

BOOK REVIEW

The Timing of Guilty Pleas: Lessons from Common Law Jurisdictions

by Kevin Cheng. Cambridge: Cambridge University Press, 2023. 210 pp.
Hardcover: US\$ 110.00.

Enshen Li

School of Law, City University of Hong Kong

(First published online 10 November 2023)

It is a truism that today's criminal justice system has been weighted heavily towards guilty pleas. This is particularly perceptible in many common law jurisdictions where plea bargaining and other comparable initiatives have functioned as expeditious approaches to case disposition. Not only are defendants urged to plead guilty, but they are induced to believe that the earlier they plead guilty, the greater the reduction they will receive in their sentence. Thus, the timing of guilty pleas becomes essential to both procedural efficiency and substantive outcome.

Kevin Cheng's book *The Timing of Guilty Pleas: Lessons from Common Law Jurisdictions* offers a timely, compelling, and richly sourced scrutiny of this salient issue. Drawing upon critical and comparative analysis, the key thesis throughout the book is that the legislative attempt to prompt early guilty pleas through the sliding scale of sentence reductions is both illusory and futile. Looking primarily at Hong Kong and England and Wales, Cheng challenges a widely-held presumption that early guilty pleas are a solution to the cracked trial – one that does not proceed as scheduled and is instead eventually dismissed because the case has already reached an outcome. This is because, unlike extant literature generally assumes, cracked trials are not caused by tactical defendants 'playing the system' in the form of delaying their guilty pleas. The criminal process, as Cheng deftly argues, does not operate in a way conducive to the manipulation of defendants. Rather, it is adept at pushing defendants into pleading guilty. Young and underprivileged defendants are more likely to hastily enter the plea agreement due to the lack of adequate legal assistance and support. So are those who have already been pressured to make confessions during police interviews and/or remanded in custody pending trial. On top of this, 'trial penalty' applies readily to defendants opting for late guilty pleas or jury trials. Cheng concludes his book with a powerful statement – 'the introduction of the sliding scale of sentence discounts for (early) guilty pleas has made little difference in terms of overall guilty plea rates, cracked trial rates, and average wait times for trial' (p 196).

The overall arguments of this book are made with admirable clarity, which is attributable to the groundwork set out in the opening chapters. Following the introduction, chapter 2 presents an incisive description of the quantified sliding scale of sentence discounts adopted in selected jurisdictions, including Hong Kong, England and Wales, and Australia. Conducting a comparative overview, it highlights a common thread of this sentencing incentive, which lies in efficiency and productivity concerns. The priority of saving costs and disposing of criminal cases as quickly as possible has seemingly justified a widespread application of the sliding scale. Chapter 3 goes on to unfold this sentencing discount as a form of implicit plea bargaining. It speaks, primarily, to a warranted anticipation by defendants for lenient sentences should they plead guilty. This may expedite guilty pleas, but a corollary of making sentencing discount explicit to defendants is the 'undue

pressure on the defendant to plead guilty' (p 49). To secure the reduced sentence, innocent defendants are tempted to plead guilty as well.

In chapter 4, Cheng critiques two widely held assumptions shaping and underpinning the sliding scale of sentencing discounts: 1) that defendants get to 'play the system' by deliberately holding off their pleas, and 2) that 'cracked trials' lead to a waste of resources. Using criminological research on Hong Kong, England and Wales, and other relevant jurisdictions, Cheng views the first claim as mostly groundless. That is, the defendant who seeks to achieve a better outcome for themselves by delaying pleas often ends up with an unforeseeable sentencing result. Cheng rebuts the second claim by asserting that the correlation between crack trials and inefficiencies appears to be overstated. At a practical level, courts have been equipped with cost-saving strategies in the event of cracked trials, ranging from overscheduling court lists to allocating vacant judges to assist with adjudication when necessary. On close inspection, there is little justification for the sliding scale of sentencing discounts to emerge and to work its magic.

Chapter 5 then examines the real factors driving defendants to plead guilty. It cogently demonstrates that what occurs in the criminal process preceding plea bargaining has a ripple effect on the defendant's plea decision. Among those susceptible to guilty pleas are defendants with a record of early confession, defendants with insufficient legal counsel, defendants with bail denied, and defendants with deficient psychological autonomy. Worse still, as chapter 6 shows, is the fact that 'defendants who do not plead guilty at the first opportunity likely face more severe sentences' (p 147). Based on the Crown Court Sentencing Survey in England and Wales and the 'Reasons for Sentence' database in Hong Kong, it is provided that 'trial penalty' renders defendants more vulnerable in the face of the leverage the prosecution wields in acquiring guilty pleas. Although a late-plea penalty proves to be more conspicuous in England and Wales than in Hong Kong, its adverse impact on the voluntariness of guilty pleas by defendants does not differ significantly.

The last two chapters tease out the sentencing discretion of judges and the public perception of sentencing discounts in guilty plea cases. Just as in many other common law counterparts, the inconsistency of sentencing decisions in Hong Kong and England and Wales is a product of a plethora of considerations. Being female and making early confession tend to be the most significant mitigating factors in sentencing. But sentencing inconsistencies are also wrought by the sentencing process itself, where there is no clear guidance on the practical sentencing methodology adopted by judges. This, in large part, explains the public discontent with the sentencing results as being overly lenient for guilty pleas. While recognising the importance of an efficient justice system, the populist attitude towards large sentencing discounts for guilty pleas is rather cynical.

Overall, I found Cheng's book a very informative and stimulating read. It successfully fills the gap in current scholarship on the timing of guilty pleas and its impact on the sentencing outcome. Challenging orthodox theoretical assumptions, this book presents convincing evidence of how the tension between efficiency and procedural justice would eventually put the very nature of our criminal justice system on the line. If there is anything that could possibly be fleshed out further in this thought-provoking book, it would be a more intricate explication on the (changing) role of the prosecution in pushing early guilty pleas under the aegis of the sliding scale of sentence reductions. Shedding light on prosecutorial authority and decision-making could also help readers gain a broader understanding of cracked trials specifically, and the timing of defendants' guilty pleas more generally.