

# The Legacy of the Plea System



Daniel J. Canon  
Professor of Law, Louis D. Brandeis School of Law  
[dan@dancanonlaw.com](mailto:dan@dancanonlaw.com)

DAN CANON

# PLEADING OUT

HOW PLEA BARGAINING  
CREATES A PERMANENT  
CRIMINAL CLASS



# Why are we so bad at criminal justice?

- How are we different from the rest of the world?
- Okay, WHY are we so different?
- What's different about the way we handle plea bargaining?
- Is there any connection between plea bargaining and our terrible outcomes?

# Plea bargaining by the numbers

- Somewhere around 97% of all criminal cases are resolved via guilty plea
- That number is (somehow) increasing
- In 1962, 15 percent of all federal cases went to trial, for a total number of just over 5,000. By 1997, the number had dropped to 3,200—not only a much lower percentage but a lower absolute number of trials, too.
- This precipitous drop happened in spite of a gigantic increase in cases over the same period (around 50,000 total cases per year in the 1960s compared to about 75,000 in the 1990s).
- From 2006 to 2016, although raw case numbers continued to increase, the absolute number of trials relative to those cases dropped another 47 percent

# (Old) England and the Practice of Leniency

You are to be drawn upon a hurdle to the place of execution, and there you are to be hanged by the neck, and being alive cut down, and your privy-members to be cut off, and your bowels to be taken out of your belly and there burned, you being alive; and your head to be cut off, and your body to be divided into four quarters, and that your head and quarters to be disposed of where his majesty shall think fit.

## (New) England and the Rise of Labor

- 1830s
  - The first evidence of plea bargaining in Boston
  - Boston's population shoots up by 50%
  - The first federation of labor unions
  - Strikes become common
  - White male suffrage is almost universal
  - Juries are very powerful

## How did the legal system respond?

1. Criminalize core activities of organized labor (until the 1840s)
2. Take power away from juries
3. Open acceptance of plea bargaining
  - a. 1830s plea bargain rate in MA: 0%
  - b. 1850s plea bargain rate: 50%
  - c. 1880s plea bargain rate: 88%

## Why was plea bargaining so useful?

- It takes the jury out of the equation
- It happens in secret
- It's fast (you can criminalize lots of people in a short time)
- It looks voluntary



# The Expansion of the Criminal Law in the 20th Century

- 1919-1933
- The Drug Wars
- *Bordenkircher v. Hayes*
- Infinite discretion
- Absurd penalties
- Capital punishment

It gets worse

- Participation theory of democracy
- The stigma of the criminal label
- The largest criminal class in the history of the world
- And again, it looks voluntary

## But is there any other way?

- Will we “crash the system” if we cut back on pleas?
- Alaska and Avrum Gross - rejection rate went to 44%!
- Prosecutors, judges, and the general public
- What can defense lawyers do?
  - Run for prosecutor
  - Public/client education
  - Strive for JUST A FEW more trials

Thank you for all you do!

Send hate mail to [Dan@dancanonlaw.com](mailto:Dan@dancanonlaw.com) - (502)-396-3774 - @dancanon

