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In *Lafler v. Cooper*, Justice Kennedy, writing for the majority of the Supreme Court, noted that "criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[1] These numbers have not been consistent: the percentage of criminal defendants opting to plead guilty has only risen over the years.[2] A defendant who pleads guilty forgoes the possibility of being acquitted and therefore receiving no punishment. A right to trial is in part a right to seek to avoid punishment. Americans interested in the legal system and foreign legislators and lawyers should be skeptical of a system in which more than ninety percent of defendants waive their right to a trial.

Plea deals were not always endemic to criminal procedure. Early common law treatises made no mention of a guilty plea procedure, and confessions were rare.[3] Even in cases in which a defendant confessed to his crime in court, judges were loath to record these

confessions, and would often recommend that the accused retract them and instead proceed to trial[4]. In the first recorded case in the United States concerning a guilty plea,[5] despite the defendant being unlikely to evoke sympathy from the court,[6] a defendant's request to plead guilty was nonetheless met with suspicion by the presiding judge. Defendant John Battis' request was instead met by a reminder that he had the right to deny the charges, and "put the government to the proof of them."[7] After remanding Battis to reconsider his guilty plea, and Battis again insisting later that day that he wanted to plead guilty,

> the Court examined, under oath, the sheriff, the jailer, and the justice, (before whom the examination of the prisoner was had previous to his commitment,) as to the sanity of the prisoner; and whether there had not been tampering with him, either by promises, persuasions, or hopes of pardon, if he would plead guilty.[8]

Only after this examination did the court accept Battis' plea.[9] In the late nineteenth century, courts still expressed skepticism at the concept of plea bargaining.[10] Nonetheless, it was in the second half of the nineteenth century that the practice became commonplace.[11] Leading explanations for this transformation include an increase in caseloads, the growing complexity of trial procedure, and the professionalization of police and prosecutors.[12] Courts' skepticism towards plea bargains notably dropped over the course of the late nineteenth century.[13] By the early nineteenth century, several cities had guilty plea rates above fifty percent.[14]

Defendants face numerous incentives to plead guilty. Prosecutors may offer to dismiss some charges a defendant is facing, prosecutors may agree to a more lenient sentence than a defendant would otherwise face, and prosecutors may change the factual description of events that the sentencing judge is presented with.[15] Additionally, prosecutors routinely threaten to charge defendants' loved ones with crimes if the defendants refuse to plead guilty.[16] Disincentives to wait for a trial, such as the financial and social costs to defendants who are detained pending their trials, can also induce guilty pleas.[17] The benefit this system offers to prosecutors is tremendous. The modern American system of mass incarceration could not exist without endemic guilty pleas. As Michelle Alexander has noted, “If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation.”[18] However, the idea of challenging mass incarceration through more defendants choosing to go to trial is subject to an inversion of the free rider problem.[19] The total population of criminal defendants and potential criminal defendants might benefit from defendants who choose to go to trial, as this would ensure fewer charges are able to be litigated. However, the defendants who choose to go to trial would suffer from the heightened punishments they would risk facing if convicted, as compared to the punishment they could expect to face if they plead guilty.[20] The plea system does not only create problems of mass incarceration, it also poses a problem for innocent defendants. Around 18% of people on the National Registry of Exonerations pleaded guilty to crimes they have since been exonerated of.[21] The number would likely be higher but for the difficulties defendants who have plead guilty have in appealing their convictions. Defendants who plead guilty may have forfeited appellate claims,[22] and will not have a trial record that might contain facts that can be used to appeal or further investigate the case.[23]

The prevalence of plea bargaining systems internationally is difficult to ascertain due to a lack of data collection. A general trend, however, is that while plea bargaining is common in many other common law legal systems, defendants choosing to go to trial is slightly less rare. In one Australian province, around eighty-two percent of convictions come from plea deals.[24] In Canada, it has been informally suggested that ninety percent of cases are resolved without a trial.[25] Around ninety percent of convictions in England and Wales come from plea deals.[26] In England and Wales, sentence reductions are limited to one third of time that would be served if the defendant were convicted at trial.[27] In Australia, a similar limit prevents time served reductions of more than twenty five percent.[28] Plea bargaining in Canada lacks a similar restraint on reductions in time served.[29]

Clark Neily describes the distinct qualities of American plea bargaining as “coercion, convicting the innocent, and loss of public confidence in the integrity of the criminal justice system.”[30] America is exporting its uniquely coercive system by exporting its prosecutors. The Office of Overseas Prosecutorial Development and Training sends United States prosecutors abroad to train other nations’ lawyers and judges in the American criminal legal system.[31] Overall, the number of jurisdictions employing trial waiver systems has increased 300% between 1990 and 2015.[32] In South Africa, a prosecutor praised the rising plea system, noting his frustration “in courts where judges tend to acquit.”[33] In an article forewarning of the possibility of America exporting its plea bargaining system, English solicitor Jago Russell expressed his concern that “guilty pleas have been used to prevent serious misconduct by the police

or prosecutors being exposed."[34] However, with the high rates of plea bargaining in other common law nations, and the aforementioned rapid exportation of this system of pleas, this may be a concern that was due decades ago and is late now.

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[1] Lafler v. Cooper, 566 U.S. 156, 170 (2012) (citing Missouri v. Frye, 566 U.S. 134, (2012)).

[2] John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, Pew Rsch. Ctr. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.
[3] Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1, 7 (1979), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2005&context=journal_articles.

[4] *Id*. at 7-8.
[5] *Id*. at 9.
[6]The defendant, John Battis, was an adult black man accused of raping and murdering an adolescent white girl. *SeeCommonwealth v. Battis*, 1 Mass 94 (1804).
[7] *Id*. at 95.
[8] *Id.*
[9] *Id.*
[10] Lucian E. Dervan, *Bargained Justice: The History and Psychology of Plea Bargaining and the Trial Penalty*, 31 Fed. Sent. R. 239, 243 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3768722.

[11] William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. Rev. 1435, 1443 (2020), https://www.bu.edu/bulawreview/files/2020/09/ORTMAN.pdf/.
[12] *Id.* at 1443.
[13] *See* Hallinger v. Davis, 146 U.S. 314, 318-19 (1893) (citing numerous state courts upholding the constitutionality of guilty pleas).
[14] Ortman, *supra* note 11, at 1447.

[15] Ram Subramanian, Léon Digard, Melvin Washington II, & Stephanie Sorage, *In the Shadows: A Review of the Research on Plea Bargaining*, Vera Inst. of Just. 2 (Sept. 2020), https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf.

[16] Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, Politico (May 2, 2017),https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/.
[17] Micah Schwartzbach, *Defendants' Incentives for Accepting Plea Bargains,* Nolo, https://www.nolo.com/legal-encyclopedia/plea-bargains-defendants-incentives-29732.html (last accessed Sept. 8, 2021).
[18] Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. Times (Mar. 10, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html.
[19] For an explanation of the free ride problem, *see* Heather Savigny, *Free Riding*, Britannica, https://www.britannica.com/topic/free-riding (last visited Sept. 9, 2021).
[20] *See supra* note 15; *see also supra* note 16.
[21] This disparity is commonly referred to as the "trial tax," or more optimistically, the "plea discount." *See, e.g.,* Andrew King, *There's No Trial Tax; There's a Plea Discount*, Mimesis Law (Jan. 29, 2016), http://mimesislaw.com/fault-lines/theres-no-trial-tax-theres-a-plea-discount/6409.

[22] Innocence Staff, *Guilty Plea Problem Website Re-Launch Today!,* Innocence Project, https://innocenceproject.org/guilty-plea-problem-website-re-launch-today/ (last visited Sept. 10, 2021).
[23] *See, e.g.,* Adam Felsenstein, *All That You Can't Leave Behind: The Court of Appeals Issues New Guidance on Plea Waivers*, Tannenbaum Helpern Syracuse & Hirschtritt LLP, https://www.thsh.com/criminal-justice-insider/all-that-you-cant-leave-behind-the-court-of-appeals-issues-new-guidance-on-plea-waivers (last visited Sept. 9, 2021).
[24] New South Wales Law Reform Commission, Encouraging Appropriate Early Guilty Pleas: Models For Discussion(Nov. 2019), https://www.lawreform.justice.nsw.gov.au/Documents/Completed-projects/2010-onwards/Early-gulity-pleas/Consultation-paper/cp15_2.pdf.
[25] Justice Is Denying Justice, Standing Senate Committee on Legal and Constitutional Affairs 27 (June 17, 2017), https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf#page26
[26] *Plea Bargaining: A Threat to Basic Human Rights?*, The Week (Sept. 21, 2017), https://www.theweek.co.uk/88453/plea-bargaining-a-threat-to-basic-human-rights.
[27] Sentencing Counsel, Reduction in Sentence for a Guilty Plea Definitive Guideline 5 (June 1, 2017), https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-plea-Definitive-Guide_FINAL_WEB.pdf; *but see* Daniel Alge, *Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?*, 19 Eur. J. Curr. Leg. Issues Web JCLI (Dec. 13, 2012), https://core.ac.uk/download/pdf/46598062.pdf.

[28] *Criminals Who Plead Guilty Early to No Longer Get 40 Per Cent Sentence Discount*, ABC (13 Oct. 2020),https://www.abc.net.au/news/2020-10-13/south-australia-criminal-sentencing-discount-laws-passed/12762084; *but see* Understanding Plea Negotiations, Office of the Director of Public Prosecution https://www.dpp.sa.gov.au/court-process/plea-negotiations (noting that charge reduction is practiced in A ustralian plea bargaining, which may mitigate this restriction).
[29] *Victim Participation in the Plea Negotiation Process in Canada,* Can. Dep't of Just. (Jan. 7, 2015), https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/p3.html.
[30] Clark Neily, *Coercive Plea Bargaining: An American Export the World Can Do Without*, Cato Inst. (April 23, 2021), https://www.cato.org/commentary/coercive-plea-bargaining-american-export-world-can-do-without.
[31] Sentencing Counsel, *supra* note 27, at 9.
[32] *Id.* at 23.
[33] *Id*. at 33.
[34] Owen Bowcott, *'Global Epidemic' of US-Style Plea Bargaining Prompts Miscarriage Warning*, The Guardian (Apr. 27, 2017, 7:03 AM), https://www.theguardian.com/law/2017/apr/27/traditional-trial-rights-renounced-as-countries-adopt-us-style-plea-bargaining.