

The Right to a Jury and the Rise of Guilty Pleas Across Common Law Countries

*Carissa Byrne Hessick**

ABSTRACT

Juries have long been considered a key common law institution, yet their use has become quite uncommon in common law systems over time. Rather than trials by juries, most criminal cases are instead resolved by way of guilty pleas. The prevalence of guilty pleas is not merely a matter of defendants' independent choices to accept responsibility and give up the right to a trial. Common law countries have adopted various legal structures over the past half century that incentivize guilty pleas and discourage trials.

This Essay will document the decline of jury trials and the rise of guilty pleas in five common law countries—Australia, England and Wales, New Zealand, Scotland, and the United States. The Essay will begin by identifying the formal right to a jury trial in these countries, including variations on that formal right—namely whether it is enshrined in a written constitution, protected only as a matter of statute, or merely accepted as a matter of tradition. The Essay then turns to modern practice, chronicling both the rates of guilty pleas and the formal legal structures that incentivize defendants to plead guilty. The Essay will conclude with some observations about why the jury, which was once perceived as a cherished common law institution, has become a bureaucratic hurdle to be overcome in the name of efficiency.

TABLE OF CONTENTS

| | |
|---|------|
| INTRODUCTION | 1300 |
| I. THE FORMAL RIGHT TO A JURY | 1302 |
| II. THE REPLACEMENT OF JURY TRIALS WITH GUILTY PLEAS | 1307 |
| III. INCENTIVES TO PLEAD GUILTY | 1310 |
| A. <i>Incentives from Judges</i> | 1311 |
| B. <i>Incentives from Prosecutors</i> | 1316 |
| IV. FROM BULWARK TO BOTHER | 1323 |
| CONCLUSION | 1326 |

* Ransdell Distinguished Professor of Law and Director of the Prosecutors and Politics Project, University of North Carolina School of Law.

INTRODUCTION

For Americans, the origin of the right to a jury trial is rooted in the country's struggle for independence and commitment to democracy.¹ One of the specific complaints against King George III in the Declaration of Independence was that he deprived the colonists of trial by jury.² Thus, in the United States, the criminal jury is often seen as an important democratic institution. In describing juries, John Adams said "the common people, should have as complete a control . . . in every judgment of a court" as in the legislature.³ Similarly, Thomas Jefferson once said that if he had to choose between democratic participation in the legislature and democratic participation in the judicial branch in the form of juries, he would choose juries.⁴ More recently, when voting to invalidate federal and state laws that encroached on the power of the jury, Justice Antonin Scalia described the jury as the "circuitbreaker" of democracy "in the State's machinery of justice."⁵

But the right to a jury trial was no American invention; it predated the voyage of English colonists to the New World by several centuries. Often traced to the Magna Carta,⁶ the right to a jury trial has long been deemed part of the English Constitution,⁷ and it was "'exported,' with the other essentials of the common law,"⁸ to other countries, including the colonies in the Americas, Australia, and New Zealand.

Statements highlighting the key role of the criminal jury abound in England and Wales. William Blackstone described the jury as the "palladium" or "the grand bulwark" of the Englishman's liberties.⁹ Two hundred years later, Lord Devlin stated that "trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives."¹⁰ Lord Justice Auld's 2001

1 See RENÉE LETTOW LERNER, *THE JURY: A VERY SHORT INTRODUCTION* 26–27 (2023).

2 *Duncan v. Louisiana*, 391 U.S. 145, 151–53 (1968).

3 John Adams, Diary Entry (Feb. 12, 1771), in 2 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 252, 253 (Boston, Charles C. Little & James Brown, Charles Francis Adams ed., 1850).

4 Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 282, 283 (Julian P. Boyd ed., 1958).

5 *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

6 There is a long history of crediting the Magna Carta with guaranteeing the right to a jury trial, pointing to the language; however, it appears that credit may be unwarranted. See, e.g., LERNER, *supra* note 1, at 20–22 (recounting and dispelling the "myth of Magna Carta and jury trial"); Walter Clark, *Magna Carta and Trial by Jury*, 2 N.C. L. REV. 1, 1 (1923) (rejecting the notion that the Magna Carta is "the origin" of the right to a trial by jury).

7 See *infra* text accompanying notes 27–34.

8 David Weisbrot, *Comment*, 90 REFORM 2, 2 (2007).

9 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 343, 350 (Oxford, Clarendon Press, 1749).

10 PATRICK DEVLIN, *TRIAL BY JURY* 164 (1956).

Review of the Criminal Courts of England and Wales noted that the right to a jury “is often described as ‘the jewel in the Crown’ or ‘the corner-stone’ of the British criminal justice system.”¹¹

The jury was an important institution in other common law countries as well. Because jury trials were perceived as an important English right, they were quickly instituted by colonists in both Australia and New Zealand.¹² The Australian High Court—the highest court in the country—has characterized a trial by jury as “the chief guardian of liberty under the law and the community’s guarantee of sound administration of criminal justice.”¹³ A history of the jury in New Zealand concluded that “the centrality of the [jury] system was reflected in both the speed with which it was introduced and the importance placed on its use and regulation” in the early days of the colony.¹⁴ And in his history of the origins of the jury in Scotland, Ian Douglas Willock characterized the jury as “one of the common law’s most distinctive and widespread institutions”¹⁵ and noted that “[t]here are few institutions of modern Scots Law which can show a longer line of descent than the jury system.”¹⁶

Put simply, the jury has a storied place in common law countries.¹⁷ The English jury trial system was often entrenched in subsequent constitutions or statutes as the countries adopted their own, independent

¹¹ THE RIGHT HONOURABLE LORD JUSTICE AULD, *REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES* 135 (2001), <https://www.criminal-courts-review.org.uk/auldconts.htm> [<https://perma.cc/LE92-CZJZ>].

¹² See Michèle Powles, *A Legal History of the New Zealand Jury Service—Introduction, Evolution, and Equality?*, 29 VICT. U. WELLINGTON L. REV. 283, 285 (1999) (“Given the importance placed on the jury system in England, it is not surprising that it was the subject of one of the first pieces of legislation in New South Wales and New Zealand.”).

¹³ *Brown v The Queen* (1986) 160 CLR 171, 197 (Austl.); see also *Kingswell v The Queen* (1985) 159 CLR 264, 298 (Austl.) (describing the need for a trial by jury as “a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases” and noting “[t]hat conviction finds a solid basis in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment”).

¹⁴ Powles, *supra* note 12, at 313–14.

¹⁵ IAN DOUGLAS WILLOCK, *THE ORIGINS AND DEVELOPMENT OF THE JURY IN SCOTLAND* 3 (William W. Gaunt & Sons 1992) (1966).

¹⁶ *Id.*

¹⁷ One could object to designating Scotland a common law country—both on the ground that its legal structure is a hybrid system containing both civil law and common law elements, see Vernon Palmer & Elspeth Reid, *Preface to the Sixth Volume of MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND*, at vii (Vernon Valentine Palmer & Elspeth Christie Reid eds., 2009), and on the ground that it is part of the United Kingdom, rather than an independent nation. Nonetheless, this Essay uses the term “common law country” to describe Scotland because the common law feature it discusses—the jury—is present. In addition, even after Scotland combined with England and Wales to form the United Kingdom in 1707, Scotland retained its own legal system as a separate entity, and its criminal law has remained independent. LINDSAY FARMER, *CRIMINAL LAW, TRADITION AND LEGAL ORDER: CRIME AND THE GENIUS OF SCOTS LAW, 1747 TO THE PRESENT* 21 (1997).

legal systems. The modern right to a jury trial in common law countries is based not only on tradition, but also on a commitment to democracy.

But despite their long history and the soaring rhetoric that they inspire, criminal juries have become increasingly rare. Very few defendants are convicted after a jury trial—or any trial at all. Instead, the vast majority of defendants plead guilty in common law courts. There are different types of incentives for a defendant to plead guilty. Sometimes the incentive comes directly from the judge in the form of sentence reduction. Other times the incentive is less direct, and it is the result of negotiations with a prosecutor. Within these two types of incentives, there are varying degrees of transparency and formality. This Essay examines the practices that incentivize guilty pleas and the push for efficiency that appears to prompt those practices.

The Essay proceeds in four parts. Part I discusses the formal right to a jury trial in five common law countries—Australia, England and Wales, New Zealand, Scotland, and the United States. Part II discusses the right in practice, chronicling the extent to which trials have been replaced by guilty pleas. Part III describes the various incentives for pleading guilty. And Part IV identifies the trend toward efficiency that appears to be driving the creation and formalization of incentives to plead guilty.

I. THE FORMAL RIGHT TO A JURY

As a formal matter, the right to a jury differs across common law countries. In some countries it is a constitutional right; in others the right is protected by statute or by rules of procedure. The scope of the right also differs: In some countries the right is assured only for the most serious crimes, such as murder and rape; in others, it is guaranteed for all but the least serious crimes.

In Australia, the right to a jury trial is enshrined in the country's written Constitution.¹⁸ It provides that “[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury.”¹⁹ As a statutory matter, crimes that are punishable by more than twelve months' imprisonment are classified as indictable offences.²⁰

The inclusion of the jury right is notable because the Australian Constitution contains very few individual rights.²¹ Unlike its American counterpart, however, the Australian Constitution's right to a jury trial

¹⁸ *Australian Constitution* s 80.

¹⁹ *Id.* The federal government in Australia is referred to as the Commonwealth.

²⁰ *Crimes Act 1914* (Cth) s 4G (Austl.).

²¹ Anthony Gray, *Constitutionally Protected Due Process and the Use of Criminal Intelligence Provisions*, 37 U.N.S.W. L.J. 125, 126 (2014) (noting that the framers of the Australian Constitution elected to include “a limited number of express written rights scattered through the *Constitution*, but no bill of rights document”).

applies only to Commonwealth crimes—that is, crimes established by the country’s federal parliament; the right has not been extended to apply to state crimes.²² This has allowed the states to place limits on the jury right. For example, multiple states allow bench trials under various circumstances.²³ It is possible that if the states were to attempt to abolish the right to a jury trial altogether, rather than merely limit it, then the Australian High Court might step in. That is because a 1996 case from the Australian High Court, *Kable v Director of Public Prosecutions (NSW)*,²⁴ interpreted the federal constitution to place what appear to be certain structural limitations on the ability of state and territorial legislatures to alter their own courts.²⁵ The so-called “Kable Doctrine” has not yet been extended to the jury trial right.²⁶

In England and Wales, the right to a jury trial is enshrined in the Bill of Rights 1689.²⁷ The Bill of Rights 1689 is legislation passed by the English Parliament in the wake of the Glorious Revolution²⁸—the ousting of King James II and the ascension of William and Mary to the throne.²⁹ Although the right can be limited—or even revoked—through legislation, the jury is sometimes referred to in constitutional terms.³⁰

²² Some have speculated that the framers of the Australian Constitution might have thought it unnecessary to extend the right to the states because when the country’s constitution was adopted in 1900, all of the Australian colonies provided for juries in trials for serious offenses. See Anthony Gray, *A Guaranteed Right to Trial by Jury at State Level?*, 15 AUSTRALIAN J. HUM. RTS. 97, 101 (2009); see also *Cheatle v The Queen* (1993) 177 CLR 541, 549 (Austl.) (noting that when the Constitution was adopted, trial by jury existed in all Australian colonies for serious criminal offenses).

²³ See, e.g., Gray, *supra* note 22, at 97–98 (discussing legislation in Queensland “which mirror changes in other jurisdictions” to allow “either the prosecutor or the accused to apply to the court for an order that the trial (on an indictable offence) be heard by a judge without a jury”); Mark Findlay, *Juries Reborn*, 90 REFORM 9, 9 & n.1 (2009), (discussing the “expansion of summary jurisdiction” in most states and territories, under which “local or magistrates courts, which operate without juries, are being given responsibility to hear more serious offences, at the election of the prosecution or the defence”).

²⁴ (1996) 189 CLR 51 (Austl.).

²⁵ *Id.* at 103.

²⁶ See generally Gray, *supra* note 22 (arguing for such an extension).

²⁷ Bill of Rights 1689, 1 W. & M. c. 2, § 1 (Eng.) (identifying “[t]hat jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason out to be freeholders” as one of several “ancient rights and liberties”).

²⁸ For more on the Bill of Rights 1689, see E. NEVILLE WILLIAMS, *THE EIGHTEENTH-CENTURY CONSTITUTION 1688-1815: DOCUMENTS AND COMMENTARY* (1960).

²⁹ For more on the Glorious Revolution, see W.A. SPECK, *RELUCTANT REVOLUTIONARIES: ENGLISHMEN AND THE REVOLUTION OF 1688* (1989).

³⁰ See, e.g., *Chandler v. DPP* [1964] AC (HL) 763 at 803–04 (Lord Devlin) (appeal taken from Eng.) (characterizing an argument that “a judge should be entitled to direct a jury to return a verdict of guilty” as “an unconstitutional doctrine” because “[i]t is the conscience of the jury and not the power of the judge that provides the constitutional safeguard against perverse acquittal”); *R v. Fanning*, (2016) 1 WLR 4175 at 4178 (Eng.) (discussing “the constitutional position of the jury in a criminal trial”); *HM Solic. Gen. v. Warner* [2024] EWHC (KB) 918, [14] (Eng.) (describing the

The notion that the right to a jury trial is part of England and Wales's constitution thus means something different than it means in countries with codified constitutions, such as Australia and the United States.³¹ Something can be a constitutional right in England and Wales and yet be subject to repeal through new legislation, because the defining principle of the country's constitution is the principle of parliamentary supremacy.³² Parliamentary supremacy ensures that Parliament is the ultimate lawmaking authority, with the power to create or abolish any law.³³ And the Parliament of England and Wales has, on occasion, passed legislation that limits the jury right.³⁴

As far as the scope of the right, whether a defendant in England and Wales is entitled to a jury depends upon the crime with which he is charged. Crimes which are classified as "summary" are tried in Magistrates' Court without a jury.³⁵ Crimes that are indictable are tried in

power of the jury to acquit according to conscience as "an established feature of our constitutional landscape"). *But see* AULD, *supra* note 11, at 137–38 ("In England and Wales there is no constitutional or indeed any form of general right to trial by judge and jury, only a general obligation to submit to it in indictable cases. . . . [T]here is no legal basis for regarding the claimed 'right' to jury trial as a constitutional entitlement, that is an entrenched right overriding all other legal instruments, as in the United States for offences carrying more than six months imprisonment or under the Canadian Charter of Rights and Freedoms for offences punishable by five years imprisonment or more, or as a right at all." (footnotes omitted)).

³¹ England and Wales are sometimes said to have an "unwritten constitution." *See, e.g.*, David S. Law, *The Paradox of Omnipotence: Courts, Constitutions, and Commitments*, 40 GA. L. REV. 407, 414 (2006) (referencing "England's unwritten constitution"). Some dispute this characterization, saying the country's constitution is written, but not codified—that is to say, it consists of many documents, including the Bill of Rights 1689. *See, e.g.*, *Explainer: What Is the UK Constitution?*, UNIV. COLL. LOND.: CONST. UNIT, <https://www.ucl.ac.uk/constitution-unit/explainers/what-uk-constitution> [<https://perma.cc/T4QG-AW8C>] ("The UK is often said to have an 'unwritten' constitution, but this is not strictly correct; it is largely written, but in different documents. It has never been codified; brought together in a single document."). Others push back against the "written" and "unwritten" distinction entirely. *See, e.g.*, Jane Pek, Note, *Things Better Left Unwritten?: Constitutional Text and the Rule of Law*, 83 N.Y.U. L. REV. 1979, 1986 (2008) ("In practice, countries without formal written constitutions possess codified laws of constitutional import, and countries with written constitutions rely upon uncoded constitutional principles.").

³² *See* UNIV. COLL. LOND.: CONST. UNIT, *supra* note 31; *see also* Law, *supra* note 31, at 414 n.21 (collecting sources).

³³ *See* A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39–40 (10th ed. 1959).

³⁴ *See* Tana Adkin, *Guest Blog: How Will Restricting Jury Trial and Reducing Jury Numbers Affect the Delivery of Justice?*, BAR COUNCIL (July 10, 2020), <https://www.barcouncil.org.uk/resource/guest-blog-how-will-restricting-jury-trial-and-reducing-jury-numbers-affect-the-delivery-of-justice.html> [<https://perma.cc/7RJD-HR9H>] (collecting examples of limitations, including the Criminal Justice Act 2003, which permits nonjury trials in cases of jury tampering, and the Domestic Violence, Crime and Victims Act 2004, which permits some criminal counts to be tried by a jury and others to be tried by a judge alone).

³⁵ *See* Peter Duff, *The Limitations on Trial by Jury*, 72 INT'L REV. PENAL L. 603, 604 (2001).

Crown Court in front of a judge and jury.³⁶ And crimes that are classified as “either-way offences” originate in the Magistrates’ Court.³⁷ In cases involving an “either-way” offense, the parties can argue that the case should either remain in Magistrates’ Court, where there are no juries, or be transferred to Crown Court, where juries are available.³⁸ The magistrate decides whether to keep or transfer the case, though the defendant generally has the right to veto the decision to keep the case in Magistrates’ Court.³⁹

Like England and Wales, New Zealand does not have a written constitution.⁴⁰ Consequently, the jury right is enshrined in statute—specifically the New Zealand Bill of Rights Act 1990.⁴¹ Under the Criminal Procedure Act 2011, not all criminal trials occur in front of a jury. For Category 1 offenses (crimes not punishable by imprisonment) and Category 2 offenses (crimes punishable by fewer than two years of imprisonment), any trial “will be a Judge-alone trial”—i.e., a bench trial.⁴² For Category 3 offenses, which are punishable by two or more years’ imprisonment, the defendant can choose whether to have a trial by jury or a bench trial.⁴³ Category 4 offenses, which include murder, piracy, treason, and other enumerated crimes,⁴⁴ are ordinarily tried in front of a jury.⁴⁵

Unlike the other jurisdictions discussed in this Essay, Scotland does not have a separate, formal right to a jury trial.⁴⁶ Rather than as a right carried with colonists to new shores, the notion of a trial by jury arrived in Scotland instead through a process of “permeation” that

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 607.

³⁹ *Id.*

⁴⁰ It is rare for modern countries not to adopt codified constitutions. As one commentator noted:

In the developed world, New Zealand is virtually unique in not having a written constitution. Only the United Kingdom and Israel, among all other civil societies, also lack such a pre-eminent constitutional document and so, too, can be described as lacking a written constitution in this formal sense. . . . Of course, countries like Australia and Canada also inherited the Westminster system of government from England but did so with a written constitution (in the form of an Act of the imperial parliament) included.

James Allan, *Why New Zealand Doesn’t Need a Written Constitution*, 5 *AGENDA* 487, 487 (1998).

⁴¹ New Zealand Bill of Rights Act 1990, s 24(e).

⁴² *Id.* ss 4(1)(d), (g), (h), (j).

⁴³ *Id.* ss 4(1)(k)–(l), 50.

⁴⁴ *Id.* sch 1, pt 1.

⁴⁵ *See id.* s 4(1)(r). A judge may order a bench trial in “cases likely to be long and complex,” *id.* s 102, or in “cases involving intimidation of juror or jurors,” *id.* s 103.

⁴⁶ Christopher Gane, *The Scottish Jury*, 72 *INT’L REV. PENAL L.* 259, 266 (2001) (“The right to jury trial—in the sense that the accused may choose whether to be tried by a jury or by some other tribunal—does not exist in Scottish procedure.”).

accompanied the growing influence of Normans who had intermarried with Scottish families and otherwise migrated from the south.⁴⁷ As a result, the country has a long tradition of jury trials.⁴⁸

The availability of juries is tied to the hierarchy of the Scottish criminal courts and the procedures observed in those courts. In particular, whether a Scottish defendant is entitled to a jury trial depends on whether her case is prosecuted under solemn procedure or summary procedure, which in turn depends on which court hears the defendant's case. Solemn procedure includes a fifteen-member jury, whereas summary proceedings are conducted in front of one or more judges.⁴⁹ Summary proceedings in sheriff court are conducted in front of a professional judge (called a sheriff), whereas summary proceedings in justice of the peace courts are conducted in front of one or more lay justices.⁵⁰ High Court proceedings are always conducted under solemn procedure; proceedings in the justice of the peace courts are always conducted under summary proceedings.⁵¹ Cases that are heard in sheriff court may be conducted under either solemn or summary procedure—a decision that is left to the public prosecutor.⁵²

The maximum penalty that may be imposed differs in each of the different Scottish courts. In the High Court, the maximum punishment is life imprisonment.⁵³ In justice of the peace court, the maximum punishment is ordinarily limited to sixty days' imprisonment.⁵⁴ In sheriff court, the maximum penalty depends on whether the case was prosecuted under solemn procedure or summary procedure—five years if solemn procedure and twelve months if summary procedure.⁵⁵

⁴⁷ WILLOCK, *supra* note 15, at 5–7.

⁴⁸ See Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, 62 LAW & CONTEMP. PROBS. 173, 173 (1999) (noting that “the Scottish criminal jury . . . developed roughly in tandem with, although in a different fashion from, its English counterpart”).

⁴⁹ See Fiona Leverick, *Plea Bargaining in Scotland: The Rise of Managerialism and the Fall of Due Process*, in WORLD PLEA BARGAINING: CONSENSUAL PROCEDURES AND THE AVOIDANCE OF THE FULL CRIMINAL TRIAL 125, 135–36 (Stephen C. Thaman ed., 2010).

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See Duff, *supra* note 48, at 176 (“Where a crime may be tried under either solemn or summary procedure, it is the public prosecutor who decides upon the mode of trial.”); Gane, *supra* note 46, at 266; Leverick, *supra* note 49, at 137; Cyrus Tata, *Sentencing and Penal Decision-Making: Is Scotland Losing Its Distinctive Character?*, in CRIMINAL JUSTICE IN SCOTLAND 195, 199 (Hazel Croall et al. eds., 2010).

⁵³ Gane, *supra* note 46, at 261; Leverick, *supra* note 49, at 136.

⁵⁴ Leverick, *supra* note 49, at 136. The Glasgow Stipendary Magistrates' Court is the sole exception; there, the maximum penalty is twelve months' imprisonment. *Id.* at 136 n.55.

⁵⁵ See *id.* at 136.

Very serious crimes, such as murder, rape, and treason, must be tried in the High Court.⁵⁶ Other common law crimes, including assault, robbery, burglary, theft, and fraud, may be tried under either solemn procedure or summary procedure.⁵⁷ Crimes that are created by statute sometimes specify whether they should be tried under solemn procedure, summary procedure, or either; most statutes specify summary procedure.⁵⁸

Of the five countries considered in this Essay, the United States provides the most robust right to a jury trial—at least as a matter of formal law. From the earliest days of the American colonies, the jury was seen as an important right. It appeared in every state constitution that was in effect when the federal constitution was adopted in 1789.⁵⁹ The federal constitution guarantees the right twice—both in the original text and in the Sixth Amendment.⁶⁰ Like in Scotland, the availability of a jury is tied to the amount of punishment that is authorized, but the American threshold is much lower. The U.S. Supreme Court has interpreted its constitution to require a jury in any case in which the defendant is facing a maximum sentence of more than six months' imprisonment.⁶¹

II. THE REPLACEMENT OF JURY TRIALS WITH GUILTY PLEAS

As the preceding Section indicates, the right to a jury trial is a key feature of common law countries. Yet, despite their long history and perceived importance, jury trials are quite rare. Rather than proceeding to trial in front of a jury of their peers, most defendants in these common law countries opt to plead guilty. This Section discusses the available data on guilty pleas, which indicates that guilty pleas are the dominant form of case resolution. As noted below, the data is easier to find for some countries than for others.

Data from Australia is remarkably easy to find. The country's Bureau of Statistics maintains national statistics about defendants in criminal courts and makes that data available for public download. That data reveals that in fiscal year 2022–2023, only 7% of cases went to trial; 81% of defendants pleaded guilty, and the remaining 11% of cases

⁵⁶ Duff, *supra* note 48, at 176.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994).

⁶⁰ *Id.* (“The right to jury trial in criminal cases was among the few guarantees of individual rights enumerated in the Constitution of 1789, and it was the only guarantee to appear in both the original document and the Bill of Rights.”).

⁶¹ See *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 542 (1989); *Baldwin v. New York*, 399 U.S. 66, 69 & n.6 (1970) (plurality opinion); *Duncan v. Louisiana* 391 U.S. 145, 159 (1968).

were dismissed.⁶² The rate of trials appears to have decreased over time, whereas the rate of guilty pleas has increased.⁶³

Data from England and Wales suggests that the country may have the highest trial rate of the five jurisdictions addressed in this Essay. In 2021, 17% of defendants in Crown Court entered a not guilty plea and proceeded to trial; 70% of defendants entered a guilty plea, and charges were dropped in the remaining 13% of cases.⁶⁴ Guilty plea rates appear to be lower in Magistrates' Court,⁶⁵ but it is unclear whether this is attributable to more defendants having their charges dropped or more defendants proceeding to trial.⁶⁶

Contemporary statistics for New Zealand have been difficult to obtain.⁶⁷ A July 2004 Law Commission report indicates that 80% of cases in District Court were resolved by guilty pleas in the years 1997–2001; 15% of cases were withdrawn, and the remaining 5% went to trial.⁶⁸ The Author was unable to locate more recent data.

The statistical picture from Scotland is clearer. Publicly available data indicates that in fiscal year 2021–2022, 93% of all defendants

⁶² These numbers are derived from the data that is provided in “data cube 1, table 1,” which is available for download at *Criminal Courts, Australia: 2022-23 Financial Year*, AUSTRALIAN BUREAU OF STAT. (Mar. 15, 2024), <https://www.abs.gov.au/statistics/people/crime-and-justice/criminal-courts-australia/2022-23> [<https://perma.cc/SQ8B-TFAB>].

⁶³ In fiscal year 2010–2011, for example, 12% of cases went to trial; 78% of defendants pleaded guilty, and the remaining 9% of cases were dismissed. *See id.*

⁶⁴ These figures were derived from publicly available data that may be downloaded from the Ministry of Justice. *See Criminal Court Statistics Publication: Pivot Table Analytical Tool for England and Wales*, MINISTRY OF JUST. (Sept. 29, 2022) [hereinafter *Pivot Table*], https://assets.publishing.service.gov.uk/media/63342ccad3bf7f34ed35ea3b/cc_plea_tool.xlsx [<https://perma.cc/L68S-FNHU>]. These figures reflect only the defendants who entered either guilty pleas or not guilty pleas. In 2021, more than 5,000 Crown Court defendants entered no plea. *See id.* Those defendants have been excluded from this Essay's calculations.

⁶⁵ The guilty plea rate for “serious magistrates' court cases” was 49% in 2021, 57% in 2022, and 67% in 2023, as compared with 67%, 64%, and 61%, respectively, in Crown Court. *See Charge to Case Completion at Court*, GOV.UK: CRIM. JUST. SYS. DELIVERY DATA DASHBOARD, https://criminal-justice-delivery-data-dashboards.justice.gov.uk/quality-justice/courts#guilty_plea_rate—table [<https://perma.cc/L2UC-HF9X>].

⁶⁶ The publicly available accredited official statistics include comprehensive data on pleas in Crown Court, but not Magistrates' Court. *See Pivot Table, supra* note 64. My own, limited research on guilty pleas, trials, and dropped charges in the United States found that charges were dropped or dismissed at a higher rate in less serious cases. *See* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 185 (2021).

⁶⁷ *See, e.g.*, Carol A. Brook, Bruno Fiannaca, David Harvey, Paul Marcus, Jenny McEwan & Renee Pomerance, *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 WM. & MARY L. REV. 1147, 1169 (2016) (noting inability to locate relevant statistics).

⁶⁸ N.Z. L. COMM'N, PRELIMINARY PAPER 55: REFORMING CRIMINAL PRE-TRIAL PROCESSES 1 & n.2 (2004).

pleaded guilty.⁶⁹ Unfortunately, the publicly available data does not indicate whether the remaining 7% of defendants proceeded to trial or had their case dismissed, and it appears that this information is not collected.⁷⁰

In the United States, data about federal cases is relatively easy to obtain. Information released by the Administrative Office of the Courts indicates that in 2022, 90% of federal defendants pleaded guilty.⁷¹ Only 2% of defendants proceeded to trial; the remaining 8% of cases were dismissed.⁷² Comparable data from all fifty states is more difficult to locate, but the available data indicates that state courts have similarly high rates of guilty pleas and low rates of trial.⁷³ And historical data indicates that trial rates have fallen significantly since the 1970s.⁷⁴

TABLE 1. GUILTY PLEA, TRIAL, AND DISMISSAL RATES

| Country | Guilty Pleas | Trials | Dismissals |
|-------------------|--------------|--------|------------|
| Australia | 81% | 7% | 11% |
| England and Wales | 70% | 17% | 13% |
| New Zealand | 80% | 5% | 15% |
| Scotland | 93% | 7% | |
| United States | 90% | 2% | 8% |

Although the availability of data varies across jurisdictions, several quantitative conclusions can be drawn. First, the United States appears to have the lowest trial rate of all jurisdictions.⁷⁵ This is notable because,

⁶⁹ This figure is derived from data downloaded from *Main Bulletin Tables Table 2. CRIMINAL PROCEEDINGS IN SCOTLAND, 2021-22*, SCOT. GOV'T (Aug. 12, 2024), <https://www.gov.scot/publications/criminal-proceedings-scotland-2021-22/documents> [<https://perma.cc/DN4N-V3BP>].

⁷⁰ See Email from Paul Bremmer, Head of Mgmt. Info. Analysis Team, Scottish Courts & Tribunals Serv. to author (Aug. 23, 2024, 09:07 ET) (on file with author) (“Regarding data on ‘discontinuance/dismissal/withdrawal of charges’ I think you would possibly have submit [sic] an FOI to Crown Office and Procurator Fiscal Service (COPFS) as I am not aware of any data published regarding withdrawal of charges.”).

⁷¹ John Gramlich, *Fewer than 1% of Federal Criminal Defendants Were Acquitted in 2022*, PEW RSCH. CTR. (June 14, 2023), <https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022> [<https://perma.cc/2B-DV-SC6Q>] (summarizing 2022 data from the Administrative Office of the Courts for both felonies and misdemeanors and noting that 89.5% resulted in guilty pleas).

⁷² *Id.* (indicating an 8.2% dismissal rate).

⁷³ HESSICK, *supra* note 66, at 28–29 (“Data collected by the National Center for State Courts shows that, in 2017, New York had 2.91 percent of criminal cases proceed to trial, Michigan had 2.12 percent of cases go to trial, and Texas had fewer than 1 percent of cases go to trial. None of the twenty-two states for which the NCSC has data had more than a 3 percent trial rate.”).

⁷⁴ *Id.* at 28.

⁷⁵ It is possible that Scotland’s trial rate is lower, but that is unclear because the country does not disaggregate cases in which defendants proceed to trial from cases in which the charges are dropped or dismissed. See *supra* note 69.

as Part I revealed, the United States has the most robust formal right to a jury trial. It is somewhat ironic that the country with the most robust commitment to the jury trial on paper is the least committed to the jury trial in practice.

Second, although the trial rate varies across countries, it remains relatively low everywhere. Only in England and Wales do more than 10% of defendants go to trial. But even in England and Wales, guilty pleas are the dominant mechanism for resolving criminal cases. The next Section addresses the various incentives for defendants to plead guilty across common law countries.

III. INCENTIVES TO PLEAD GUILTY

Sometimes defendants plead guilty because they are guilty and they do not want to subject themselves—and others—to the time, expense, and embarrassment of a trial. But given the possibility of an acquittal at trial, the rational actor model tells us that even guilty defendants will insist on proceeding to trial.⁷⁶ In order to alter that calculus—and make it in a defendant's self-interest to plead guilty—an incentive is necessary to counterbalance the chance of acquittal at trial. Put differently, some defendants need an incentive to plead guilty; they need something in return for giving up the chance that they would have been found not guilty.

The most obvious incentive for a defendant to plead guilty is a reduction in sentence—that is to say, defendants will perceive that it is in their interest to plead guilty if they will receive a less severe sentence than the sentence they would have received if convicted at trial. Each of the common law systems discussed in this Essay offers such an incentive, though the form of the incentive differs from country to country. One difference is the source of the incentive. Sometimes the incentive comes directly from the judge at sentencing or from rules that guide judicial sentencing discretion. Other times the incentive is obtained indirectly through negotiations with prosecutors that alter the possible sentencing range, limit or adjust the facts on which the judge will sentence, or offer a favorable sentencing recommendation to the judge.⁷⁷

⁷⁶ The hypothetical rational actor weighs costs and benefits in order to make decisions that maximize her own well-being. See Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1214–15 (2003) (describing the basic rational actor theory).

⁷⁷ For a similar approach to discussing plea bargaining, see MATTHIAS BOLL, PLEA BARGAINING AND AGREEMENT IN THE CRIMINAL PROCESS: A COMPARISON BETWEEN AUSTRALIA, ENGLAND AND GERMANY 4–6 (2009). Although judges and prosecutors are the main sources of guilty-plea incentives, legislatures can also provide incentives. To the extent that those incentives flow through judicial sentencing, they are discussed *infra* in text accompanying notes 86–95.

Guilty-plea incentives also differ in how transparent the incentive is to those outside of the case.

The following Section explores the different features of various guilty-plea incentives and explains which incentives are available in different countries.

A. *Incentives from Judges*

Judges incentivize guilty pleas by imposing more lenient sentences on those defendants who plead guilty than on those who proceed to trial. As explained in more detail below, initially shorter sentences were purely a matter of judicial sentencing discretion. Over time, common law countries have indicated that a guilty plea is an appropriate mitigating factor at sentencing, and some countries have indicated what the sentence reduction ought to be.

To understand how judges incentivize a guilty plea, it is first important to note that these more lenient sentences are rarely framed as an incentive to plead guilty. Instead, the reduced sentences are often characterized as leniency or mitigation in recognition of the defendant's remorse.⁷⁸ This characterization may have a historical basis. When trials were more common, a defendant's guilty plea was seen as a confession of guilt and whether that confession was enough to warrant lenient treatment was seen as a question of mercy for the court.⁷⁹ In a system of judicial sentencing discretion, defendants had no guarantee that their guilty plea would result in leniency. But it eventually became quite common for defendants to receive a sentencing "discount" if they pleaded guilty.⁸⁰

Even as so-called "plea discounts" became more common, they were still tied to the idea of remorse. For example, in *R v. Harper*,⁸¹ a 1968 case from the Court of Appeal of England and Wales, the court said it is "proper to give a man a lesser sentence if he has shown genuine remorse, amongst other things by pleading guilty."⁸² Remorse, one Australian court explained, is an appropriate mitigating sentencing factor because it suggests the defendant is a good prospect for rehabilitation.⁸³ These explanations were often accompanied by exhortations that

⁷⁸ See *infra* notes 81–85 and accompanying text.

⁷⁹ Merriam-Webster illustrates the idiom "throw oneself on the mercy of (someone)" with the statement "The prisoner confessed his crimes and *threw himself on the mercy of the court.*" *Throw Oneself on the Mercy of (Someone)*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/throw%20oneself%20on%20the%20mercy%20of%20%28someone%29> [https://perma.cc/HW6H-5FZ6].

⁸⁰ See HESSICK, *supra* note 66, at 19–20.

⁸¹ [1968] 2 QB 108 (Eng.).

⁸² *Id.* at 110.

⁸³ *R v Jabaltjari* (1989) 64 NTR 1, 15 (Austl.) (stating that a guilty plea "represents a realistic appraisal by the accused that he knows that he has done wrong and must be punished, and therefore exhibits prospects of rehabilitation through self-knowledge").

defendants who plead not guilty should not receive longer sentences merely because they insist upon a trial⁸⁴ and that the plea discount must be awarded to recognize that the defendant's remorse indicates rehabilitative potential, not because a plea is administratively expedient, efficient, or convenient.⁸⁵

But not all courts were comfortable with the notion of a plea discount. In 1987, the Scottish Court of Appeal explicitly disapproved of the practice in a case called *Strawhorn v. McLeod*.⁸⁶ *Strawhorn* involved an appeal by a defendant who was dissatisfied with his sentence; in particular, he argued that the lower court judge should not have decreased his plea discount on the grounds that the guilty plea had been entered late.⁸⁷ Rather than siding with the defendant, the Court of Appeal voiced objection to the entire practice of plea discounts, stating that the practice was "objectionable" and incompatible with the presumption of innocence.⁸⁸ Whether lower court judges continued to award plea discounts despite this direction of the Court of Appeal is a matter of some factual disagreement.⁸⁹ *Strawhorn* was eventually overturned by legislation in 1995, which allowed sentencing judges to reduce punishment

⁸⁴ See *Harper*, 2 QB at 110.

⁸⁵ As one Australian judge explained this distinction:

It is not possible, I think, to exhaustively formulate all of the circumstances in which a discretionary allowance should be made in favour of an offender who pleads guilty. However, the cases to which I have referred, and the general principles of sentencing, lead me to the view that for the benefit to be available, there must be found, or inferred from the plea, something subjective to the offender going to his contrition or desire to cause no more harm. Inherent in such a finding or inference, based upon the plea or such other evidence as is available, is the notion that by the time the plea is entered or indicated the offender's rehabilitation has at least commenced, he or she having accepted responsibility for the criminality involved in the conduct making up the offence.

There is one matter referred to in *Shannon* and some of the other cases which I am most reluctant to follow. That is that a benefit may be extended to an offender on the basis that the guilty plea saves time, expense and delay in the criminal justice system. Those factors are consequential upon the plea. It seems to me that it is what motivates the offender to plead guilty in relation to the offence which may count in his favour, not the benefits which might flow to others unconnected with the offence.

Jabaltjari, 64 NTR at 30.

⁸⁶ (1987) SCCR 413 (Scot.).

⁸⁷ *Id.* at 413.

⁸⁸ *Id.* at 413, 415.

⁸⁹ Compare Fiona Leverick, *Tensions and Balances, Costs and Rewards: The Sentence Discount in Scotland*, 8 EDINBURGH L. REV. 360, 363 (2004) ("[T]here is at least some evidence that judges continued to take the fact and timing of a guilty plea into account in sentencing decisions."), with Tata, *supra* note 52, at 203 (noting that research revealed "no major and systematic practice of sentence discounting across the board in Scotland" with the exception of "certain categories of cases (notably sexual offences)").

based on a guilty plea.⁹⁰ Current Scottish statutory law not only allows judges to account for guilty pleas, but requires judges who are sentencing defendants who pleaded guilty to (1) take into account when in the proceeding the defendant indicated that he or she intended to plead guilty and (2) explain how the defendant's guilty plea impacted the sentence that the judge imposed.⁹¹

Scotland was not the only country to adopt legislation regarding plea discounts. A guilty plea or the expression of remorse is a statutory mitigating factor in most Australian jurisdictions,⁹² England and Wales,⁹³ New Zealand,⁹⁴ and several U.S. states.⁹⁵ These statutes not only legitimize the plea discount, but also sometimes mandate such a discount.

Plea discounts were further legitimized and standardized in common law countries as those countries developed structured sentencing regimes—that is, sentencing systems in which the judge's sentencing discretion is constrained by statutory rules or regulations. Structured sentencing systems take different forms, including not only sentencing guidelines, but also appellate opinions that are functionally equivalent to such guidelines.

Three countries have adopted formal sentencing guidelines, which do not simply recognize a sentencing discount for those defendants who plead guilty, but also create some consistency regarding the amount of that discount. In England and Wales, the sentencing guideline reduction for guilty pleas is quite large. A defendant can receive up to a one-third discount in her sentence if she pleads guilty “at the first stage of the proceedings,” and lesser discounts are available for those defendants who plead guilty later in the process.⁹⁶

⁹⁰ Leverick, *supra* note 89, at 362 (noting that the practice “was not formally recognised in Scottish legislation until 1995, initially in section 33 of the Criminal Justice (Scotland) Act 1995, which was almost immediately consolidated into the Criminal Procedure (Scotland) Act 1995”).

⁹¹ Criminal Procedure (Scotland) Act 1995 § 196(1)–(1)(A).

⁹² *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(j) (Austl.); *Crimes Act 1914* (Cth) s 16A(2)(g) (Austl.); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(k) (Austl.); *Sentencing Act 1995* (NT) s 5(2)(h)–(j) (Austl.); *Sentencing Act 2017* (SA) s 11(1)(g) (Austl.); *Sentencing Act 1991* (Vic) s 5(2)(e) (Austl.); *Sentencing Act 1995* (WA) s 9AA(2) (Austl.). The Tasmanian Sentencing Act 2017 does not include instructions on what factors ought to mitigate a sentence. MIRKO BAGARIC, RICHARD EDNEY & THEO ALEXANDER, *SENTENCING IN AUSTRALIA* 367 (10th ed. 2022).

⁹³ The Sentencing Act 2020, c. 17, § 73(2) (Eng.).

⁹⁴ Sentencing Act 2002, s 9(2)(b) (N.Z.).

⁹⁵ Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 199 & n.147 (2016).

⁹⁶ *Reduction in Sentence for a Guilty Plea - First Hearing on or After 1 June 2017*, SENT'G COUNCIL (June 1, 2017), <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/reduction-in-sentence-for-a-guilty-plea-first-hearing-on-or-after-1-june-2017/> [https://perma.cc/2GPH-WXHQ].

In the United States, the Federal Sentencing Guidelines provide for a reduction in a sentence for “acceptance of responsibility.”⁹⁷ But because of how the guidelines operate, that reduction may be relatively modest. Specifically, the guidelines constrain sentencing discretion by instructing judges to calculate an “offense level”—a number that is determined not only based on the crime for which the defendant was convicted, but also other facts, such as the amount of harm that was inflicted, the weight of drugs that were distributed, and so forth.⁹⁸ The guidelines provide for a reduction of two to three points for acceptance of responsibility, which could result in a large plea discount for defendants with low offense level scores and a smaller discount for defendants with high offense level scores.⁹⁹

The third jurisdiction with formal guidelines, Scotland, is an outlier in that it does not provide much in the way of consistency. In Scotland, the sentencing guidelines indicate that for those defendants who plead guilty, the judge “must take into account the stage in the proceedings at which, and the circumstances in which, the offender indicated their intention to plead guilty,”¹⁰⁰ but do not recommend specific discounts.¹⁰¹ However, appellate case law instructs trial judges that defendants who plead guilty at the earliest possible stage should receive a one-third discount, those who plead guilty at the preliminary hearing should receive a one-quarter discount, and those who plead guilty just before trial should receive no more than a ten percent discount.¹⁰²

Australia and New Zealand do not have formal written guidelines, but they have statutory structure to their sentencing law. Specifically, both countries have, at least to some extent, adopted so-called “guideline judgments,” which are intended to bring more consistency to

⁹⁷ U.S. SENT’G COMM’N, U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2024).

⁹⁸ For a visual explanation of how an offense level is calculated, see KATE SMITH & JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS app. D, at 192–93 (1998). In the wake of *United States v. Booker*, 543 U.S. 220 (2005), federal judges have the discretion to deviate from the sentencing range recommended by the guidelines. *Id.* at 245–46. But federal judges are still required to correctly calculate that range before deciding whether to deviate. See *Gall v. United States*, 552 U.S. 38, 49–50 (2007).

⁹⁹ See U.S. SENT’G COMM’N, *supra* note 97, § 3E1.1.

¹⁰⁰ See SCOT. SENT’G COUNCIL, THE SENTENCING PROCESS: SENTENCING GUIDELINES 12 (2021), <https://www.scottishsentencingcouncil.org.uk/media/jtbhlsre/the-sentencing-process-guideline-d.pdf> [<https://perma.cc/BJ3B-8YMB>].

¹⁰¹ The requirement that the judge consider the guilty plea and the timing originates in statute. The criminal procedure act was amended in 2004 to change the word “may” to “shall.” Criminal Procedure (Amendment) (Scotland) Act 2004, (ASP 5) § 20(2).

¹⁰² Leverick, *supra* note 49, at 145 (discussing cases); see also Jay Gormley, *The Inefficiency of Plea Bargaining*, 49 J.L. & Soc’y 243, 280 (2022) (“While judges are under no obligation to grant any discount for a guilty plea (on occasion, no or little discount may be given), the expectation is that an early guilty plea will generally result in the notional headline sentence being reduced by a stated amount of up to one-third.” (footnote omitted)).

sentencing decisions.¹⁰³ Unlike formal guidelines, guideline judgments do not come from external bodies, such as sentencing commissions or sentencing councils. Instead, guideline judgments are appellate court opinions that are issued in the course of resolving a particular case.¹⁰⁴ However, a guideline judgment differs from an ordinary appellate opinion in that it is explicitly written to provide more general guidance to sentencing courts regarding categories of cases or sentencing issues that are not necessarily implicated by the facts of the case at bar.¹⁰⁵

Guilty-plea discounts have been formalized and standardized in New Zealand's guideline judgments. The prevailing guideline judgment requires a sentencing judge to first determine a "provisional sentence" for the defendant, which is based on the crime committed as well as any aggravating or mitigating factors.¹⁰⁶ After determining the provisional sentence, the judge must then reduce the provisional sentence to account for the guilty plea "by applying a sliding scale reduction to the provisional sentence, fixed principally by reference to when the plea was entered."¹⁰⁷ The maximum discount is set at twenty-five percent.¹⁰⁸

Plea discounts in Australia are more complicated. As noted above, most Australian states have legislation designating a guilty plea as a mitigating factor,¹⁰⁹ and case law in every state and territory recognizes a guilty plea as a mitigating factor.¹¹⁰ The country's leading treatise

¹⁰³ See, e.g., Kate Warner, *Sentencing Review 2000-2001*, 25 CRIM. L.J. 332, 335-41 (2001) (describing the adoption of guideline judgments in certain Australian jurisdictions); Tania Singh, 'Zhang v R' [2019] NZCA 507: *A Brave New World?*, 2019 N.Z. L.J. 404, 404-05, 407 (discussing recent doctrinal changes to guideline judgments in New Zealand).

¹⁰⁴ The written decisions that Americans call "opinions" are called "judgments" in other common law countries. See, e.g., KEIRAN HARDY, *LAW IN AUSTRALIAN SOCIETY: AN INTRODUCTION TO PRINCIPLES AND PROCESS* 33 (2019) ("At the end of a case, the judge (or judges) write up a document known as a judgment. A judgment is a statement of reasons that explains how and why the judge decided the case in a particular way." (emphasis omitted)).

¹⁰⁵ Guideline judgments appear to have originated in England and Wales during the latter half of the 1970s. See ROSEMARY PATTENDEN, *ENGLISH CRIMINAL APPEALS 1844-1994: APPEALS AGAINST CONVICTION AND SENTENCE IN ENGLAND AND WALES* 270 (1996). For more on guidelines judgments, see Briana Lynn Rosenbaum, *Sentence Appeals in England: Promoting Consistent Sentencing Through Robust Appellate Review*, 14 J. APP. PRAC. & PROCESS 81, 118-25 (2013).

¹⁰⁶ *Hessell v. R.*, [2010] NZSC 135, [2011] 1 NZLR 607 at [72] per McGrath J. (N.Z.).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at [75].

¹⁰⁹ See *supra* note 92.

¹¹⁰ See BAGARIC ET AL., *supra* note 92, at 370 ("Pleading guilty is a mitigating factor in all Australian jurisdictions."). The one state that does not have such a statute, Tasmania, has case law recognizing guilty pleas as a mitigating factor. SENT'G ADVISORY COUNCIL (TASMANIA), *STATUTORY SENTENCING REDUCTIONS FOR PLEAS OF GUILTY* 31 (2018), https://www.sentencingcouncil.tas.gov.au/_data/assets/pdf_file/0003/449553/Web-version-Sentencing-Discounts-Final-Report-October-2018.pdf [<https://perma.cc/GJJ9-5A3D>] ("Tasmanian case law has recognised that a plea of guilty may be taken into account as a mitigatory factor apart from any subjective consideration of remorse.").

on sentencing states, “While there is no precise or uniform discount that is accorded for pleading guilty, it is clear that the discount is normally considerable.”¹¹¹ Guideline judgments could provide additional consistency across cases, but very few states have experimented with guideline judgments.¹¹² Only one state, New South Wales, has adopted a guideline judgment regarding guilty pleas. The guideline judgment, which was adopted in 2000, instructs trial judges to discount a sentence “in the range of” ten to twenty-five percent if the defendant pleads and instructs that the “primary consideration” judges should take into account in deciding where in that range a particular discount should fall “is the timing of the plea.”¹¹³

B. *Incentives from Prosecutors*

Although they do not have the power to impose a sentence on a criminal defendant, prosecutors nonetheless possess the ability to incentivize guilty pleas. Prosecutors incentivize guilty pleas by negotiating or bargaining with defendants over different matters in return for a guilty plea. These bargains fall into three categories: bargains about criminal charges, bargains about sentencing recommendations, and bargains about sentencing facts. As is the American convention, this Essay uses the terms “charge bargaining,” “sentence bargaining,” and “fact bargaining” to refer to these different incentives.

Before discussing these different categories of incentives, it is important to note that prosecutorial incentives tend to be less transparent than incentives from judges. That is because, although judicial incentives are usually acknowledged and discussed in sentencing hearings, which are public, prosecutorial incentives are discussed in out-of-court negotiations between prosecutors and defense attorneys, which are not public. That is not to say that the terms of these plea-bargain negotiations never become public. In the United States, for example, the prosecutorial incentives are often memorialized in formal plea agreements, which are a matter of public record.¹¹⁴ But in

¹¹¹ BAGARIC ET AL., *supra* note 92, at 376.

¹¹² Australia’s relationship to guideline judgments is somewhat complex. The country’s High Court has been quite critical of the opinions, going so far as to state that guideline judgments may not be adopted for sentencing in Commonwealth—i.e., federal—cases. *See Wong v The Queen* (2001) 207 CLR 584, 637 (Austl.). But some intermediate courts have nonetheless adopted guideline judgments for state crimes. New South Wales, for example, issued a guideline judgment for guilty pleas in *R v Thomson* (2000) 49 NSWLR 383, 383 (Austl.).

¹¹³ *Thomson*, 49 NSWLR at 383.

¹¹⁴ *See, e.g.*, FED. R. CRIM. P. 11(c)(2) (“The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.”); MASS. R. CRIM. P. 12(c)(1) (“If the parties have entered into a plea described in Rule 12(b)(5)(B), the parties shall disclose the terms of that agreement on the record in open court unless the judge for good cause allows the parties to disclose the terms of the plea

other countries, these agreements are informal. In those countries that have not fully formalized and incorporated plea bargaining into their criminal justice system, there is less transparency because the incentives often go unacknowledged in the public case proceedings.¹¹⁵

This lack of transparency is important because it affects the ability to discern what sorts of prosecutorial incentives are occurring across countries. In contrast, how judges incentivize guilty pleas in various countries is easy to discern because that information is contained in published opinions, statutes, and the written materials that guide structured sentencing. When countries do not acknowledge and formalize plea agreements between prosecutors and defense attorneys, the ways in which prosecutors incentivize plea bargaining often cannot be determined by consulting primary legal sources. As a result, this Essay often relies on secondary sources as evidence of prosecutorial incentives for plea bargaining. Among other sources, it draws heavily from a 2016 law review article by Professor Paul Marcus and others, which collected responses from judges and lawyers in a number of different countries about various questions related to plea bargaining.¹¹⁶

Turning first to charge bargaining, prosecutors create an incentive for the defendant to plead guilty by agreeing to drop certain charges or allow a plea to less serious charges in return for a guilty plea.¹¹⁷ Charge bargaining is an accepted, but informal, practice in Australia,¹¹⁸ England and Wales,¹¹⁹ and Scotland.¹²⁰ Although the legal and formal status of charge bargaining is quite similar in these three countries, the role of the judge in accepting or rejecting the charge bargain differs.

agreement in camera on the record.”); PA. R. CRIM. P. 590(B)(1) (“At any time prior to the verdict, when counsel for both sides have arrived at a plea agreement, they shall state on the record in open court, in the presence of the defendant, the terms of the agreement, unless the judge orders, for good cause shown and with the consent of the defendant, counsel for the defendant, and the attorney for the Commonwealth, that specific conditions in the agreement be placed on the record in camera and the record sealed.”).

¹¹⁵ See, e.g., Brook et al., *supra* note 67, at 1160 (noting that because plea negotiations in England and Wales are “informal in nature, they take place in private and go unrecorded”); N.Z. L. COMM’N, PRELIMINARY PAPER NO 28: CRIMINAL PROSECUTION 44 (1997) (“Informal plea negotiation in both summary and indictable cases does occur in New Zealand, however, there is little detailed information about the extent to which it occurs. It involves private discussions between the parties and the court has no involvement or knowledge of the content of plea negotiations.”).

¹¹⁶ See generally Brook et al., *supra* note 67 (discussing plea bargaining procedures across multiple common law nations based on conversations with international criminal justice professionals, including judges and practicing attorneys).

¹¹⁷ See *Plea Bargain*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining charge bargaining).

¹¹⁸ Brook et al., *supra* note 67, at 1152 (“In Australia, ‘plea bargaining’ is the informal process by which a prosecuting authority and defense counsel negotiate the charge(s) on which the prosecution will proceed . . .”).

¹¹⁹ *Id.* at 1159–60.

¹²⁰ See Tata, *supra* note 52, at 202; Leverick, *supra* note 89, at 360 & n.1.

In Australia, the court is largely bound to accept the guilty pleas that result from a charge bargain.¹²¹ In England and Wales, however, “many judges think they have the power to disallow a plea of guilt not compatible with the alleged facts.”¹²² Scotland falls somewhere in the middle: Scottish judges have “no direct power” to refuse to accept a guilty plea, but there is a practice of judges intervening and asking prosecutors “to re-consider whether the guilty plea should have been accepted” in some circumstances.¹²³

Charge bargaining in New Zealand is more complicated. Unlike Australia, England and Wales, and Scotland, where charge bargaining is acknowledged, but informal, the acceptance of charge bargaining in New Zealand is more tenuous. The official stance is that the parties should not negotiate over criminal charges,¹²⁴ and there are guidelines that prohibit prosecutors from initiating charge bargaining negotiations.¹²⁵ Nonetheless, charge bargaining does occur.¹²⁶ But because of its uneasy legal status, when it occurs, charge bargaining largely goes unacknowledged.¹²⁷

Charge bargaining is most formalized and accepted in the United States. Court rules contemplate the practice,¹²⁸ and the U.S. Supreme Court has rejected constitutional attacks to charge bargaining, even under circumstances that appear to be coercive.¹²⁹ In some courts, written plea agreements, setting out the terms of the bargain, are entered into the court record.¹³⁰ And although judges retain the power to reject

¹²¹ Brook et al., *supra* note 67, at 1152 n.3 (citing *Maxwell v The Queen* (1996) 184 CLR 501, 511–14, 534 (Austl.)) (explaining that a judge is empowered to reject a guilty plea that the prosecutor has accepted only “to prevent an abuse of process, or where there is evidence that the plea is the result of ignorance, fear, duress, or mistake on the part of the defendant”).

¹²² *Id.* at 1160.

¹²³ Leverick, *supra* note 49, at 146.

¹²⁴ See N.Z. L. COMM’N, REPORT 66: CRIMINAL PROSECUTION 80 (2000) (noting that “formal charge negotiation is not encouraged in New Zealand”); Brook et al., *supra* note 67, at 1162 (“We do not use the term ‘plea-bargaining’ in any official or unofficial sense. Rather, counsel may ask the judge for a ‘sentence indication.’”).

¹²⁵ N.Z. L. COMM’N, *supra* note 124, at 84; N.Z. L. COMM’N, *supra* note 115, at 48.

¹²⁶ See N.Z. L. COMM’N, *supra* note 124, at 80 (acknowledging that charge bargaining “does occur”); N.Z. L. COMM’N, *supra* note 115, at 45 (noting that “[m]ost plea negotiation in New Zealand is informal charge negotiation”); see also Isabelle Becconsall-Ryan, *Combating Hate in New Zealand: The Problems with Hate Crime Legislation and the Importance of Non-Criminal Alternatives*, 53 VICT. U. WELLINGTON L. REV. 129, 142 (2022) (describing the charge bargaining that commonly occurs in hate crime cases).

¹²⁷ See N.Z. L. COMM’N, *supra* note 115, at 44 (noting that “the court has no involvement or knowledge of the content of plea negotiations”).

¹²⁸ E.g., FED. R. CRIM. P. 11(c); DEL. R. CRIM. P. 11(e)(1).

¹²⁹ See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (holding that a defendant’s due process rights were not violated by a reindictment on charges carrying a mandatory life sentence following his rejection of a plea deal carrying a five-year sentence).

¹³⁰ E.g., FED. R. CRIM. P. 11(c)(2).

plea bargains, some appellate courts have begun to place limits on that power.¹³¹

A second prosecutorial incentive is the “sentence bargain.” In a sentence bargain, a prosecutor agrees to make a favorable sentencing recommendation in return for a defendant’s guilty plea.¹³² Sentencing bargaining appears to be less widespread than charge bargaining, in part because some countries do not have a practice of allowing the prosecutor to make a sentencing recommendation.¹³³ If a prosecutor does not make a sentencing recommendation, then there can be no negotiation over what that recommended sentence will be.

It appears that sentence bargaining is not an option in two countries where prosecutors do not make sentencing recommendations. In England and Wales, with minor exceptions,¹³⁴ “prosecutors are not allowed to address the court on issues of sentence.”¹³⁵ Preventing prosecutors from offering a sentencing recommendation appears to be related to the idea that sentencing is a matter “entirely within the court’s discretion.”¹³⁶ Because they do not make sentencing recommendations, prosecutors in England and Wales cannot engage in sentence bargaining.¹³⁷ Neither does Scotland appear to have a practice of either sentencing recommendations or sentence bargaining, though it is unclear whether this is a legal prohibition or merely accepted practice.¹³⁸

¹³¹ See Carissa Byrne Hessick, *Judges and Mass Incarceration*, 31 WM. & MARY BILL RTS. J. 461, 477–79 (2022) (describing cases).

¹³² See *Plea Bargain*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining sentence bargaining).

¹³³ See *infra* notes 134–38 and accompanying text.

¹³⁴ Complex fraud cases are one such exception. See Brook et al., *supra* note 67, at 1161.

¹³⁵ *Id.* at 1159; see also John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC’Y REV. 287, 289 (1979) (stating that it would be “quite unethical” for the prosecutor to make “a specific sentence recommendation”).

¹³⁶ Brook et al., *supra* note 67, at 1159.

¹³⁷ Baldwin & McConville, *supra* note 135, at 288 (“[T]he trial judge’s discretion over sentence makes it difficult for the prosecution to offer the defense any promise with respect to the sentence.”). Although prosecutors are unable to engage in sentence bargaining, there is evidence that defense attorneys would obtain sentencing guarantees from judges and then use those guarantees to induce their clients to plead guilty. See *id.* at 293–94 (reaching this conclusion based on interviews with a number of defendants in the Birmingham courts); Richard Young & Andrew Sanders, *Plea Bargaining and the Next Criminal Justice Bill*, 144 NEW L.J. 1200, 1213 (1994) (“In practice, both defence counsel and judges have abused their right to meet in private . . . by engaging in sentence bargaining on a wide scale.”).

¹³⁸ I have been unable to locate any sources stating that prosecutors are prohibited from offering a sentencing recommendation, though Gormley indicates that the country’s “charge bargaining and fact bargaining do not result in any pre-agreed sentence.” Gormley, *supra* note 102, at 280. And other discussions of plea bargaining indicate that Scottish prosecutors engage in charge bargaining, whereas judges are the source of all sentencing discounts. See, e.g., Leverick, *supra* note 89, at 360–61 & n.1; Leverick, *supra* note 49, at 149–54. See generally Jay Gormley, Rachel McPherson & Cyrus Tata, *Sentence Discounting: Sentencing and Plea Decision-Making*, SCOT. SENT’G COUNCIL (May 2019), <https://www.scottishsentencingcouncil.org.uk/media/>

The question of sentence bargaining is more complex in New Zealand and Australia. Sentence recommendations are permitted in New Zealand, but not in a way that facilitates sentence bargaining. Prosecutors are expected to tell judges what they believe the appropriate sentencing range is, but not to give a specific sentencing recommendation.¹³⁹ Although prosecutors could presumably strike bargains about what sentencing ranges they recommend, it appears that sentence bargaining is quite rare, perhaps because such a recommendation is of limited value to defendants. As one government report put the issue, “there is no true sentence negotiation” both because the judge has the “sole power to determine the sentence” and because the practice is prohibited by prosecution guidelines.¹⁴⁰ A subsequent government report indicated that, under “existing practice,” plea negotiations “should not include express agreement as to a particular sentence.”¹⁴¹ To the extent that the report authors had observed “prosecutors supporting a particular sentence from time to time,” they stated that “this should not happen.”¹⁴² Thus, it appears that sentence bargaining is possible, but not prevalent in the country.

In Australia, there has been some dispute over whether prosecutors may make sentencing recommendations. In 2014, the High Court of Australia declared that prosecutors should not make any recommendations to the judge about the appropriate sentence.¹⁴³ That decision was widely understood as having arisen in the context of an informal and implicit sentence bargain,¹⁴⁴ though that issue is not addressed in the High

vtgh30it/20201216-sentence-discounting-lit-review.pdf [https://perma.cc/H9Y8-JMHL] (discussing sentence bargaining in several other jurisdictions, but not mentioning it in the description of the Scottish system).

¹³⁹ See N.Z. L. COMM’N, *supra* note 124, at 83 & n.136 (stating that “[p]rosecutors have an obligation to tell the court what they consider to be the appropriate sentencing range” but noting the prosecution guideline’s “restriction on a prosecutor supporting any particular sentencing option”).

¹⁴⁰ N.Z. L. COMM’N, *supra* note 115, at 46 & n.79.

¹⁴¹ N.Z. L. COMM’N, *supra* note 124, at 83.

¹⁴² *Id.*

¹⁴³ See *Barbaro v The Queen* (2014) 253 CLR 58, 76 (Austl.) (“Once it is understood that a submission by the prosecution about the bounds of the available range of sentences is no more than a statement of opinion, it follows that the sentencing judge need not, and should not, take it into account in fixing the sentences to be imposed.”).

¹⁴⁴ See, e.g., Brook et al., *supra* note 67, at 1152 & n.3 (characterizing *Barbaro* as “recogniz[ing]” the practice of plea bargaining, “if only to . . . delineate the roles of the parties and the court”); Rebecca Ananian-Welsh & Kate Gover, *Before the High Court: Commonwealth v Director, Fair Work Building Industry Inspectorate: The End of Penalty Agreements in Civil Pecuniary Penalty Schemes?*, 37 SYD. L. REV. 417, 418 (2015) (“The practical impact of [*Barbaro*] was that an accused could no longer rely on pre-trial discussions or agreements on sentencing range in considering whether to enter a plea of guilty.”).

Court's opinion. The decision has provoked criticism since it was handed down a decade ago.¹⁴⁵ Because the decision was not made on a constitutional basis but was instead a matter of sentencing common law, several jurisdictions have since passed legislation overruling it and permitting prosecutorial sentencing recommendations.¹⁴⁶ As a result, sentence bargaining is possible in some Australian jurisdictions but not in others.

Sentence bargaining is both possible and common in the United States, because prosecutors are permitted to make sentencing recommendations to judges. In some U.S. jurisdictions, the parties are able not only to make a sentencing recommendation, but also to condition the defendant's guilty plea on the court's acceptance of the parties' agreed-upon sentence.¹⁴⁷ That is to say, the court can reject the agreed-upon sentence, but if that happens, the defendant is able to withdraw his or her guilty plea.

The discussion of sentence bargaining might suggest that in most countries, prosecutors are not able to incentivize defendants to plead guilty through negotiations over the sentence that the defendant will receive. But that is not accurate. Although prosecutors in many of the common law countries cannot *directly* bargain over a defendant's sentence, they can *indirectly* bargain over the sentence by bargaining over the relevant facts.

Fact bargaining allows the prosecution to incentivize a guilty plea by negotiating over the statement of facts that will be tendered to the judge for sentencing.¹⁴⁸ Especially in countries where certain facts are widely acknowledged as aggravating or mitigating, the parties can exert a significant, if imprecise, effect on what sentence will be imposed by agreeing that certain facts are or are not present in a case.

¹⁴⁵ See, e.g., BAGARIC ET AL., *supra* note 92, at 112–17.

¹⁴⁶ See, e.g., *Crimes (Sentencing) Act 2005* (ACT) s 34AA (Austl.); *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld) s 9(2)–(3) (Austl.).

¹⁴⁷ See, e.g., FED. R. CRIM. P. 11(c)(1)(C); FLA. R. CRIM. P. 3.171(b)(1)(A)(iii). *But see*, e.g., DEL. R. CRIM. P. 11(e)(2) (establishing that the defendant “has no right to withdraw the plea” if the court decides not to accept the parties' sentencing recommendation).

¹⁴⁸ See *Fact Bargain*, BLACK'S LAW DICTIONARY (12th ed. 2024).

Fact bargaining is a common prosecutorial incentive across all five countries. In Australia,¹⁴⁹ England and Wales,¹⁵⁰ New Zealand,¹⁵¹ and Scotland,¹⁵² a negotiated statement of facts forms the basis for a judge's sentencing decision. Those negotiations allow the parties to bargain about what facts to include and how to characterize them.

Of the countries discussed in this Essay, the United States appears to have shown the most hostility to fact bargaining. This is arguably surprising, given the country's otherwise affirmative embrace of both charge bargaining and sentence bargaining.¹⁵³ The most obvious example of that hostility comes from the federal system. Specifically, the Federal Sentencing Guidelines were structured, in part, to ensure that defendants were sentenced based on their "real offense" behavior and to prevent the parties from bargaining over sentencing facts.¹⁵⁴ But evidence suggests that fact bargaining endured despite these structural precautions.¹⁵⁵

¹⁴⁹ See Brook et al., *supra* note 67, at 1152 (stating that plea bargaining in Australia includes "the informal process by which a prosecuting authority and defense counsel negotiate the . . . concessions that may be made by the prosecution in relation to sentencing, including the facts on which sentencing should proceed, with a view to arriving at a mutually acceptable agreement according to which the defendant will plead guilty"); Asher Flynn, *Plea Negotiations, Prosecutors and Discretion: An Argument for Legal Reform*, 49 AUSTL. & N.Z. J. CRIMINOLOGY 564, 565 (2016) (explaining that prosecutors can "agree to present case facts to fit a particular sentence range, based on standard sentencing practices and outcomes, and/or recommend a sentence type . . . to the court" and that "[s]uch recommendations are not binding, but generally influential").

¹⁵⁰ See ATT'Y GEN.'S OFF., THE ACCEPTANCE OF PLEAS AND THE PROSECUTOR'S ROLE IN THE SENTENCING EXERCISE, at A3 (2012), <https://www.gov.uk/guidance/the-acceptance-of-pleas-and-the-prosecutors-role-in-the-sentencing-exercise> [<https://perma.cc/SU4G-FZYS>] ("The basis of plea agreed by the parties in a criminal trial is central to the sentencing process.").

¹⁵¹ See Brook et al., *supra* note 67, at 1181 (describing how the judge's role at sentencing is "essentially a passive one" unless the parties cannot agree on the summary of facts, which may require the judge to hold a hearing).

¹⁵² Leverick, *supra* note 49, at 154 ("Where an offender pleads guilty, at least in the High Court, the prosecution and defense now agree to a narrative of the offense that is presented to the judge at the sentencing stage before the defense's plea in mitigation."); Gormley, *supra* note 102, at 280 ("In Scotland, plea bargaining consists of explicit charge bargaining and fact bargaining between the defence and the prosecution . . .").

¹⁵³ See *supra* notes 128–31, 147 and accompanying text.

¹⁵⁴ See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8–12 (1988) (describing the decision to adopt a modified "real offense" approach to sentencing, rather than a charge-based approach); *id.* at 30 (stating that the new "Guidelines seek to change existing plea bargaining practices only slightly" by instructing the prosecutor and defense counsel to "accurately state the facts" and then having a probation officer "prepare a report describing the offense accurately"); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 505 (1992) ("The guidelines require the judge to consider [relevant] facts, when present, regardless of whether they are charged and whether the parties have made stipulations to the contrary.").

¹⁵⁵ See, e.g., Nagel & Schulhofer, *supra* note 154, at 522, 540 (reporting the discovery of fact-bargaining under the federal sentencing guidelines).

IV. FROM BULWARK TO BOTHER

As the preceding Section makes clear, common law countries have taken multiple steps to incentivize guilty pleas. In other words, despite the fact that juries are supposed to be the “grand bulwark” of the common law system,¹⁵⁶ those countries have taken affirmative steps to avoid juries and trials. Indeed, some of the guilty plea incentives discussed in the previous Section are designed to ensure not only that defendants plead guilty, but also that they do so quickly in order to conserve resources.¹⁵⁷ As this Section explains, these incentives appear to have been devised in order to make the criminal justice system work more efficiently. Because jury trials stand in the way of swift resolution of criminal cases, so the argument goes, defendants should be encouraged to give up their right to a jury and plead guilty instead.

That efficiency is the goal of these incentives is often explicitly acknowledged. For example, one commentor has noted that as Scotland has begun to embrace plea discounts, it has done so by adopting an efficiency-based model of justice.¹⁵⁸ Under the efficiency model, “where people might end up pleading guilty, they should be encouraged to do so as early as possible, and it is acceptable (even sensible) to encourage ‘appropriate’ pleas of guilty through rewards and incentives.”¹⁵⁹ In the United States, the Supreme Court’s eventual embrace of plea bargaining came amidst explicit concern that the courts did not have the capacity to try all criminal cases; guilty pleas and plea bargaining were necessary in order to avoid an avalanche of trials.¹⁶⁰

The efficiency rationale may be most obvious in those countries where the plea discount depends upon when in the case the defendant offers to plead guilty. In those countries, guilty pleas are often openly discussed in terms of increasing efficiency. For example, as noted above, an existing guideline judgment instructs New Zealand judges to award up to a twenty-five percent reduction for an early guilty plea.¹⁶¹ Recent increases in jury trials and delays in the entry of guilty pleas prompted the New Zealand government to commission research to examine the issue on the grounds that these trends “undermine the efficiency of

¹⁵⁶ See BLACKSTONE, *supra* note 9 and accompanying text.

¹⁵⁷ See *supra* Section III.A.

¹⁵⁸ See Tata, *supra* note 52, at 200 (“Since at least the early 1990s successive governments have been interested in making the Scottish criminal justice process quicker, simpler and more cost-effective.”).

¹⁵⁹ Tata, *supra* note 52, at 199. This efficiency model is often contrasted with a due process model. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 25–26 (1979); see also Tata, *supra* note 52, at 198–99 (explaining the due process model).

¹⁶⁰ See HESSICK, *supra* note 66, at 23–24 (chronicling the relationship between the Supreme Court’s acceptance of plea bargaining and concerns about insufficient resources).

¹⁶¹ See *supra* note 108 and accompanying text.

the justice system and run counter to the aims of the Criminal Procedure Act (2011).”¹⁶² Subsequently, the government proposed setting a maximum discount of five percent for a guilty plea entered during the trial.¹⁶³ The policy was justified as a way to “prevent undue discounts for late-stage guilty pleas and avoid unnecessary trials that are costly and stressful for victims.”¹⁶⁴

Not all countries are entirely comfortable with the efficiency model. In Australia, for example, some justices have taken a dim view of the efficiency argument, stating that plea discounts are better justified as recognizing the defendant’s “willingness . . . to facilitate the course of justice,” but that if the discount is instead justified “on the pragmatic and objective ground that the plea has saved the community the expense of a trial,” then the plea discount could instead be seen as a trial penalty.¹⁶⁵ But other justices of the High Court have embraced the efficiency model, stating that “a plea of guilty is ordinarily a matter to be taken into account in mitigation . . . on the pragmatic ground that the community is spared the expense of a contested trial.”¹⁶⁶ And the guideline judgment adopted by New South Wales to standardize plea discounts was requested by the Attorney General for explicitly utilitarian reasons—namely to better achieve “the objective of encouraging guilty pleas, especially early guilty pleas.”¹⁶⁷

To be clear, although efficiency appears to be the primary driver of guilty plea incentives, there are other reasons why countries have sought to encourage guilty pleas. Most notably, there appears to be concern that juries will sometimes fail to convict guilty defendants. In the United States, this concern is rarely voiced publicly.¹⁶⁸ But in other countries the concern is more explicit. For example, a recent Scottish

¹⁶² MINISTRY OF JUST., A QUALITATIVE INSIGHT INTO THE INCREASE IN LATER GUILTY PLEAS AND ELECTION OF JURY TRIALS 3 (2021), <https://www.pds.govt.nz/assets/Documents/Publications/OIA-100246.pdf> [<https://perma.cc/HPU9-UYAT>].

¹⁶³ Paul Goldsmith, *Tougher Sentences Coming for Criminals*, BEEHIVE.GOV.NZ (June 26, 2024), <https://www.beehive.govt.nz/release/tougher-sentences-coming-criminals> [<https://perma.cc/WA3N-J356>].

¹⁶⁴ *Id.*

¹⁶⁵ *Cameron v The Queen* (2002) 209 CLR 339, 343 (Austl.) (per Gaudron, Gummow and Callinan JJ).

¹⁶⁶ *Siganto v The Queen* (1998) 194 CLR 656, 663–64 (Austl.) (per Gleeson CJ, Gummow, Hayne and Callinan JJ).

¹⁶⁷ *R v Thomson* [2000] 49 NSWLR 383, 394 (Austl.).

¹⁶⁸ For a rare example of such a public acknowledgment, see All Sides with Amy Juravich, *The Issue of Plea Bargains in the U.S.*, WOSU PUB. MEDIA, at 36:10, 44:45 (Feb. 1, 2022), <https://www.wosu.org/show/all-sides-with-ann-fisher/2022-02-01/the-issue-of-plea-bargains-in-the-u-s> [<https://perma.cc/WVQ2-VURY>] (interview with Louis Tobin, Executive Director, Ohio Prosecuting Attorney Association, who expresses the view that favorable plea agreements for lesser offenses are justified in order to ensure that convictions occurred in cases involving sex crimes against children because such cases might have otherwise ended in acquittals).

government report on sexual assault cases explicitly considered eliminating jury trials in sexual assault cases.¹⁶⁹ The consideration appears to have been prompted by a concern that the acquittal rate for those cases was too high.¹⁷⁰

Incentivizing guilty pleas to ensure convictions in weak cases strikes at the very foundation of the jury right. After all, juries exist to protect liberty by constraining the government's ability to obtain criminal convictions.¹⁷¹ But although the desire to convict more defendants may seem particularly at odds with the historic veneration of the jury as an institution, the efficiency rationale does not suffer from that flaw. Efficiency is its own end, rather than a value that is obviously in tension with liberty.

What is more, the need for modern governments to function efficiently has been widely embraced across common law countries. In the United States, efficiency has spurred multiple initiatives to reduce government waste. This includes the National Performance Review, spearheaded by Al Gore in the 1990s, which sought to import "private sector efficiency techniques to make government more results-oriented and less costly,"¹⁷² and the Trump administration's announcement of the Department of Government Efficiency.¹⁷³ Other countries have gone even further, creating independent auditors committed to ensuring government transparency and efficiency.¹⁷⁴

¹⁶⁹ See SCOT. GOV'T, IMPROVING VICTIMS' EXPERIENCES OF THE JUSTICE SYSTEM: CONSULTATION 86–87 (May 2022), <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2022/05/improving-victims-experiences-justice-system/documents/improving-victims-experiences-justice-system-consultation/improving-victims-experiences-justice-system-consultation/govscot%3Adocument/improving-victims-experiences-justice-system-consultation.pdf> [<https://perma.cc/XH7J-428V>].

¹⁷⁰ *Id.* at 85–86 (explaining that review of whether to retain jury trials in sexual assault cases was informed by low conviction rates in such cases).

¹⁷¹ See *supra* text accompanying notes 9–17.

¹⁷² See Charles S. Clark, *Reinventing Government—Two Decades Later*, GOV'T EXEC. (Apr. 26, 2013), <https://www.govexec.com/management/2013/04/what-reinvention-wrought/62836/> [<https://perma.cc/ZVD8-2UEP>].

¹⁷³ See Michael D. Shear & Eric Lipton, *Trump Taps Elon Musk and Vivek Ramaswamy to Slash Government*, N.Y. TIMES (Nov. 12, 2024), <https://www.nytimes.com/2024/11/12/us/politics/elon-musk-vivek-ramaswamy-trump.html> [<https://perma.cc/U4UZ-BLKX>].

¹⁷⁴ See, e.g., Public Audit Act 2001, s 16(1)(a) (N.Z.) (authorizing the Auditor General to "at any time examine . . . the extent to which a public entity is carrying out its activities effectively and efficiently"); Scotland Act 1998, c. 46, § 70(2)(c) (UK) (authorizing the Auditor General to "carry[] out examinations into the economy, efficiency and effectiveness with which the Scottish Ministers and the Lord Advocate have used their resources in discharging their functions"); National Audit Act 1983, c. 44 (UK) (authorizing the Comptroller and Auditor General to conduct audits in order to "promot[e] economy, efficiency and effectiveness in the use of such money by government departments and other authorities").

If the past is any indication, the desire for efficiency is effective at discouraging trials. Thus, efficiency may ultimately prove more harmful to the jury trial right than efforts to advocate for more convictions.

CONCLUSION

Once thought to be a hallmark of the common law criminal justice system, the jury trial has declined and been supplanted by guilty pleas. Despite firm commitments to a criminal trial by jury—whether enshrined in written constitutions, protected by statute, or entrenched as a legal tradition—data from Australia, England and Wales, New Zealand, Scotland, and the United States make clear that juries have become the exception, rather than the rule. Each of these countries has adopted various formal legal structures and informal legal practices that incentivize defendants to plead guilty. The result is that the jury, which was once perceived as a cherished common law institution, is now seen as a bureaucratic hurdle to be overcome in the name of efficiency.