demonstrated the lack of power accused persons have when they are remanded to custody awaiting trial. Pelvin's (2017) study, like Kellough and Worley's (2002), found that accused persons were more willing to engage in a guilty plea if they were awaiting trial in custody. Notably, the present study also indicated that while the power of the accused decreases when they are awaiting in custody pretrial, the Crown's power simultaneously increases.

Given their lack of power, clients were conceptualized as engaging in plea resolutions that were not in their best interest. Only three participants (P8, P11, P18) indicated that there may be the odd client who is willing to wait in custody pre-trial; for the most part, in-custody clients want out and are willing to plead guilty to do so, even if that is not in their best interest. Notably, Kellough and Wortley (2002) found that the longer an accused was in custody pending trial, the greater their likelihood of engaging in a plea of guilt became. Although their findings indicated that accused persons recognized when a Crown's case was weak, or when they could win at trial, being remanded to custody for a lengthy period of time ultimately resulted in a slow deterioration of the accused's willingness to await trial (Kellough & Wortley, 2002).

Lawyers in the present study expressed that they found this particularly frustrating. One participant (P4) highlighted this frustration by indicating that they have seen cases where there were multiple defensible angles, but because the client did not receive bail they did not want to proceed to trial. Thus, lawyers indicated the importance of ensuring that every effort was made to get their client bail. This particular sentiment was also indicated by Pelvin (2017) whose findings demonstrated that, in terms of pleading guilty, bail could be the deciding factor in the route the accused would take their case.

Lawyers did note that they had clients who were chronic recidivists. These "rounders" have knowledge of how the system works through their experience. Although their knowledge is not the same as other court actors, they cannot be conceptualized as existing on the same level as an individual who does not have a criminal record. In this way, clients who have an extensive criminal record are not as affected by engaging in a guilty plea while in pre-trial detention as accused persons who have no criminal record or a very minimal record; the latter are the ones most impacted by engaging in a plea bargain that is not in their best interest. For these

participants, the short-term benefit of pleading guilty to get out of jail may seem enticing, but that decision could have very real long-term repercussions. The consequences of a criminal record are far-reaching and can affect employability, child custody and access, travel (including major issues crossing the border into the United States) and immigration (Canadian Bar Association, 2017; John Howard Society, 2017).

Notably, multiple lawyers (n=4) brought up domestic cases: this represented 22% of the participants who explicitly addressed bail (n=18). Domestic cases were typically ones where the accused was detained pre-trial regardless of whether or not they had an extensive record. As one participant (P7) indicated, many of their domestic clients had jobs and could not afford to sit in jail. Due to this, these clients were recognized as being highly incentivized to plead guilty to get out of jail for the short-term benefits. However, the long-term repercussions could be extremely detrimental. For example, the Canadian Bar Association (2017) indicated that child access and custody were especially relevant consequences of a criminal record that included domestic offences.

These findings reiterate those found by both Pelvin (2017) and Kellough and Wortley (2002) and demonstrate the important role that bail plays in relation to an accused's case. Canada can be recognized as having a high number of persons in pre-trial detention. Myers (2017) indicated that accused persons make up 35 percent of Canada's prison population; provincially, 60.7 percent of Ontario's incarcerated population were accused persons in pre-trial detention. Statistics Canada's Juristat report also indicated that the utilization of pretrial detention had increased in all provinces between 2004 and 2015 (Canada Centre for Justice Statistics, 2017, p. 3). This suggests that the findings regarding bail and its relationship to plea bargaining are especially relevant. However, it is important to note that the 2016 Supreme Court decision in *R.*

v. Antic aimed to reduce the number of accused persons being remanded in custody. The ruling in *Antic* indicated the importance of imposing the least onerous bail condition and adhering to the step principle. Thus, the results from the present study emphasize the importance of utilizing the step principle and ensuring that bail is reserved for only those accused that must be detained in the interest of public safety.

Accused Persons and the Hierarchy of Power within the Criminal Justice System

Although the results from the present study were typically positive, in terms of the emphasis lawyers placed on accused person's rights and ethics, it is still clear that a hierarchy of power exists within the criminal justice system. Ericson and Baranek (1982) detailed this hierarchy by indicating that accused persons have the least amount of power in the criminal justice system because they do not have the education and experience to navigate it. The results from the present study suggest that unfortunately accused persons are still in the position of least power within the criminal justice system. However, Ericson and Baranek's (1982) study focused on the power differences between the various court actors, and the hierarchy of power that existed among them. The results from the present study suggest that aside from power differences existing between court actors, there is also a hierarchy of power between accused persons themselves.

One of the main differences in accused person's experiences from 1982 to the present is that accused persons cannot simply be categorized into a homogenous group. A hierarchy of power exists within the category of 'accused persons' with respect to the criminal justice system. For example, an accused person who is affluent and has the ability to access justice without barriers arguably has a considerable amount of power in comparison to the accused person who experiences barriers to accessing justice because of their marginalized position. Further, a

chronic recidivist would also have more power than an accused person who has not been processed through the justice system. Although a more seasoned accused arguably does not have the same specialized knowledge of the justice system as a lawyer would, their experiences of being through the system would arguably make them more able to realize what is in their best interest without heavy reliance on a lawyer. In contrast, an inexperienced accused person may be much more highly dependent on their lawyer, and would more readily be characterized in the same way as accused persons were in Ericson and Baranek's (1982) study.

Further, one of the more concerning results from the present study was the disadvantaged position accused persons were in when they did not make bail. Based on the results from the present study, it is arguable that these accused persons are in the position of least power. Because they are in such a disadvantageous position the power of other court actors increases, such as that of the Crown. The present study demonstrated that this resulted in accused persons engaging in plea deals that were not in their best interest. Unlike Ericson and Baranek's (1982) study, which concluded that all accused persons' fates were predetermined by their position of least power, the results from the present study suggest that accused persons' fates are not ordered unless they are denied bail. Thus, bail can be recognized as one of the most important components of the criminal process and has a direct relationship with the outcome of a case.

Denial of bail is not the only aspect of the bail process that could directly impact accused persons. The John Howard Society of Ontario (2013) discussed that onerous bail conditions also place an accused person in a difficult and often detrimental situation. For example, the John Howard Society of Ontario (2013) indicated that placing strict conditions on bail could set an accused person up for failure (such as making an accused person who has an addiction abstain from alcohol or drug consumption). While it is positive that, since *R. v. Antic*, there is

importance in an accused person receiving the least onerous bail condition possible, accused persons who do make bail with strict conditions are in a position of limited power.

Thus, the results from the present study demonstrate that accused persons have moved away from Ericson and Baranek's (1982) 'dependent' classification. However, accused persons experience a double hierarchy within the criminal justice system. Not only are they in a position of limited power in relation to other court actors, they also can be constructed as being on a hierarchy of power in relation to other accused persons. On a positive note, even though accused persons experience limited power, the present study suggests that the majority of accused persons' fates are not predetermined by their lack of power. Accused persons' rights were continuously constructed as paramount to the lawyers within this study.

Conclusion

The results from the present study have shed light on the complex system within which criminal lawyers work. In doing so the present study has demonstrated that, from the perspective of these lawyers, it cannot simply be deduced that a trial penalty either 'exists' or 'does not exist'. Rather, the lawyers' voices pointed out the deep and complex layers that exist within the practices of plea negotiations, trials and sentencing. It was demonstrated that there is no simple formula that a lawyer can use to determine the result of a trial. Instead, various factors, such as the nature of the offence, the offender, witnesses, complainant, court time, court resources and the economic and administrative demands of an overburdened justice system were characterized as interacting together to create a complex dynamic that the lawyer must assess and present to the client.

Ultimately, running a trial was presented to the client as a gamble, yet in many instances taking the gamble was constructed as being worth the risk. The results from the present study can

be recognized as having implications regarding policy, practice and theoretical contributions. These implications will be discussed below. This section will then conclude by briefly highlighting the perceived limitations of the present study and indicating future research directions.

Policy Implications

Plea bargaining is a legal process that has been routinely critiqued. Much of the scholarship on plea bargaining centers around the debate of whether or not plea bargaining should be reformed, abolished or remain unchanged (Di Luca, 2005). While scholars draw on various arguments to support their position, it is relevant to note that the practice has been deeply entrenched within the North American legal systems (McCoy, 2005; Di Luca, 2005; Sanborn, 1986), and also within the international context (Turner, 2009). While plea bargaining has changed over time in Canada, it is the primary mechanism used for disposing of criminal cases (Di Luca, 2005). Results from the present study confirm the important role that plea negotiations play within the criminal justice system.

The results from the present study also suggest that plea bargaining does not need to be significantly reformed within Ontario. In Canada, Chasse (2009) is recognized as a scholar who calls for major reformations to the current operation of plea bargaining, in order to eliminate the trial penalty. McCoy (2005) calls for similar reforms in the United States. However, given that the present study rendered the trial penalty a relatively harmless entity that is dependent on a lawyer's perspective of the criminal justice system, calls for reform are not necessary on this basis.

Interestingly, the results indicated that lawyers recognized guilty pleas to be worth a credit because the accused person saved court resources and did not force witnesses and victims

to testify. However, unlike England and Wales, the amount of credit a guilty plea is worth is not structured in Canada. Recent literature by Cole and Roberts (2018) discussed that Canada's lack of any type of plea reduction guidelines creates an individualistic dynamic that, at times, lacks clarity. For example, Cole and Roberts (2018) discussed how in the case of F.H.L the accused person did not receive mitigation at sentencing for pleading guilty. This was a decision upheld by Ontario's Court of Appeal and ran contrary to the existing case law on the matter (Cole & Roberts, 2018). Even in cases where an accused person enters a guilty plea to avoid an inevitable conviction after trial, the courts have granted that accused mitigation for saving court resources and sparing witnesses and victims (Cole & Roberts, 2018). These factors were also recognized as benefits of guilty pleas within the *Martin Committee Report* (1993).

Cole and Roberts (2018) concluded by suggesting that Canada could benefit from having more structure and clearer guidelines as to the sentence reduction that should be awarded to an accused on a guilty plea. The results from the present study suggest that Cole and Roberts' (2018) call for a policy change could be beneficial to how lawyers negotiate plea agreements and help their clients determine what route to take with their case.

The present study demonstrated that there is no way for a lawyer to predict the outcome of a trial. This is a factor that will inevitably be given weight in an accused person's decision regarding how they will proceed with their case. Plea bargaining becomes an enticing option because the outcome is more predictable. However, the exact credit that would be warranted on a guilty plea at sentencing is still unknown, unless the Crown and defence have engaged in a joint submission. Therefore, a more structured guideline for plea reductions could aid in the lawyers' ability to engage in plea negotiations and provide a client with more clarity.

Implication for Practice

The present study demonstrated the important role that defence lawyers play in protecting accused persons' rights. In order to protect an accused person's right, it is important that lawyers present their client with all relevant options regarding their case. In presenting this information to their clients, they must do so in a way that their client can understand; therefore, the accused person is aware of the potential consequences of all options. Although the present study demonstrated that accused persons are more autonomous and in a better position than they were found to be in Ericson and Baranek's (1982) study, it is still important that lawyers realize the power that they have over their client.

While the participants in the present study emphasized the importance of operating ethically, they indicated that they know lawyers who do not operate with their clients' best interest at heart. Because accused persons are in a position of limited knowledge and power within the criminal justice system, lawyers have the ability to manipulate their client to take their case a route that could have negative consequences for the accused (Ericson & Baranek, 1982; Alati, 2015). Given this, the results from the present study suggest the importance of lawyers operating from a client-centered position to ensure that they are working within their client's best interest.

Another important distinction made within the present study was the position of in-custody clients, versus those clients who have made bail. It is evident that whether or not an accused person makes bail will have a significant impact on the direction that the accused may end up taking their case. Because pleading guilty becomes an enticing option when accused persons are incarcerated, bail was constructed as one of the most important steps in the criminal process. Therefore, the results from the present study suggest that, in practice, lawyers should

ensure that they do the necessary leg work at this stage in the legal process especially if the client's case has significant triable issues.

Theoretical Contributions

Given the lack of scholarship on the topic of plea bargaining and the trial penalty within Canada as a whole, but more specifically Ontario, the results from the present study fill an existing gap in literature. The results are also important because of their relationship to existing literature on the trial penalty. The most significant contribution that the present study makes to the theoretical body of knowledge on the trial penalty is the understanding that simply constructing the trial penalty as existing or not is overly simplistic. Because the present study utilized a descriptive exploratory methodology and a social constructivist framework, the study was able to gain an in-depth understanding of how lawyers construct their work within the criminal justice system. Existing literature on the trial penalty does not draw on the experiences of court actors who are directly involved in the trial process, plea negotiations or sentencing. Talking with justice professionals who work within the criminal justice system every day paints a vivid and complex picture that highlights the innate nuances within the various processes involved in advocating for accused persons and their rights.

In doing so, the present study found that lawyers were often unable to indicate whether or not a trial penalty was a separate entity from the credit an accused often receives from pleading guilty. Unlike the literature that explains the trial penalty as a negative and pervasive force that detrimentally impacts accused persons (McCoy, 2005; Chasse, 2009), the present study did not find that the trial penalty negatively impacted accused persons. The results even suggested that there are times where accused persons do better if they wait until closer to trial, or even after

trial. The threat of a trial penalty was not recognized as a consideration made by accused persons when they determined what route to take with their case.

Furthermore, the term ‘entertainment tax’ was most readily utilized within the context of the present study. This was because lawyers constructed the trial penalty as an ‘entertainment tax’ and often made reference to this ‘tax’ in a comedic fashion. In this way, the trial penalty was not seen as a threatening entity, but rather a joke made when a lawyer is making light of cases that should not proceed to trial and the wasting of court time and resources. Ultimately, the existence of trial penalty is a matter of perspective and depending on what perspective a lawyer took, they either believed that it existed, did not exist, or indicated that penalty and benefit are two sides of the same coin.

Limitations and Future Directions

A perceived limitation of the present study was that the study only spoke with defence attorneys, who are only one of the various court actors that are directly involved in plea negotiations. Although this could be highlighted as a shortcoming of the present study it is important to recognize that focusing on only one court actor allowed for an in-depth exploration of how defence attorneys conceptualized the trial penalty. Widening the scope of the study to include other criminal justice actors would have reduced the ability to analyze defence lawyers’ constructions to the same magnitude and quality as the present study was able to do.

However, given that this study examined defence lawyers’ constructions of the system, future research should explore the perspectives of other criminal justice actors, such as Crowns and judges. Because of the different roles that defence lawyers, Crowns, and judges play within the justice system, it would be interesting to explore questions related to plea bargaining from varying vantage points. In short, the present study has added to the existing literature on plea

bargaining to fill the gap in scholarship on the topic within Canada. In doing so, this study has presented implications for both policy and practice, while also making theoretical contributions.

Fundamental to justice within Canada is the rights that accused persons are afforded within the *Canadian Charter of Rights and Freedoms*. These rights should never be undermined for institutional priorities that benefit the administration of justice but further marginalize accused persons. Fundamental to the maintenance of due process and the protection of all accused persons' rights is a justice system that does not compromise rights for expediency. Confidence in the administration of justice can only be maintained through the assurance that all persons experience the justice system *justly*.

The findings of the present study also reflect the *Martin Committee Report's* (1993) explanation of the multifaceted benefits of plea bargains. When done correctly, plea negotiations benefit the accused, victims, witnesses, the administration of justice and the community. Thus, plea bargaining is an integral part of the Canadian criminal justice system and while the process may evolve over time, as it has in the past, it is unrealistic to envision a criminal justice system without plea negotiations and the multifaceted benefits that it affords.

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Appendix A: Letter of Invitation

Hi [lawyer's name],

My name is Jennifer Cabot, I am a research assistant to Dr. Voula Marinos at Brock University. I would like to invite you to participate in a study about the plea resolution process in the Ontario criminal justice system. The purpose is to understand how the plea resolution process works in Ontario and how defence lawyers relate to their clients and Crown prosecutors through the process. The results may serve to dispel myths about how the criminal justice system operates.

This study has received clearance from the Brock University Research Ethics Board.

The study is completely confidential and your participation is voluntary. You will not be asked any questions about specific cases, specific clients or any personal identifiers. You may decline to answer any questions or participate in any component of the study without penalty. There are no known or anticipated risks, either physical or psychological, associated with your participation in this study. You must sign an informed consent form before the interview.

The interview will be recorded digitally. The interview lasts about an hour. We are happy to come to your office to interview you.

1. Are you interested in participating?
2. At the end of the interview, we would like you to consider referring us to another lawyer who you believe may be interested in participating. We will use the same 'script' as we have here, to ask the lawyer to participate in the study. We will let the potential participant know that you referred them, but you will not receive feedback from us about whether the lawyer participated. Can we ask you at the end of the interview to nominate another participant?

Sincerely,

Jennifer Cabot