Making (Global) Criminal Procedure:
Empire, the End of Justice, and the Rise of Efficiency

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Contents

1 Acknowledgements

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2 Introduction

Since 1990, at least 47 countries have formally adopted a plea bargaining-style procedure that relies on a defendant being offered a choice: either admit guilt, giving up the right to trial while receiving some benefit, or opt for a trial and risk a harsher penalty.[1] The diffusion of plea bargaining is unexpected. Plea bargaining developed in the United States but has spread around the world. Usually anglophone countries are imagined as having a distinctive criminal legal tradition from the rest of the world,[2] which was considered a barrier making the spread of plea bargaining impossible.[3] What's more, this diffusion constitutes a radical change in the way criminal procedure has historically been theorized: rather than an elaborated procedure focused on ensuring protection from state violence, plea bargains focus on a contract between state and accused, in service of efficient administration.

Why plea bargaining spread so widely in spite of these seeming barriers is a puzzle. I propose that there are three factors that dissolve the puzzle, pointing to wider phenomena that need to be understood as we analyze the evolution of criminal justice systems around the world. First, the "adversarial" (anglophone) and "inquisitorial" (European) criminal procedure traditions turn out to be less different than is often claimed.[4] Second, there has always been a deep tension between efficient administration of criminal legal regimes and the criminal justice system's place as the mediator between state violence and the individual. Put simply, swift justice is often not justice. Plea bargaining does represent a different solution than the one that has historically been preferred, but the fundamental dynamics of the problem are the same. And finally, the spread of plea bargaining is one instantiation of a wider pattern of diffusion in criminal procedure, which includes the rejection

1. Máximo Langer, "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions," *Annual Review of Criminology* 4 (2020); Jago Russell and Nancy Hollander, "The Disappearing Trial: The global spread of incentives to encourage suspects to waive their right to a trial and plead guilty," *New Journal of European Criminal Law* 8, no. 3 (2017): 309–322.

2. Maíximo Langer, "The Long Shadow of the Adversarial and Inquisitorial Categories," in *Handbook on Criminal Law* (2014), 1–47.

3. John H Langbein, "Torture and Plea Bargaining," *Crosskey Lectures* 4 (1978).

4. Langer, "The Long Shadow of the Adversarial and Inquisitorial Categories"; John R. Spencer, "Adversarial vs inquisitorial systems: is there still such a difference?," *International Journal of Human Rights* 20, no. 5 (2016): 601–616, ISSN: 1744053X, doi:10.1080/13642987.2016.1162408.

of torture across Europe,[5] the end of the death penalty in sentencing,[6] the spread of the Napoleonic Code Penal,[7] and the spread of penal orders.[8] To understand the appeal of plea bargaining, we need to see it in this larger context.

Rather than a direct resolution of the puzzle, this points to broader questions about criminal procedure. Where does the tension between efficiency and justice (taken to mean protecting people from unwarranted state violence) come from, and how has it been addressed in different states at different times? What mechanisms drive these diffusions in criminal procedure? These are questions that merit sociological interest and require sociological answers. The tension between efficiency on the one hand and justice, and particularly the victory of efficiency with plea bargaining's globalization, is a crucial case of Weberian rationalization.[9] Criminal justice is perhaps the most ethically charged field in contemporary discourse – the fact that in contemporary legal circles the "best" criminal justice system is often equivalent to the fastest and least expensive one bears explanation. The various diffusions in criminal procedural history are a part of that story of rationalization, but they are important in their own right. The spread of legal systems is intimately bound up in colonial and imperial relations between nations, putting the classic organizational diffusion model (coercive, normative and mimetic)[10] in a different context. This requires rethinking the way hegemonic power relates to these three standard mechanisms, providing insights for theorizing diffusion in other domains.

This thesis begins with a process tracing account of criminal procedural development in France, Germany, and the United States. Through these cases, I identify a tension between efficiency and justice, demonstrating its persistence across institutional and national contexts. I propose that historically this tension has been resolved via decoupling – where there is an elaborated, rationalized formal procedure that is rarely enacted, and an often-informal procedure actually used to administer

5. J H Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Lawbook Exchange, 2005), ISBN: 9781584775775.

6. Anthony McGann and Wayne Sandholtz, "Patterns of death penalty abolition, 1960–2005: Domestic and international factors," *International Studies Quarterly* 56, no. 2 (2012): 275–289.

7. Charles Summer Lobingier, "Napoleon and his Code," *Harv. L. Rev.* 32 (1918): 114.

8. Stephen C Thaman, "The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?," 2012,

9. Max Weber, *Economy and society: An outline of interpretive sociology*, vol. 1 (Univ of California Press, 1978), 139.

10. Paul J. DiMaggio and Walter W. Powell, "The Iron Cage Revisited : Institutional Isomorphism and Collective Rationality in Organizational Fields," *American Sociological Review* 48, no. 2 (1983): 147–160.

criminal justice on a day-to-day basis. I go on to show how plea bargaining, which began as a decoupled practice, emerged as a rationalized procedure, making efficiency the highest virtue in the United States in the 1970s, offering an alternative resolution to the tension in criminal procedural systems. I then analyze the diffusion of criminal procedural elements developed in the preceding accounts: the spread of the Napoleonic Code – the criminal procedural code developed by Napoleon – from France; penal orders – a summary procedure where for some crimes and sentences the prosecutor notifies the defendant of the sentence and unless the defendant objects, the sentence is carried out – from Germany; and plea bargaining from the United States. Leveraging variation in these diffusions, I develop a model of criminal procedural diffusion that centers hegemons – France and the United States – in actively shaping the contemporary criminal procedure landscape. I then validate this model using quantitative data sources. Taken together, the history of criminal procedural developments and diffusions offer one causal account of the rationalization of criminal procedural.

In the Section 3, I develop these theoretical considerations further and explain the qualitative and quantitative elements of this study design. The three developments are documented in Section 4, and the three diffusions in Section 5. Section 6 develops and validates the model empirically. It is worth noting that this thesis is composed of several studies connected by common questions and theoretical orientation. These parts are not necessarily all immediately instrumental to developing an account of the rationalization of criminal procedure, but they do constitute such an account.

3 Research Design and Case Selection

3.1 Research Design

The goal of this study is to explain the rationalization of global criminal procedure by giving an account of the processes driving its development and diffusion. The first claim here is that the engine of criminal procedural reform is the tension between justice and efficiency endemic to criminal procedure as it emerged in Western Europe post-1670. The second claim is that hegemony is a central factor in the international diffusion of criminal procedure and that hegemons – in particular

France and the United States – have shaped the global criminal procedural landscape. Further I will show how economic-rationality was introduced into criminal procedure in the United States in the 1960-70s as a solution to the justice-efficiency problem, and then how rationalizing global criminal procedure became an explicit goal of U.S. foreign policy from 1990 onward.

Section 4 takes a process-tracing approach to teasing out the causal mechanisms underlying criminal procedural reform in three cases: France from 1670 through the development of the Napoleonic Criminal Procedural Code in 1804, Germany from 1804 to the postwar restoration of the Lex Emminger in 1951, and the United States, focusing on the development of plea bargaining from 1820 to the 1970s, when a series of Supreme Court cases led to the procedure's formal adoption.[11]

The main contribution of Section 4 is the identification of the tension between justice and efficiency in the courts. Criminal procedure bears tremendous weight in legitimating modern states, because it mediates the most direct form of state violence enacted on the citizens of that state. This weight leads to the elaboration of complex proceedings intended to ensure the state is justified in the use of violence, and that no violence is enacted on anyone who does not "deserve" it. But the criminal justice system is also a tool for social control; it is an apparatus for ensuring people feel secure, ensuring property rights remain respected, for managing racialized/criminalized populations, and for suppressing political dissent.[12] This creates an immediate tension between the highly elaborated procedure and the practical necessity of efficiently processing people in the criminal legal system.

The second major contribution of Section 4 is tracing the different solutions to this tension across the three cases over time. The historical solution to this has been decoupling: the formal elaborated procedure is never actually enacted in practice, and is instead replaced by informal practices more suited to the local conditions. But in the U.S. in the 1960s, plea bargaining, then relegated to back-room deals, was rationalized, legitimated, and enshrined as a formal component of U.S. law. This represented a very different solution: plea bargains were re-imagined as consensual agreements

11. When exactly the US formally adopted plea bargaining is a somewhat contested and complicated question, as discussed in Section 4.3.

12. Stanley Cohen, *Visions of social control: Crime, punishment and classification* (Polity Press Cambridge, 1985); Donald Black, "Crime as social control," *American sociological review*, 1983, 34–45; Mark Neocleous, *Critique of security* (Edinburgh University Press, 2008).

between the defendant and the state, a kind of contract. I will argue that this effectively substituted fairness for justice, enabling explicit arguments for efficiency in criminal procedure.

The third contribution of Section 4 is elaborating two consequences of decoupling for criminal procedural policy making. Decoupling leads to cyclic (de-)legitimization in criminal procedural: elaborated procedures are developed, decoupling occurs, the decoupling is identified and reform begins, and the process repeats. This pattern is clear from the development processes traced in France, Germany and the United States. Furthermore, the significant degree of decoupling combined with the lack of clear feedback mechanisms means that criminal procedural reform is often dominated by ideas that "make sense." Even with contemporary data and econometric techniques, it is very difficult to assess the causal impact of different criminal procedural practices on the effectiveness of a justice system (the crime rate, the recidivism rate, the number of perpetrators captured), and formal procedures are rarely actually enacted, so the actual drivers of reform in the criminal procedural context are under-constrained. The appearance of success and compelling arguments for the theoretical benefits of a given procedure emerge as important to procedural reform. Immediately power becomes central in legitimating criminal procedural systems. Both the appearance of "success" as well as what arguments "makes sense" are socially constructed, in part a product of the hegemonic culture surrounding the empires that develop and spread these procedures. The discourses legitimating the Napoleonic code, German penal orders, and American plea bargaining are identified by tracing the development of these procedures.

Section 5 focuses on the diffusion of three procedural elements discussed in these genealogies to other countries. There are a number of criminal procedural elements from each case discussed in Section 4, but these diffusion studies focus on three specific practices:

The Napoleonic Code: The collection of procedural innovations developed in France under Napoleon, promulgated in 1808. These include: the tripartite division of crimes, the introduction of defense council, the use of mixed courts (lay participation with expert advice) and the self-defense exception.

Penal Orders: A procedure developed in Germany in the 1830s where the prosecutor sends the defendant an order indicating the crime and the proposed sentence which is carried out unless the defendant objects within a set amount of time, with restrictions on the crimes and allowable punishments the prosecutor can order.

Plea Bargaining: A decoupled practice developed in the U.S. in the 19th Century, formalized in the 20th century, wherein criminal defendants agree to accept guilt in exchange for some benefit from the state, most commonly in the form of reduced charges and/or lower sentences.

The main contribution of this section is identifying that France and the United States were/are hegemonic powers which explicitly took on the project of spreading their criminal procedures to other countries, especially those they were occupying. Many of these efforts were successful, and consequently many countries today have criminal procedures that are descended from the systems developed by their former colonizers. This section starts by briefly tracing the diffusion of these procedures, with a focus on the mechanisms underlying the diffusion.

Section 6 begins by comparing these three accounts to develop a model showing how hegemonic powers can leverage coercive diffusion combined with their cultural position to drive mimetic diffusion. I then attempt to empirically validate this model. To assess importance of hegemonic influence and mimetic diffusion I estimate a separate event history model for the Napoleonic Code, penal orders, and plea bargains. These studies show that the diffusion tipped off by initial coercive spread is partially mimetic, driven by the *arguments* for the policy and the legitimacy embedded in those arguments, disconnected from concrete consequences of policy uptake. To further validate this model I make use of two additional pieces of evidence: utilization data describing the fraction of cases resolved via plea bargaining for a subset of adopting countries and a survey of legal experts

in countries that adopted plea bargaining. These sources further demonstrate that countries adopt plea bargaining to appear to support the *ideal* of efficiency without necessarily incorporating plea bargains into the regular practice of criminal procedure.

3.2 Case Selection

The logic of case selected for this study is essential to the validity of its design. Three factors were important in case selection. First, some criminal procedures constitute crucial cases,[13] having too widely structured criminal procedure today to be ignored. Second, to ensure sufficient variation to develop the model of diffusion I include a negative case – where diffusion is less successful than the first two cases included.[14] Finally it is useful to select at least one procedure that is comparably efficient to plea bargaining to allow addressing questions about the importance of the intrinsic efficiency of the procedure in its diffusion.

Two of the cases selected for this analysis are crucial:[15] this study is about the development and diffusion of criminal procedural practices. It is necessary to include two of the most significant developments and diffusions in criminal procedure: the Napoleonic Criminal Procedural Code and plea bargaining. The Napoleonic Code served as the basis for the legal system in many states in Europe and in newly liberated colonies, and its influence can be seen in most criminal procedural systems currently in use.[16] The other case is the diffusion of plea bargaining, a component of a wider phenomena often called "Americanization" in the legal world; this diffusion represents a second major wave that is changing the practice of criminal procedure, often in the most significant ways since codification.[17] These two cases are crucial because the diffusion of these procedural

13. Harry Eckstein, "Case study and theory in political science," *Case study method*, 2000, 119–164; Matthew Lange, *Comparative-historical methods* (Sage, 2012).

14. Rebecca Jean Emigh, "The power of negative thinking: The use of negative case methodology in the development of sociological theory," *Theory and Society* 26, no. 5 (1997): 649–684.

15. Eckstein, "Case study and theory in political science"; Lange, *Comparative-historical methods*.

16. CS Lobingier, "Napoleon and his Code," *Harvard Law Review* 32 (1918): 114–123; Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, "The transplant effect," *Am. J. Comp. L.* 51 (2003): 163; Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, "Economic development, legality, and the transplant effect," *European economic review* 47, no. 1 (2003): 165–195; Emilia Iñesta-Pastor, "The Influence Exerted by the 1819 Criminal Code of the Two Sicilies upon Nineteenth-Century Spanish Criminal Law Codification and Its Projection in Latin America," in *The Western Codification of Criminal Law* (Springer, 2018), 243–278; Máximo Langer, "Revolution in Latin American criminal procedure: Diffusion of legal ideas from the periphery," *The American Journal of Comparative Law* 55, no. 4 (2007): 617–676.

17. Máximo Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization thesis in Criminal Procedure," *Harvard International Law Journal* 45, no. 1 (2004): 1–64, ISSN: 00178063; Langer, "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions"; Robert A Kagan, "Globalization and legal change: The "Americanization" of European law?," *Regulation & Governance* 1, no. 2 (2007): 99–120.

practices has been so wide and has shaped so many criminal procedural systems – formally and informally – around the world. Power plays a key role in the initial uptake of both of these systems, as the first states to adopt these practices were under pressure from the empires that developed them: Germany was conquered by Napoleon; Senegal was a French colony; the Philippines was under US control through the 1940s.

The third case is the diffusion of penal orders, which developed in Germany in the late 19th century. This case was selected for three primary reasons: first, it is useful to have a negative case to contrast the wide diffusions of the Napoleonic Code and plea bargaining;[18] second, this study focuses in part on imperial mechanisms driving diffusion, so penal orders – which developed in Imperial Germany[19] – offer a case where those mechanisms could theoretically come into play; third, penal orders are an extremely useful point of comparison for plea bargains. Penal orders were developed during a similar period to plea bargains, are endemic to French/German legal tradition, and are often used in similar circumstances to plea bargains – to avoid a trial when the prosecutor and/or judge think someone is clearly guilty of a relatively minor offense.[20] A naive approach might expect penal orders to substitute for plea bargains in non-English-descended criminal systems, but instead we see plea bargaining as the dominant model, sometimes displacing penal orders where they have already been adopted.

These three cases offer the opportunity to study the dynamics of reform in criminal procedure and the diffusion of those procedures in three separate contexts, in three distinct periods (roughly 1670-1813, 1804-1954, 1820-1970). A process tracing approach focused on formal reforms to the criminal procedural system allows uncovering both the within-case causal processes behind reform, and the between-case patterns in reform over time.[21] The tension between justice and efficiency is evident across all three cases, as is the fact that the historical solution to this problem has been decoupling.[22]

18. Emigh, "The power of negative thinking: The use of negative case methodology in the development of sociological theory."
19. Thaman, "The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?"
20. Langer, "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions."
21. Pascal Vennesson, "12 Case studies and process tracing: theories and practices," *Approaches and methodologies in the social sciences* 223 (2008).
22. Charles C Ragin, "Comparative methods," *The Sage handbook of social science methodology*, 2007, 67–80.

Additionally, these cases cover a nearly contiguous period from 1670 to the present, which offers a valuable opportunity to analyze the way solutions to the justice-efficiency tension have developed over time. Comparison of the US case with the French case clearly demonstrates a shift in the legitimating arguments of criminal procedure, where instead of focusing on justice – understood as ensuring the state only enacts violence on those who have violated the criminal law[23] – US reformers formalize plea bargains as consensual agreements between the state and the accused, eliding the operation of state power and allowing for direct focus on efficiency.[24]

Finally the fact that France, Germany and the United States have all been imperial powers, and that France and the U.S. initially spread their criminal procedures coercively offers the opportunity to understand and compare the processes underlying their diffusion. Plea bargains and penal orders are also partial substitutes, the former a deal that can be made in any case but employed heavily for lesser crimes, the latter a prosecutor-ordered sentence usually restricted to certain kinds of offense with limited penalties. The fact these two procedures are often employed in similar cases and to the same end (avoiding the trial and efficiently managing caseloads)[25] allows comparing their uptake and utilization to understand the impact of legitimating arguments in criminal procedural diffusion.

4 Three Procedural Genealogies

> It is better that ten guilty persons escape, than that one innocent suffer. – Blackstone[26]
>
> [T]oo often men would rather punish ten innocent Negroes than let one guilty one escape. – Du Bois[27]

"Criminal justice" has been a central legitimizing institution in Western societies for centuries. The criminal legal system then bears a tremendous theoretical burden; it is the institution that mediates between state violence and individuals. That mediating role places criminal justice at the central of the modern state. The maintenance of state legitimacy requires the justification of state violence.[28]

23. F Hélie, *Traité de l'instruction criminelle: ou théorie du Code d'instruction criminelle*, Traité de l'instruction criminelle: ou théorie du Code d'instruction criminelle v. 8 (H. Plon, 1867).
24. US Supreme Court, "Brady v. United States," 397 US 742 (1970).
25. Langer, "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions."
26. William Blackstone, *Commentaries on the Laws of England*, vol. 2 (J. Grigg, 1827).
27. William Edward Burghardt Du Bois, *The souls of white folk* (The Independent, 1910).
28. Weber, *Economy and society: An outline of interpretive sociology*, 54-56.

If the state is indeed the organization with the monopoly on the legitimate use of violence, and if the criminal legal system is a key institution making that violence legitimate, then an illegitimate criminal justice system makes for an illegitimate state.

The centrality of criminal justice leads to the elaboration of complex rationalized procedures intended to guarantee the state has sufficient evidence to *know* that someone is guilty before punishing them. In practice the criminal legal system is more than this theoretical mediator though; it is a crucial instrument in modern social control. The criminal justice system is used to manage poor and racialized populations, to secure property rights, to suppress political dissent, and more generally to ensure the feeling of security for the population.[29] The highly elaborated procedures developed to protect the theoretical citizen from the state are not well suited to the practical necessity of systems that in practice process millions of people a year.

The tension between justice and efficiency is not some natural or necessary phenomenon but rather emerges from the particular construction and organization of the the world society and the nation state. The rise of the individual, the understanding of individuals as having clear objective interests, and the continual accumulation of individual rights all put increasing pressure on criminal justice systems to justify state violence and to elaborate procedure.[30] On the other hand the nation-state did not exist in anything resembling its present form in 1670 (the earliest period discussed in this study); the role of the state has expanded since the medieval period, and has come to encompass more forms of social control which used to lie in other parts of society.[31] These two trends, the increasing focus of global culture on the individual and the centralization of social control in the state lie at the heart of the tension identified above. The escalation of these tendencies places more strain on criminal procedure, intensifying the tension between efficiency and justice, necessitating a resolution.

29. Cohen, *Visions of social control: Crime, punishment and classification*; Black, "Crime as social control"; Neocleous, *Critique of security*.

30. John W Meyer and Ronald L Jepperson, "The 'actors' of modern society: The cultural construction of social agency," *Sociological theory* 18, no. 1 (2000): 100–120.

31. John W Meyer et al., "World society and the nation-state," *American Journal of sociology* 103, no. 1 (1997): 144–181; Ronald L Jepperson, "Political modernities: Disentangling two underlying dimensions of institutional differentiation," *Sociological Theory* 20, no. 1 (2002): 61–85; Cedric J Robinson, *Black Marxism: The making of the Black radical tradition* (Penguin UK, 2021).

Blackstone's normative position that criminal justice systems should air on the side of freedom is incompatible with the practical necessities of social control, which Du Bois identifies. Instead the historical solution has come in the form of decoupling: highly rationalized criminal procedures like the trial are simply never enacted and instead informal practices develop that allow criminal procedural systems to function.[32] The United States is an illustrative example. The U.S. education system and media conjure the image of the trial as the way criminal cases are resolved, people in the U.S. seem to believe trials are the way criminal cases are resolved, yet in reality 95%+ of criminal cases are resolved via plea bargains rather than trials[33] and more than half of cases have been resolved via plea bargains since at least 1920.[34]

It is precisely the fact that the trial is rarely used that preserves the legitimacy of the system. If trials were employed for every case things would grind to a halt – the decoupled procedure is what allows the things to operate while maintaining the appearance of functioning in good faith.[35] This resolves the tension identified in criminal procedural systems with some important consequences.

Decoupled practices tend to further professionalize the institution, minimizing the need for external actors involvement and often shifting decision making power to actors within the institution, increasing the importance of professional discretion.[36] The continual attenuation of the lay jury (an panel of external actors) and the rise of procsecutorial discretion will be a pattern across the discussions of France, German and the U.S. Relatedly, any time the criminal justice system *is* exposed to external review its decoupling will quickly be identified, often precipitating a reform designed to curtail the exposed practice. Usually these reforms will take the form of even more elaborated procedures, accumulating protections for individuals as well as practices meant to prevent previous decoupled practices. Such elaborated procedures tend to decouple rapidly, creating a cycle of reform. The French case serves as a particularly vivid illustration of this phenomenon.

32. John W Meyer and Brian Rowan, "Institutionalized organizations: Formal structure as myth and ceremony," *American journal of sociology* 83, no. 2 (1977): 356.
33. John Pfaff, *Locked in: The true causes of mass incarceration-and how to achieve real reform* (Basic Books, 2017).
34. George Fisher, *Plea bargaining's triumph: a history of plea bargaining in America* (Stanford University Press, 2003).
35. The theory of decoupling also helps explain the occasional high profile case – a periodic ritual to maintain public confidence (Meyer and Rowan, "Institutionalized organizations: Formal structure as myth and ceremony," 358), as well as the resistance to inspection – and concordant lack of data – in criminal procedure (ibid., 359).
36. Ibid., 358.

Decoupling also detaches policy fights from on-the-ground reality, allowing reform processes to unfold with few constraints. Being highly institutionalized criminal procedural policy-making is disconnected from any real output controls.[37] Criminal procedure therefore tends to strongly reflect normative cultural attitudes and orientations. The differences in the formal (and informal) evolution of criminal procedure in the cases detailed here reflect the political cultures of France, Germany and the United States. To contextualize these genealogies of criminal procedure it is useful to organize them along two axes, individualistic-corporatist and societal-statist.[38] The former corresponds to whether society is organized around individuals or groups, the latter the centrality of the state in organizing social relations. From this perspective the formal centralization of criminal procedure in Germany accords with its corporatist/statist culture. Similarly reformers in the United States, an individualistic/societal state, preferred a formal focus on the jury trial: individual citizens, rather than the state, functioning as the arbiters of justice. In this typology France sits somewhere between Germany and the U.S., an individualistic/statist culture. Fittingly French criminal procedure is a hybrid, mixing elements of the old inquisitorial and adversarial procedures.

The fact that criminal procedure has historically been such a moralized discursive field and that it has remained detached from output controls makes its rationalization all the more surprising. Tracing the rationalization of plea bargaining to the U.S., along with this theory of U.S. political culture, helps explain this seemingly counter-intuitive development.

Plea bargaining started as a decoupled practice in the U.S. sometime in the 19th century.[39] The form of plea bargaining, a deal between prosecutor and defendant where the defendant chooses to plead, is clearly amenable to U.S. political culture with its reification of the individual. It was formalized in U.S. law in 1970, raised from an informal practice to the legitimated way criminal procedure was done. Plea bargains came to dominate U.S. procedural practice, and today represent an alternate resolution to the justice-efficiency tension, a rationalized practice that functions to substitute

37. Meyer and Rowan, "Institutionalized organizations: Formal structure as myth and ceremony."
38. Jepperson, "Political modernities: Disentangling two underlying dimensions of institutional differentiation."
39. G Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (Stanford University Press, 2003), ISBN: 9780804751353; Mary E Vogel, "The social origins of plea bargaining: An approach to the empirical study of discretionary leniency?," *Journal of Law and Society* 35 (2008): 201–232.

instrumental rationality for moral rationality in criminal procedure. Recombinant innovation[40] justified raising plea bargaining from an informal procedure to a formal one. Specifically economists and lawyers transposed the social relations of the market onto the court-room, reconceptualizing plea bargains: "Plea bargains are essentially contracts" (Pucket v.United States, 2009). This formulation had special normative appeal against the backdrop of continued expansion of individual actorhood and the ascendancy of choice in the post-War period,[41] while simultaneously not getting in the way of the nascent U.S. war on crime.[42] Bringing this kind of market logic and focus on choice into criminal procedure made plea bargains fair in the eyes of the law. Imagining plea bargains as consensual agreements ameliorated historical anxieties about justice (the implicit assumption being that no one would consent to violence) and allowing for arguments explicitly foregrounding efficiency.

Shortly after its rationalization in the United States, plea bargaining diffused internationally – in no small part due to U.S. efforts to push its adoption around the world (see Section 5.3). Plea bargaining was adopted as *the* legitimate way of efficiently managing a criminal legal system, a necessary step to "modernizing" criminal procedure (see Table 2). But I will argue in Section 6.3 that in practice plea bargaining itself is decoupled, with many countries that have adopted the procedure not using it (see Fig. 5) – it has come to *symbolize* efficiency in the same way the trial symbolized justice.

These three genealogies of criminal procedure in France, Germany, and the United States will further develop these ideas, giving a sense of the mechanisms driving criminal procedural reform within these three states and, showing that the justice-efficiency trade-off is central across the three cases, even as the differing political cultures of these states lead to different particular procedural trajectories.

40. John F Padgett and Paul D McLean, "Organizational invention and elite transformation: The birth of partnership systems in Renaissance Florence," *American journal of Sociology* 111, no. 5 (2006): 1463–1568.

41. Meyer and Jepperson, "The 'actors' of modern society: The cultural construction of social agency."

42. Jonathan Simon, *Governing through crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, 2007); Vesla M Weaver, "Frontlash: Race and the development of punitive crime policy," *Studies in American political development* 21, no. 2 (2007): 230–265.

4.1 Cyclic (De)Legitimacy and the Development of the Hybrid System in France

The story of modern criminal procedure begins in France in 1670, when Louis XIV put into place the *Ordonnance Criminelle*, institutionalizing the inquisitorial procedure which had developed in the ecclesiastical courts for the preceding three centuries.[43] In doing so, Louis effectively established a regime of state-sanctioned torture that would define French justice until the revolution.[44]

In theory, according to the *Ordonnance Criminelle*, a case began with a public prosecutor bringing an accusation, which would prompt a secret preliminary inquiry by the presiding magistrate. The magistrate had broad powers to search out the facts, with no real checks on what they might investigate. The prosecutor took on a more passive role throughout this investigation, as they would oversee the magistrate, at most making suggestions as to what to pursue. If the prosecutor perceived some error in the investigation they could appeal to a higher court for a more thorough investigation into some facet of the case. The magistrate then turned to the system of legal proof, a dominant feature of early inquisitorial procedure. This system laid out in detail what evidence was required to proceed to a trial, and further what evidence was required for a conviction. If the investigation had produced sufficient evidence, the magistrate would proceed to trial. The investigation produced an abundance of written documentation, which was compiled and summarized by a reporter whose job it was to state the facts of the case. The trial would be presided over by a panel of three or five judges (according to the severity of the crime), who heard the reporter's account of the facts, then heard the prosecutor's conclusions, and interrogated the accused. The judges then took into account these orations, in combination with all other documents compiled from the investigation, and if the dossier fulfilled the conditions for conviction under the system of legal proof, then the judges were compelled to convict.[45,46] The facts of the case play a central role in this description, because the main contemporary ideas about law were that once the facts were known it was an almost mechanical process of determining the proper outcome.

43. A Esmein, R Garraud, and C J A Mittermaier, *A History of Continental Criminal Procedure, with Special Reference to France*, A History of Continental Criminal Procedure, with Special Reference to France v. 5 (Little, Brown, 1913), 211-250.
44. Langbein, "Torture and Plea Bargaining."
45. Francia, *Ordonnance criminelle, 1670*, Code Louis (Giuffrè, 1670), ISBN: 9788814051081.
46. Esmein, Garraud, and Mittermaier, *A History of Continental Criminal Procedure, with Special Reference to France*, 211-250.

The system in practice decoupled immediately and catastrophically, ironically in similar fashion to the loophole that would later be exploited by enterprising prosecutors in the United States culminating in the practice of plea bargaining. The heart of the issue was the system of legal proof, which was meant to prevent the arbitrary and unwarranted meting out of justice. For a capital conviction — which was the most common outcome of a criminal case of the era — the burden of proof was two eye witnesses or a confession.[47] The clauses that a confession could substitute for the two witnesses was the main basis of the decoupled system: the states could simply torture the accused to get a confession, and by that means a conviction.[48] Torture was not simply a French affectation in the early Renaissance; it was on the contrary perhaps the defining characteristic of criminal procedure on the continent, but France's legal system is the one that would evolve to become the theoretical standard against which future systems would be judged, and so that is the one we trace here.[49] As the legal historian John Langbein put it:

> Judicial torture survived the centuries not because its defects had been concealed, but in spite of their having been long revealed. The two-eyewitness rule had left European criminal procedure without a tolerable alternative. Having entrenched this unattainable level of safeguard in their formal trial procedure, the Europeans found themselves obliged to evade it through a subterfuge that they knew was defective. The coerced confession had to replace proof of guilt.[50]

The tension Langbein identifies here recurs throughout criminal procedural history: highly rationalized and elaborated procedures are developed to safeguard individuals from state power but the practical necessities of running a criminal legal system require a certain level of efficiency. During this period in France, and Europe more generally, the solution was decoupling, which allowed for nominal protection from the state in the formal procedure while state violence was in practice unimpeded. Although torture would recede from normal practice, the pattern in this earliest case generalizes.

47. Morris Ploscowe, "Development of Inquisitorial and Accusatorial Elements in French Procedure," *Journal of Law and Criminology* 23, no. 2 (1932): 374.
48. Langbein, "Torture and Plea Bargaining."
49. Ibid., 1.
50. Ibid., 8.

It would be over a century before the *Ordonnance Criminelle* would be revisited. Voltaire and Beccaria became famous for exposing the system of judicial torture to the public, but their critiques gained traction only in the context of wider civil unrest. The heightening of the scrutiny and the burgeoning delegitimization of the French state began to bubble over when in 1788, under the heavy public pressure preceding the revolution, the practice of torture was abolished by the crown. Less than a year later, merely days after the royal family was moved from Versailles to Paris under the "protection" of the National Guards, the National Assembly passed the Law of October 8-9, 1789, which represented more significant reform.[51]

In direct response to the neglect of the rights of the accused under the regime of torture – the clear injustice that represented – the Assembly incorporated two major additions to the inquisitorial system, but left the major institutions of 1670 largely intact. The first of these was a check on the unbridled investigative powers of the state; two *adjoints* ("laymen of good reputation") were to oversee the magistrate investigating the case, prior to the appearance of the accused. The second reform, seen as an import from English criminal procedure by the reformers, was to permit the accused a lawyer.[52] French jurists were being swayed by English arguments that a lawyer who was present for the examination of witnesses and who had access to all the documents of the case meant there was someone to tell the accused's side of the story, in a way there simply was not prior to 1789. England had escaped the Continent's system of procedural torture with its distinct trial system, and so importing elements of this system that the English claimed were important made sense to French reformers. This diffusion was facilitated by the emerging logic of the nation state and state rationalization, which were transforming particular procedures into general models that could easily spread from one country to another.

Only two years later, when a more comprehensive solution was drafted, the success of the defense council, of English procedure, was foremost in the minds of reformers. They passed the Law of September 16-29, 1791, which abandoned entirely the existing French institutions importing wholesale the English model.[53] The underlying assumption that they could import an entire system,

51. Ploscowe, "Development of Inquisitorial and Accusatorial Elements in French Procedure," 376.
52. Ibid., 377.
53. Esmein, Garraud, and Mittermaier, *A History of Continental Criminal Procedure, with Special Reference to France*, 408.

a whole bureaucracy and a new set of institutions, was implicit. It went without saying. If it worked in England, it would work in France.

The most enduring aspect of the law would be the tripartite categorization of offenses. Petty offenses, *contraventions*, were tried before the Justice of the Peace directly. More serious crimes, *delits*, were tried by a panel of three judges. Finally, the most serious offenses, *crimes*, were tried before the jury.[54,55] Another lasting change was a set of ideas from the English model about extenuating circumstance, which allowed the court to acknowledge the context in which a violation of the law occurred.[56]

The law completely reconfigured the bureaucrats who oversaw the justice system. It abolished the magistrate and the prosecutor, replacing these positions with three new officials. Taking on a role parallel to that of the magistrate was the justice of the peace, an elected official who was imbued with the power to issue warrants summoning the accused, hearing the accused and any relevant witness testimony, simply deciding in the case of *contraventions*, or determining whether to send the case to the panel of judges or to call a Grand Jury in the case of more severe offenses. The prosecutor was substituted for two figures, a Comissionaire of the King, charged with seeing the laws were enforced, and a Public Accuser, who appeared in court as the counsel representing the state.[57,58] The French Grand Juries were guided by a Director of the Jury, who read the facts of the case and provided guidance to the laity, and who would in the end draft the verdict.[59] In practice the course of the decoupling of this French version of the English procedure would flow through the Director of the Jury, who would see their power grow significantly, until eventually the Grand Jury's role would amount to little more than concurring with the Jury's expert advisor. Mixing legal experts and citizen jurors in this way would become a common practice especially in Germany, where it would similarly function to mitigate the role of citizen participation.

54. Esmein, Garraud, and Mittermaier, *A History of Continental Criminal Procedure, with Special Reference to France*, 408-436.
55. Ploscowe, "Development of Inquisitorial and Accusatorial Elements in French Procedure," 385.
56. Carl Ludwig von Bar, *The Continental Legal History Series*, v. 3 (Little, Brown, & Company, 1912), 351.
57. Esmein, Garraud, and Mittermaier, *A History of Continental Criminal Procedure, with Special Reference to France*, 408-436.
58. Ploscowe, "Development of Inquisitorial and Accusatorial Elements in French Procedure," 378.
59. Ibid., 379.

And the most radical component of the reform was the adoption of the Anglo-American style jury trail, with adversarial argument and lay decision. There are two ways in which this jury differed from the English model, first, in France the jury lists were compiled in secret by a government official, whereas in England the lists were public, and second, the juries were required to announce public verdicts in response to factual questions posed by the judge as opposed to the simple "guilty" or "not guilty" decisions proclaimed in England.[60] Still, viewing the system as a whole it amounts to nothing less than a straightforward copying of the adversarial model.

The revolutionary reformers had been convinced that the central flaw in the inquisitorial model was that it put too high a priority on the bare facts, and when they sought an alternative they were confronted by English jurists who had developed a highly rationalized set of arguments buttressing the trial, centering on the debate before a jury. English jurists argued that the interpretation of the facts, the construction of narratives surrounding the facts, and the understanding borne out of the debate was just as central as the facts. To the French reformers this theoretical re-interpretation was so plausible they baked it into the very language of the new law, in spite of the fact that it was completely unrelated to the regime of torture they were allegedly attempting to remedy.

> It is especially on the basis of evidence, and the debates which take place in their presence, that the jurors must establish their personal certainty; because it is their personal certainty that is at issue here; it is this which the law demands that they express, it is this which society and the accused depend upon.[61]

Despite high-minded ideals, this procedure was largely viewed as a failure in France, having been hastily implemented, its bureaucrats poorly trained, its ability to curtail rampant crime unproven, and, most devastating, bearing the stain of Robespierre's reign of terror.[62] The fact that surely no criminal procedure considered in isolation could possibly have curtailed the reign of terror was irrelevant. The decoupling of the system under the revolutionary government combined with the executions it was being used to justify quickly undermined the legitimacy of the system. When

60. Markus Dirk Dubber, "The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology," *The American Journal of Comparative Law* 43, no. 2 (1995): 227–271.
61. Francia, *Loi des 16-29 septembre 1791*, 1791, translation my own.
62. Esmein, Garraud, and Mittermaier, *A History of Continental Criminal Procedure, with Special Reference to France*, 437.

reformers would once more return to the drawing board to pick up the pieces they rationalized the system's failure as an overcorrection[63] – too much focus on the debate, not enough on the establishment of the facts to be debated. The absurdity of this interpretation in a situation where the entire rest of the state apparatus was oriented to abuse the criminal procedure is evidence of the faith placed by reformers in the formal models of these systems: they were capable of ignoring almost any practical reasons for the system's failure.

Thus much of the radical change of 1791 was rolled back in 1801 by the passage of the Law of Pluviose 7, An IX, which reestablished the inquisitorial flavor of French procedure.[64,65] The prosecutor was reestablished by merging the Comissionaire of the King and the Public Accuser. The Grand Jury was rendered utterly symbolic as the powers of the Director vastly expanded, taking on the investigative role held prior to 1791 by the magistrate. Affording the Director these responsibilities rendered the justice of the peace redundant, but the position was maintained, robbed of all its power. The investigative role of the Director also effectively nullified the impact of the Grand Jury, which no longer heard testimony, but rather rendered impotent, simply rubber-stamping the Director's conclusion on whether to go to trial.[66]

The 1801 reform laid the groundwork for the more decisive rejection of the adversarial system that would come in 1808 with the *Code d'Instruction Criminelle*, the product of Napoleon's commission to reform the criminal justice system.[67] The debate surrounding the code had two main factions: those championing the inquisitorial system of 1789, and those in favor of the adversarial system of 1791. These debates were perhaps best summarized by Faustin Helie, a French legal professor and the head of the criminal affairs bureau at the Ministry of Justice, writing some 60 years later, in his seminal *Traité de l'instruction criminelle: ou théorie du Code d'instruction criminelle*. Héliè thought of himself as elucidating the arguments for both systems. He described the strength of the inquisitorial system in terms of its truth-oriented nature:

63. Esmein, Garraud, and Mittermaier, *A History of Continental Criminal Procedure, with Special Reference to France*, 437.
64. Ploscowe, "Development of Inquisitorial and Accusatorial Elements in French Procedure," 379.
65. This is a pattern in other systems as well, particularly Germany; a time of radical change, the importation of a new system from elsewhere, followed by a long process of reconciling the "new way" with the regional traditions of the locality.
66. Esmein, Garraud, and Mittermaier, *A History of Continental Criminal Procedure, with Special Reference to France*, 437-461.
67. Ibid., 437.

> The inquisitorial form is eminently peculiar to searches, verifications, and the ascertainment of the facts. The examining magistrate, placed in the context of the acts which he is to investigate, deploys, in order to ascertain these facts and to determine their character, all the power of the investigation. He carries out all the searches; he seizes all the evidence he discovers; he moves from the evidence to the facts themselves.[68]

Héliè believed this particular truth-seeking capacity is by default lacking in the adversarial system, but he is not merely a blind adherent of the inquisitorial system, as he explains, "[the judge] can see the material facts, but can he know the guilt of the accused? He can bring together all the elements of the trial, but can he debate them in order to bring out the truth?"[69] Héliè seized on this perceived weakness of the inquisitorial procedure as a lack of interpretive capacity. He further elaborated on the benefits of the adversarial system:

> The judge, magistrate, or juror [he who determines the verdict], must be present at the debate of the facts and declarations; placed in the midst of the contrary allegations of the prosecution and the defense, which clash incessantly, he examines, he appreciates, he determines his opinion. The most palpable proofs are of value only when they have been subjected to this test; it is by this struggle that the truth is manifested. And it is for this reason that, of all the systems whose object is to strengthen human justice, there is none which brings the guarantees of the accusatory form.[70]

Héliè crystalized the argument that would become the crux of formal criminal procedural reform for the next century. He developed a model of the inquisitorial system as oriented toward finding the facts and the adversarial system as a way to ensure they would be thoroughly interpreted and contextualized. These theories emerged out of the diagnoses of his predecessors about what failures drove the legitimacy crises that had plagued the French criminal legal system for the precedining

68. Hélie, *Traité de l'instruction criminelle: ou théorie du Code d'instruction criminelle*, 43, translation my own.
69. Ibid.
70. Ibid.

centuries (which were, in actuality, driven primarily by the over-elaborated systems and their decoupling). Héliè went further, outlining the necessity of both these elements to the trial: finding and interpreting the facts endorsing the hybrid model developed under Napolean: "why not borrow from each of these two systems the most salutary measures, the most useful forms? Why not combine their reciprocal forces towards a common end which they could only achieve incompletely isolated from each other?"[71]

This theory – that the inquisitorial form offered true fact finding and that the adversarial system embodied interpretation and context, and finally that the ideal procedure would be a synthesis – led to the French system and its descendants being hailed as the most theoretically robust criminal procedure available. In fact when the American system of criminal procedure came under attack, well into the 20th century, the main charge was often mobilizing precisely the discursive line that Héliè laid out: that it lacked the capacity to determine the facts.[72] On the other side of things, when procedures are adopted or amended well into modernity, Héliè's logic clearly echoes, as in the Overview of Criminal Justice from the Supreme Court of Japan:

> Under [the current Code of Criminal Procedure], the Continental European system is maintained to a much greater degree, while at the same time, the best characteristics of Anglo-American law have been adopted... The court must find facts and determine the sentence in the event that the accused is found guilty, so the proceedings for fact-finding and sentencing are merged into a single phase. Thus, evidence both for fact-finding and for mitigating/aggravating circumstances are submitted during the same procedure.[73]

It is worth reiterating this point: this model was the product of the historical accumulation of theories, theories which never engaged with the actual reasons for the failure of various procedures, instead proposing theoretical reasons for those failures paired with theoretical solutions, none of which ever reflected the actual practice of the law. It is a clear cycle of developing legitimated

71. Hélie, *Traité de l'instruction criminelle: ou théorie du Code d'instruction criminelle*, 43, translation my own.
72. John H. Langbein, *The Origins of Adversary Criminal Trial* (2005), 1–376, ISBN: 9780191718137, doi:10.1093/acprof:oso/9780199287239.001.0001, arXiv: arXiv:1011.1669v3.
73. Supreme Court of Japan, *Outline of Criminal Justice in Japan*, technical report (2016).

models, instituting them, discovering their inevitable decoupling, their delegitimization, culminating in the development of a new model which fixes a perceived flaw in the previous model, without addressing the decoupling.

4.2 Against the Jury: Criminal Procedural Reform in Germany

It is a bit difficult to speak of the German system of criminal procedure of the 18th century, as at the time there was in truth no unified German state at all. Rather the Holy Roman Empire of the German Nation was a conglomerate of smaller states that over time would be unified under Prussia towards the end of the 18th Century. There were three main states that are of interest in legal scholarship of this era; Prussia, Austria, and Bavaria, and it is to the local codes of each of these that we must turn to find information on the German procedure before 1866.[74]

As in France, the pre-German states' criminal procedures were dominated by torture. This practice was abolished in Prussia in 1740, with the rise of Fredrick the Great.[75] It was abolished in Austria in 1776 and in Bavaria in 1806.[76,77] Austria and Bavaria instituted their respective reforms in the wake of the wider torture-abolition movement occurring throughout Europe after Beccaria and Voltaire's writing called attention to the issue.[78] The shared nature of criminal procedural practice in Europe from 1670 through the 1700s led to this wave of reform as European states were forced to acknowledge the decoupling of the system of proof and the practice of torture.

Napoleon invaded Rhineland in 1805, conquered it, and created the Confederation of Rhine, a French protectorate composed of the German states on the border between France and Austria and Prussia.[79] This confederation, though nominally independent, was in truth under French occupation and rule, and as such implemented the French criminal procedure. This was the French criminal procedure as it existed under Napoleon, essentially the *Code d'Instruction Criminelle* described above, with inquisitorial investigation and adversarial trial proceedings.[80,81] When the French ceded

74. Bar, *The Continental Legal History Series*, 343-375.
75. Ibid., 250.
76. Ibid., 246.
77. The Editors of Encyclopaedia. Britannica, "Paul, knight von Feuerbach."
78. Bar, *The Continental Legal History Series*, 246.
79. T Vormbaum and M Bohlander, *A Modern History of German Criminal Law* (Springer Berlin Heidelberg, 2013), 343-350, ISBN: 9783642372735.
80. Ibid.
81. Dubber, "The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology," 231.

the territory back to Germany in 1814, this criminal procedure was left intact, an institutional inertia carrying the system forward. The code was popular; a Prussian commission reported on the French system's overwhelming approval within the Rhine states, entrenching the system as the *de facto* alternative to the somewhat dysfunctional domestic law of the era.[82,83]

Feuerbach was one of the earliest champions of reform to bring better protections for individual rights to Germany (in fact it was his advocacy that led to the abolition of torture in Bavaria).[84] He thought it was vital to ensure the state did not enact violence on people without being able to prove their guilt, and so stands in the historical tradition of justice observed in France, but he rejected the jury as a necessary component in guaranteeing that kind of individual protection. These values were reflected in the Bavarian code of 1813 that Feuerbach drafted.[85,86] He was the first in a long line of German thinkers to be skeptical of the jury as an institution of lay participation.[87] This distaste eventually manifested in German scholars re-imagining the jury as a French institution foisted on Germany by conquest, rather than a transplant that had been adopted and modified by German jurists. This skepticism among the German academia would remain, growing to shape German justice into the modern era, but in the "Springtime of the Peoples" German law would be dictated by popular demand.[88]

The Revolution of 1848 focused on a pan-German ideal, and at the center of that ideal was a conception of the German people as one, as the *Volk*.[89] As such the right to judgement by the people – trial by jury – was one of the central precepts enshrined by the Frankfurt National Assembly, which adopted a code heavily informed by the Napoleonic Code and Feuerbach's 1813 Bavarian code. By 1849 almost all German states had adopted the French jury, based on the model conveniently provided by the Rhine states.[90,91]

82. Vormbaum and Bohlander, *A Modern History of German Criminal Law*, 343-350.
83. Dubber, "The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology," 231.
84. Britannica, "Paul, knight von Feuerbach."
85. Vormbaum and Bohlander, *A Modern History of German Criminal Law*, 343-350.
86. Britannica, "Paul, knight von Feuerbach."
87. Dubber, "The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology," 232.
88. Bar, *The Continental Legal History Series*, 347.
89. Ibid.
90. Dubber, "The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology," 234.
91. The French model was adopted, rather than the English trial which was more popular among some German reformers due to the ease of transition enabled by a domestic model.

The democratic procedures adopted in 1848 were steadily eroded by decades of pushback from legal professionals, especially from within German academia. Following in Feuerbach's tradition, fighting to decrease the impact of lay participation predicated on the idea the laity could not enact rigorous categorization of the facts – a crucial component of German criminal law – and therefore would not be able to decide if there was sufficient evidence to warrant punishment.[92] The jury mandated by the constitution of 1849 was mainly employed in cases of serious crimes, but the early 1850s saw the decline of even this limited jurisdiction as legal professionals pushed more cases to their preferred adjudicators: panels of professional judges (analogous to a jury of judges).[93] Both the democratic pressure and the professionalizing forces within German criminal law ascribed to the idea that a just legal system was one where state power was reserved for those it could be convincingly shown had broken the law.

Occurring in parallel to this preliminary codification of German criminal law was the development of penal orders in Prussia. Penal orders started as a decoupled procedure to allow Prussian police to manage cases associated with political unrest during the Polish uprising of 1830-31.[94] Penal orders (*Mandatsverfahren*) were first formalized for use in the Berlin Police courts in 1946 and were extended to all of Prussia in 1849. In this earliest iteration penal orders were a procedure where the prosecutor sends the defendant an order indicating the crime and the proposed sentence which becomes the sentence unless the defendent objects within a set amount of time. If the defendant does oppose, the case moves on to the procedurally dictated resolution process.[95] This first codification completly bypassed the judge, and was reserved for the lowest category of Prussian crimes, because it was thought penal orders were only appropriate for cases where prison sentences were off the table. The careful navigation of the tension between restraining state power and managing criminalized populations – in the case of the Polish uprising quite immediately – is extremely clear here. Jurists originally saw the need to efficiently process dissidents, and then minor crimes more generally, but wanted to ensure there was no "deprivation of liberty."[96] Parallel to the attenuation of the jurisdiction

92. Markus Dirk Dubber, "Colonial Criminal Law and Other Modernities: European Criminal Law in the Nineteenth and Twentieth Century," in *Oxford Handbook of European Legal History* (2018), 232-233.
93. Dubber, "The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology," 235.
94. Thaman, "The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?"
95. Ibid., 159.
96. Ibid., 157-8.

of the French trial, the jurisdictions where penal orders were available to prosecutors expanded from the lowest crimes to also include mid-tier crimes and eventually the highest category of crime in the Prussian schema, although the use of penal orders was restricted so that the only penalties a prosecutor could order were small fines or police detention of up to 6 weeks. Additionally, the judge was brought in to the penal order process as someone who had to be informed of the orders, although judges could not overturn an order if the defendent did not object. Along with these increases in jurisdiction within Prussia, penal orders also spread through the German States over the next decade.[97,98]

Between the shrinking jurisdiction of the jury trial which shifted power from the laity to judges and the rise of penal orders which similarly increased the scope of prosecutorial discretion, the decades after the 1848 Revolution were characterized by professionalization of the criminal procedure. This trend was somewhat reversed by the passage of the Code of Criminal Procedure of 1877 and the Judicial Organization Code (GVG) in 1879, which together universalized the German criminal procedural system.[99]The two most important elements for this study of the unified German procedure were the defense council and penal orders. The GVG standardized the defense counsel as a facet of German procedure.[100] The influence of the legitimating arguments developed in France is clear: without defense counsel there is no one to tell the conflicting stories as Helie envisions, and no guarantee of someone making the case against the state on behalf of the defendant. On the other hand, the universalization of German criminal procedure also came with the universalization of penal orders.[101]

These high-level takeaways are symbolic of the wider GVG: it was a compromise between a reformers who wanted more democratic procedure and the professionalizing tendency noted above. The code borrowed the French tripartite distinction between crimes, which were — again similar to the French system — adjudicated by three different courts. Extremely minor crimes were handled by a single professional judge. All of these cases could be handled via penal orders. Beyond that,

97. Thaman, "The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?," 159.
98. It is unclear whether a decoupled form of penal orders existed in German States outside of Prussia before this formal diffusion process occurred.
99. Dubber, "The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology," 235.
100. Bar, *The Continental Legal History Series*, 350.
101. Thaman, "The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?," 159.

the lowest crimes, *Übertretungen*, and lower mid-tier crimes, *Vergehen*, were overseen by a mixed court, one professional and two lay judges. Similarly all cases overseen by the mixed court could be resolved via penal order, with the same restrictions that came into place in Prussia: maximum penalties of minor fines or up to 6 weeks of incarceration.[102] Higher *Vergehen* and lower *Vergehen* fell under the jurisdiction of a panel of five professional judges. Higher *Vergehen*, the most serious crimes, were adjudicated by three professional judges and twelve lay jurors. This highest jury court functioned much like the jury in France, with a jury foreman to guide deliberation and the judge able to posit questions to the jury to probe the rationale for the decision.[103,104] Probably the most consequential aspects of the GVG in practice were the components related to penal orders, which arbitrated a huge number of cases in practice. It is difficult to call this decoupling, because penal orders were a formal procedural element, but their existence and prominence in legals practice certainly make the fights over whether the jury court should exist and what cases it should preside over seem out of touch with what mattered in the criminal procedural system. This seems like another case where something *like* decoupling enabled criminal procedural reform to proceed according to ideological commitments largely detached from practical understandings of procedural practice.

Despite professional efforts to curtail the laity in the intervening 50 years, no successful reform was made until after the Empire's defeat in World War I.[105] During this period, the jury continued to lose formal jurisdiction in favor of the mixed court, a compromise which satisfied both lay advocates and legal professionals, while simultaneously expanding the jurisdiction of penal orders. Crushing defeat, economic collapse and political upheaval that characterized the post-WWI period came with changes to the criminal code. The maximum allowable imprisonment prosecutors could request in penal orders was raised from 6 weeks of detention to 3 months.[106] Further, under the auspices of the Emergency Act of 1924, justice minister Erich Emminger unilaterally put into place the *Lex*

102. Thaman, "The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?," 159.
103. Bar, *The Continental Legal History Series*, 350-352.
104. Dubber, "The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology," 235.
105. Ibid., 236-237.
106. Thaman, "The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?," 159.

Emminger, a radical reform that invested much more power in the state, and removed much of the public's voice in German proceedings.[107]

The *Lex Emminger's* most dramatic change to the German system was the outright abolition of the jury, replacing it with a large mixed court of six lay judges and three professional judges.[108] The law also significantly expanded the jurisdiction of the single professional judge, pushing the jurisdiction of the small mixed court (2 lay judges, one professional) to cover higher *Vergehen* and lower *Übertretungen*, ameliorating any need for the five-judge court.[109]

> With its abolition of jury courts, a massive downward shift of the first instance of jurisdiction, and the first inroads into the principle of mandatory prosecution, the Emminger Decree represented a significant leap, perhaps even a turning point in the modern development of criminal procedure: if the nineteenth century, with its so-called reformed criminal procedure, had produced a compromise between the accusatory and inquisitorial principle, the legislative intervention of 1924 can be seen as the return of a preponderance of the professional, inquisitorial element over the accusatorial, adversarial element of criminal procedure.[110]

This was a major step in the further professionalization of the law, essentially the death knell of lay participation in the lineage of modern German criminal law. This is not to imply that Germany did not see increases in lay participation in the time between the passage of the *Lex Emminger* and today, there was; it was through the law of the Third Reich. Although lay participation was a feature of the Nazi regime,[111] this was a mythic procedure. In reality while nominally expanding the role of the *Volk* in criminal procedure the Nazi codes further raised the maximum imprisonment possible under penal orders, and 77% of cases were resolved via penal orders from 1930-1935.[112] This lip service paid to public participation while simultaneously penal orders were used to manage the regimes political opponents is a striking feature of criminal procedure under the Third Reich. The

107. Vormbaum and Bohlander, *A Modern History of German Criminal Law*, 167-169.
108. Ibid., 169.
109. Dubber, "The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology," 237.
110. Vormbaum and Bohlander, *A Modern History of German Criminal Law*, 169.
111. Dubber, "The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology," 238.
112. Thaman, "The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?," 160.

developments of criminal procedure from 1924-1945 were effectively erased as the Uniformity Act of 1950 brought West Germany back to the code of 1924, the *Lex Emminger* and similarly restored the maximum punishment allowable in a penal order to 3 months.[113,114]

Penal orders as they exist today in Germany are similar to the version restored in 1950, with the maximum penalty a year of probation with a prison sentence for violating the probation (rather than direct incarceration). This version of penal orders is much less punitive than contemporary plea bargains, but the arguments for their use are much less well developed. Historically, penal orders have been tools for processing minor cases and have been legitimated on those terms. They have always been tools for avoiding the trial, avoiding the laity, and minimizing the autonomy of the defendant in favor of efficiently dealing with these minor cases.

4.3 How Efficiency Killed Justice: Plea Bargaining in the United States

The United States nominally employs a jury trial to handle criminal cases. The right to a public jury trial is enshrined in the Constitution. U.S. police procedurals portray the trial as the way criminal cases are resolved. Immediately beneath these formal rights and the public perception is a decoupled reality. Plea bargaining is the way U.S. criminal cases are handled, and they have represented the majority of criminal case resolutions since the 1920s.[115]

Plea bargaining is a procedure that relies fundamentally on a defendant being offered a choice: to admit guilt and forego a more elaborate and time-consuming procedure, and receive some benefit in exchange – a different charge on the books, a different set of facts entered into the record, a reduced sentence. Or the accused can opt for the more elaborate procedure, a long delay for trial, often while jailed, and risk the harsher outcome. There are two competing quintessential accounts of the origins of plea bargaining which offer competing accounts of the driver behind plea bargaining's rise to dominance.[116] Both of these accounts situate the origin of plea bargaining in Massachusetts, although that seems to be an artifact of where paper records were preserved from a century ago

113. Dubber, "The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology," 239.
114. Thaman, "The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?," 160.
115. John F Padgett, "Plea bargaining and prohibition in the federal courts, 1908-1934," *Law and society review*, 1990, 413–450.
116. Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America*; Vogel, "The social origins of plea bargaining: An approach to the empirical study of discretionary leniency?"

rather than a real agreement on where plea bargaining really started.[117] In fact neither of these accounts can prove that the plea bargains they document are the origin of the practice that spread to dominate U.S. criminal procedure. The fact that they document seemingly isolated traditions of plea bargaining in different parts of Massachusetts lends credence to a kind of organic origin for plea bargains: they were an "obvious" procedural innovation in the U.S. context that arose independently in multiple jurisdictions.

Regardless of which particular account of the origin of plea bargaining is correct, there is consensus that the practice emerged in the United States sometime in the early to mid 19th century. It spread rapidly, and by 1920 plea bargaining constituted over 50% of criminal convictions (across federal jurisdictions).[118] By 1970, when the United States first formally acknowledged and formalized plea bargains, they accounted for over 75% of convictions.[119] Today the number is over 95%.[120] This is an expected outcome from the theory outlined at the beginning of this section, and from the historical trajectories of the French and German legal systems just discussed. The U.S. trial is a highly elaborated procedure focused on ensuring justice, and plea bargaining is the decoupled procedure that takes up the practical burdens of the criminal justice system. Plea bargaining also professionalizes procedure, cutting the laity out and giving prosecutors tremendous discretionary power – again as expected.

What is interesting about U.S. criminal procedural reform is that plea bargaining, which started as a decoupled practice, is legitimated by the U.S. Supreme Court and written into the U.S. Federal Rules of Criminal Procedure.

The formalization of plea bargaining begins with the post-war interest in understanding the scope of organized crime in the U.S. The post-WWII era saw an increase in illegal gambling fueled by rising incomes, and a parallel rise in organized crime, which had organized into a consortium of regional syndicates by the 1940s.[121] The period also saw increasing crime rates, which were

117. Vogel, "The social origins of plea bargaining: An approach to the empirical study of discretionary leniency?"
118. Padgett, "Plea bargaining and prohibition in the federal courts, 1908-1934."
119. Court, "Brady v. United States."
120. Pfaff, *Locked in: The true causes of mass incarceration-and how to achieve real reform.*
121. William Howard Moore, *The Kefauver Committee and the politics of crime, 1950-1952* (University of Missouri Press, 1974), 30-33.

initially blamed on juvenile delinquency, but later became more closely tied to the upward trend in organized crime. To get these rising crime rates under control, U.S. politicians began efforts to understand organized crime. One of the earliest of these initiatives originated with Earl Warren, then governor of California and soon-to-be Chief Justice of the U.S. Supreme Court. Warren organized the California Crime Commission, essentially a study group to understand the contours of organized crime in the state. This kicked off two parallel trends – the rise of the citizen-crime commission movement, and the sensational coverage of all things organized-crime-adjacent in the press. These local crime-investigation bodies had a symbiotic relationship with journalists of the time, supplying details for stories that sold papers, and also burnished the reputations of the commissions themselves.[122]

The fervor created by Warren's initial committee caught the attention of Estes Kefauver, a young, ambitious Senator from Tennessee interested in making a name for himself. Kefauver launched a national investigation into organized crime in 1950, and then requested the assistance of the American Bar Association (ABA) in how to "modernize" the criminal justice system.[123] The ABA responded by creating the Commission on Organized Crime that same year. The commission's final report recommended the creation of a more permanent institution within the ABA for the study of criminal law.[124] In response, the ABA created the American Bar Foundation (ABF).[125]

The increasing crime rates and national media storm pushed the Ford Foundation to fund its own study of criminal justice through the newly minted American Bar Foundation. The ABF initiated a pilot in 1956, headed by Wisconsin law school Professor Frank Remington. The pilot was limited to Michigan, Wisconsin, and Kansas, and intended to gather information before the launch of a more representative 18-state study.[126] The survey represented a radical break with previous national commissions to study the criminal justice system, starting from the assumption of ignorance

122. Moore, *The Kefauver Committee and the politics of crime, 1950-1952*, 36-41.
123. Ibid., 78-81.
124. ed. Ploscowe Morris, *Organized crime and law enforcement : the reports, research studies and model statutes and commentaries prepared for the American Bar Association Commission on Organized Crime, Vol. 1-2*, 1953, doi:10.11575/PRISM/10182.
125. Samuel Walker, "Origins of the contemporary criminal justice paradigm: The American Bar Foundation Survey, 1953–1969," *Justice Quarterly* 9, no. 1 (1992): 51.
126. Donald J Newman and Frank J Remington, *Conviction: The determination of guilt or innocence without trial*, vol. 278 (Little, Brown Boston, 1966); Walker, "Origins of the contemporary criminal justice paradigm: The American Bar Foundation Survey, 1953–1969."

about the actual functioning of the criminal justice system. Unlike the crime commissions of the Progressive Era, which satisfied themselves with examinations of publicly available data produced by departments and agencies, the ABF took an ethnographic approach with a focus on extensive fieldwork.[127]

In the early roll-out of the pilot, the domination of the criminal justice system by discretionary decision making – previously unknown to legal experts – became obvious and essential to report on. The pilot documented rampant violation of the law by law enforcement, especially against Black people; misconduct among prosecutors; and defense attorneys misrepresenting themselves to clients.[128] The survey found that discretion pervaded every facet of criminal justice, and that almost nothing was done according to law-on-the-books. This is exactly what is theoretically expected in a highly institutionalized organization like the criminal justice system: decoupling and discretion.

The survey would never make it past this initial pilot, criticized for a lack of focus and a lack of clear, communicable results. So after the initial phase ended in 1957, the researchers heading the study pivoted, making the 2,000 field reports they had collected in the course of fieldwork available to researchers for a series of books, each one focused on a (previously under-studied) discretionary decision point identified by the pilot.[129]

The second book in the series, *Conviction*, written by Donald Newman a Ph.D. in sociology from the University of Wisconsin and Professor of Social Work there, was published in 1966 and was "the only major work to present a detailed analysis of these problems [plea bargains]."[130] Newman had initially discovered and described plea bargaining in 1955,[131] but the data in the ABF Survey reports revealed a much more detailed and far-reaching picture. Newman opens his book with a normative evaluation of plea bargaing. He explains that "[c]ompared to the typically long, costly, and complex trial, the guilty plea is a model of efficiency, assuring conviction of defendants at small cost to all involved."[132] He goes on to say that:

127. Walker, "Origins of the contemporary criminal justice paradigm: The American Bar Foundation Survey, 1953–1969," 52-4.
128. Ibid., 56-9.
129. Ibid., 60-4.
130. Walter V Schaefer, *American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty (Tentative Draft)*, 1967, 5.
131. Donald J Newman, "Pleading guilty for considerations: A study of bargain justice," *J. Crim. L. Criminology & Police Sci.* 46 (1955): 780.
132. Newman and Remington, *Conviction: The determination of guilt or innocence without trial*, 4.

> Efficiency alone is not the mark of proper administration of justice at the court level or at any other point in the criminal justice process... [T]here is the question of whether nontrial adjudication practices, particularly when they result in conviction, adequately fulfill such basic objectives as accurate and fair separating of the guilty from the innocent.[133]

Newman's questions about fairness are discussed at length throughout his book. One of his central findings is that some innovative judges investigated the voluntariness and fairness of guilty pleas by extensively questioning the defendant before accepting a plea. The existing jurisprudence on assuring confessions are voluntary was underspecified, and allowed judges flexibility in determining whether coercion was at play, but it was a legitimate concern.[134] At the time, there were not clear guidelines for ensuring that a plea be accurate, based on factual evidence of the defendant's guilt, so judges were investigating these questions "by the use of informal techniques of viewing evidence."[135] Newman seems to think these judge-driven checks on the plea bargaining procedure are sufficient to ensure fairness and accuracy, if similar procedures were to be formalized and established uniformly across jurisdictions.[136]

Despite this optimistic outlook, Newman actually finds a common disregard for the facts among both prosecutors and judges. He terms these cases "illogical pleas" where, for example, a defendant pleads to robbery instead of armed robbery despite clear evidence they were armed. He describes how "many prosecutors ... support the practice as both necessary and desirable: necessary to induce the high rate of guilty pleas required to process the daily case load efficiently, and desirable to achieve sentencing flexibility which would otherwise be prevented, in some cases, by mandatory sentences."[137] Judges too accepted the practice, throwing some doubt on Newman's preferred solution for judge-driven establishment of a factual basis for conviction. Newman notes that one judge argued for illogical pleas as a form of compromise explicitly analogous to similar practices in civil cases.[138]

133. Newman and Remington, *Conviction: The determination of guilt or innocence without trial*, 4.
134. Ibid., 233.
135. Ibid., 234.
136. Ibid., 234-5.
137. Ibid., 102.
138. Ibid.

The analogy to civil law here refers to the branch of U.S. law enforcing contracts, property relations, and generally civil wrongs.[139] In other words, civil law is the domain of law concerned with market relations, a branch of law where negotiation and settlement of differences by informal proceedings has long predominated. Linking plea bargains to these practices in civil law is a case of recombinant innovation: mapping the social relations of the market that permeated civil law onto criminal legal proceedings. Newman raised this point in *Conviction*, noting "the basic issue is the kind of conviction and acquittal process most fitting to a democratic society."[140] The trial with its jury of citizens clearly fits a society putting democracy first. Newman did not come to a clear verdict on whether "bartering in criminal cases was a proper form of criminal justice administration in a democratic society,"[141] although his repeated questioning of the procedure's appropriateness seems to indicate he did have an opinion on the matter.

At the time Newman wrote *Conviction*, the fate of plea bargaining was deeply uncertain. The practice had only really been "discovered" a decade earlier, and there had been only a handful of appellate cases reviewing the procedure. He was not sure whether "plea bargaining [would] eventually [be] forbidden or given formal recognition,"[142] but he did think it needed to be clarified one way or another. The fact that Newman, then without doubt the leading expert on plea bargaining, with access to far-and-away the most data on the courts' reliance on the practice, was not sure whether it would be forbidden indicates that the U.S. genuinely need not have gone the route it did. To enumerate some alternatives: the courts could have developed some alternate expedited procedure, could have altered trial proceedings, could have followed Blackstone's maxim and abstained from trying cases without the proper protections of the trial, or could have attempted to drastically scale the court system to allow many more jury trials. It was possible to reject plea bargaining as a practice incompatible with democratic justice.

Against a backdrop of rising crime rates and a civil rights movement that exacerbated white anxiety about Black criminality,[143] the Supreme Court would take the path of least resistance. The U.S.

139. Glanville (Glanville Llewelyn) Williams, *Glanville Williams : learning the law* [in eng], Seventeenth edition / edited by A.T.H. Smith.. (2020), 2-4, ISBN: 0414069080.
140. Newman and Remington, *Conviction: The determination of guilt or innocence without trial*, 4.
141. Ibid., 237.
142. Ibid.
143. Weaver, "Frontlash: Race and the development of punitive crime policy."

was in crisis, and crime was becoming "a, if not the, defining problem of government."[144] At this moment, the birth of the Leviathan, far from trying to stop the growth of punishment and ensure proceedings focused on guaranteeing justice, the Supreme Court instead legitimated plea bargaining, laying a framework for how American criminal courts could work efficiently enough to feed the system being built. It seemed the Court learned a lesson from the cases under Earl Warren that had expanded defendant's rights earlier in the decade,[145] and decided it was better to be an accomplice to the rise of plea bargaining than face further backlash. In fact, by institutionalizing plea bargaining, the Court systematically undermined all the procedural protections it had put in place in its previous decisions, which relied on the trial as the location to enforce the rules. In a series of decisions from 1969-1978, the court would rely on the recombinant innovation first evident in Newman's study to legitimate plea bargaining, transforming backroom deals into approved market transactions, by arguing that defendants were rational actors making voluntary, informed decisions to come to mutually beneficial agreements with the state.[146]

Three documents laid the foundation for these Court rulings: the 1966 amendments to Rule 11 of the Federal Rules of Criminal Procedure; the ABA Project on Minimum Standards for Criminal Justice draft on pleas of guilty; and the report from President Johnson's Commission on Law Enforcement and Administration of Justice (also known as the Katzenbach Commission).

The 1966 Amendments to Rule 11 The same year Newman's book came out, the Advisory Committee on the Federal Rules of Criminal Procedure released the first set of amendments to Rule 11, the rule governing pleas, since its inception. The Notes of the Advisory Committee for the 1966 amendments begin:

> The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial.[147]

144. Simon, *Governing through crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*, 13.
145. W J Stuntz, *The Collapse of American Criminal Justice* (Harvard University Press, 2011), 240-2, ISBN: 9780674051751.
146. US Supreme Court, "Boykin v. Alabama," 395 US 238 (1969); Court, "Brady v. United States"; US Supreme Court, "North Carolina v. Alford," 404 US 25 (1970); US Supreme Court, "Santobello v. New York," 404 US 257 (1971); US Supreme Court, "Blackledge v. Allison," 431 US 63 (1977); US Supreme Court, "Bordenkircher v. Hayes," 434 US 357 (1978).
147. "Federal Rules of Criminal Procedure Rule 11."

The amendment makes four changes to the rule: first, it is the courts' responsibility to ensure that the plea is made "volunatarily and with understanding"; second, the court must address the defendant directly in ascertaining whether a plea is voluntary and understood; third, the court is required to ensure the defendant understands the consequences of their plea; and fourth, the court has a duty to satisfy itself that there is a factual basis for a plea before entering judgement. These changes to Rule 11 seem to closely reflect the findings of Chapter 3 of *Conviction*; in fact the basis for the fourth amendment in the Notes is actually Michigan state law, Michigan being one of the states in the ABF survey. Furthermore, all but one of the citations to Michigan state law in the Notes are cited in Newman.[148] Remington, the professor who led the ABF survey that formed the basis for *Conviction*, sat on the rules committee from 1960-1978. Taken together, this seems like strong evidence that Remington was taking Newman's empirical findings and trying to translate them into federal law.

The ABA Project on Minimum Standards for Criminal Justice The ABA Project was initially proposed by the Institute of Judicial Administration at New York University Law School in 1963. The ABA conducted a one-year pilot to develop a plan for the project, and then approved the resultant proposal with a three-year budget of $750,000, raised through grants from the ABA Endowment, the Avalon Foundation (predecessor to the Mellon Foundation) and the Vincent Astor Foundation.[149] The project was overseen by Judge Joseph E. Lumbard, until he was succeeded by then U.S. Court of Appeals Judge Warren Burger, who in turn headed the project until his confirmation as Chief Justice of the United States in 1969.[150] The standards were designed as guidelines for the states and federal jurisdictions, and although they were nonbinding, they had immediate and consequential impact across the criminal justice system.[151] In February 1967, the ABA Project would circulate a draft of what would become one of its most widely cited volumes in the Standards: the *Standards Relating to Pleas of Guilty*. The draft *Standards Relating to Pleas of Guilty* outline the ABA's recommendations for handling plea bargains, bringing the practice out of the shadows. The draft

148. In re Valle, 364 Mich. 471, 110 N.W.2d 673 (1961) see footnote 24 in Newman Chapter 3; People v. Barrows, People v. Bumpus see footnote 4 in Newman Chapter 3

149. Schaefer, *American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty (Tentative Draft)*, v.

150. Tom C Clark, "American Bar Association Standards for Criminal Justice: Prescription for an Ailing System," *Notre Dame Law.* 47 (1971): 431.

151. Martin Marcus, "The Making of the ABA Criminal Justice Standards-Forty Years of Excellence," *Crim. Just.* 23 (2008): 10.

relied heavily on Newman's *Conviction*. The Introduction states (as noted above) that "Newman is the only major work which presents a detailed analysis of these problems. Frequent reference is made to this volume in the commentary accompanying the standards."[152] In fact the draft cites Newman 24 times in 78 pages. By the time of the draft's eventual publication (with minor revisions) in 1972, it had already been cited by the Supreme Court.

The Katzenbach Commission The Katzenbach commission's *Task Force Report: The Courts* (which served as background for the more public-facing report titled *The Challenge of Crime in a Free Society*) was published 5 months later, in July 1967. It lists the director of the ABA Project as an advisor and heavily cites both Newman's *Conviction* and the draft *Standards Relating to Pleas of Guilty*. The report opens with a chapter on plea bargaining, which "draws heavily on the work of the American Bar Foundation Project including Professor LaFave's book [Arrest] and another volume in the series, Newman, Conviction..."[153] The report is not simply a recapitulation of the empirical findings laid out by Newman, rather it uses *Conviction* as a starting point to gather some additional quantitative evidence on plea bargains, finding that on average 87% of cases were resolved via plea bargaining in 1964 (in the jurisdictions where the commission could gather data).[154]

These four documents, Newman's initial *Conviction*, followed by the 1966 Federal Rules of Criminal Procedure Rule 11, the ABA's draft *Standards Relating to Pleas of Guilty*, and the Katzenbach commission's *Task Force Report: The Courts* identified plea bargaining as the *de facto* way criminal procedure was done in the United States. They all expressed worries about the fairness of plea bargains. All but the amendments emphasized the cost/time efficiencies of plea bargaining. Both *Conviction* and the Katzenbach report also *explicitly* analogized plea bargains and civil settlement: "plea negotiation [is] an active bargaining process in which both sides make explicit concessions in order to 'settle' a case without going to trial";[155] "[c]ommonly known as 'plea bargaining" this is a process very much like the pretrial settlement of civil cases."[156]

152. Schaefer, *American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty (Tentative Draft)*, 5.
153. United States. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (US Government Printing Office, 1967), See footnote 1.
154. Ibid., 9.
155. Newman and Remington, *Conviction: The determination of guilt or innocence without trial*, 237.
156. Law Enforcement and Justice, *Task Force Report: The Courts*, 9.

These documents identified the decoupled reality of U.S. criminal procedure and pointed out the ways in which that might be normatively problematic; this demanded some response. These texts simultaneously indicated a way to legitimize the procedure with minimal changes to the actual practice of criminal law, and it was this route that the the U.S. Supreme Court would take over the course of the next decade.

Nixon won the presidential election in 1968 witg a campaign focused on law and order, permeated by dog-whistle politics.[157] The year he took office, 1969, the Supreme Court heard Boykin v. Alabama, a case in which a Black man pleaded guilty to five indictments for robbery. The judge asked no questions, and at the hearing at which he pleaded guilt, the defendant did not speak. Following the guilty plea, the defendant went to a jury to fix punishment. Again, the defendant did not testify, nor was any background or character testimony presented on his behalf. The jury sentenced him to death on each indictment. The Alabama Supreme Court, which automatically reviewed capital cases, affirmed the five death sentences for five robbery convictions. Citing the amended Rules of Federal Criminal Procedure Rule 11 (which do not automatically apply to state cases), the Supreme Court held that the trial judge's failure to question the defendant to ensure the plea was "intelligent and voluntary" constituted a reversible error. This ruling effectively enforced the requirements of Rule 11 onto the states as a matter of federal constitutional law (as heatedly noted in the dissent).[158] On its own, Boykin represented some protection for defendants in plea bargains, but its legacy would be wider: the standard it applied from Rule 11 would form the framework under which the court would formalize plea bargaining, first as a rational and mutually beneficial agreement meriting some judicial oversight, and eventually as a simple contract between (equal) parties.

The court first recognized plea bargaining in Brady v. United States, decided in 1970. Brady was indicted for kidnapping, which could result in a death sentence if taken to trial. Under the implicit threat of death, Brady agreed to plead. The court held that "a plea of guilty is not invalid merely because entered to avoid the possibility of the death penalty" because it "met the standard of voluntariness as it was made 'by one fully aware of the direct consequences' of that plea."[159]

157. Ian Haney-López, *Dog whistle politics: How coded racial appeals have reinvented racism and wrecked the middle class* (Oxford University Press, 2015).
158. Court, "Boykin v. Alabama."
159. Court, "Brady v. United States."

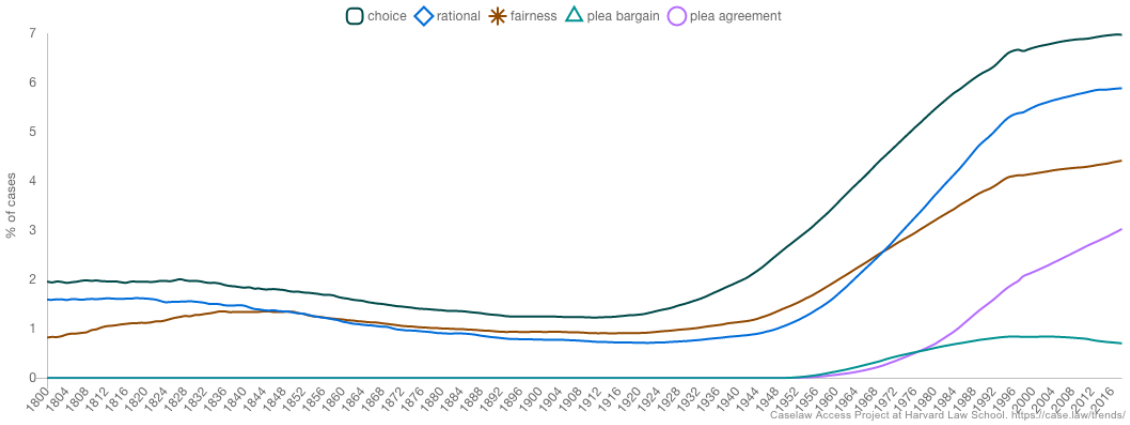


Figure 1: Frequency in U.S. caselaw of several phrases pertaining to choice, individualism and plea bargaining from the The Caselaw Access Project.

In coming to this ruling, the Brady decision lays out a model of plea bargaining deeply rooted in understanding the defendant as an rational actor making a voluntary choice between a set of alternatives. The decision carefully stipulates that: "even if we assume that Brady would not have pleaded guilty except for the death penalty provision ... this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act."[160] The decision also quotes the transcript of the judge questioning Brady as the final piece of evidence that the plea is voluntary. With voluntariness established, the Court continues: "nor is there evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, *rationally* weigh the advantages of going to trial against the advantages of pleading guilty."[161] This view of the human capacity for rationality in the face of the possibility of death stems from the reification of actorhood, which comes with seeing rational choice as a good in and of itself. The individualistic nature of U.S. political culture means people in the U.S. are particularly likely to view people as atomized actors pursuing their own interests,[162] but this view has been particularly ascendant in the postwar period with the proliferation of choice-based language in the law (see Fig. 1).[163]

With this image of Brady established, the Court turns to the most important part of its decision. Citing both *Conviction* and the draft *Standards on pleas of guilty*, the Court recognized that U.S.

160. Court, "Brady v. United States."
161. Ibid., Emphasis added.
162. Hazel R Markus and Shinobu Kitayama, "Culture and the self: Implications for cognition, emotion, and motivation.," *Psychological review* 98, no. 2 (1991): 224; Jepperson, "Political modernities: Disentangling two underlying dimensions of institutional differentiation."
163. Meyer and Jepperson, "The 'actors' of modern society: The cultural construction of social agency."

criminal procedure was dominated by plea bargains. The Court then attempts to establish that plea bargains are good for both the prosecution and the defendant, tentatively claiming "it is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty."[164] The mutual benefit presumed by the court crucially hinges on the defendant rationally acting to maximize their best interests. This construction ignores the difference in power, knowledge, and experience in plea bargaining negotiations between prosecutors and defendants, and the interest misalignment between public defenders and defendants. This kind of logic was common in economics at the time, when modeling contract agreements between economic actors – as in civil law contexts.[165]

Based on this supposition of mutual benefit, the decision explains that the Court cannot hold plea bargaining unconstitutional, effectively enshrining the practice:

> Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.[166]

Brady held that taking a plea to avoid the death penalty constituted a voluntary plea, giving a particular response to one of Newman's original concerns, fairness. But in Brady, the court did not address Newman's second worry about plea bargaining: accuracy. It was partly to address these questions that the court hear North Carolina v. Alford. Alford was indicted for first-degree murder, which, similar to Brady, allowed the death penalty if recommended by a jury. Again similar to Brady, Alford pled guilty to a lesser crime (second-degree murder) to avoid the possibility of the

164. Court, "Brady v. United States."
165. Ronald H Coase, "The problem of social cost," in *Classic papers in natural resource economics* (Springer, 1960), 87–137.
166. Court, "Brady v. United States," The discussion of the frame of mind of the defendant after a guilty plea is a reference to some of Newman's commentary in *Conviction*, which indicates one reason plea bargains are normatively prefereable is their requirement that the defendant take responsibility for their crime. This is interestingly similar to some modern transformative justice practices.

death penalty, but unlike Brady, Alford disclaimed guilt while pleading guilty.[167] In its decision, the Court re-affirmed and extended the logic laid out in Brady:

> An accused may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, or even if his guilty plea contains a protestation of innocence, when, as here, he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt.[168]

The strain this ruling placed on the requirement of a factual basis for the plea (laid out in the 1966 amendments and extended to the states in Boykin) is obvious. It was now possible for the court to be required to find factual basis for conviction over the protestation of the defendant. But this ruling was required by the logic that the defendant was rationally evaluating their options and making the best decision according to their interests.[169]

Where Brady and Alford established and solidified plea bargains as mutually beneficial agreements between rational actors, Santobello v. New York in 1971 and later Blackledge v. Allison in 1977 established and solidified plea bargains as analogous to contracts familiar to lawyers in the civil context. Santobello, a New York mobster, was indicted for promoting gambling and possessing gambling records.The prosecutor in Santobello's case made a deal for Santobello to plead to a lesser offense so long as the prosecutor made no recommendation as to the sentence. Due to delays in sentencing, a different prosecutor took over the case, but after accepting Santobello's plea, the new prosecutor made a sentencing recommendation, in violation of the plea agreement. The Court used Santobello's case to bring plea bargains further in line with the model of a contract, ensuring the enforceability of promises made in the plea bargaining process.

Blackledge v. Allison is a case about a defendant who expected a 10-year sentence in exchange for a guilty plea, but filled out a form outlining that he would be sentenced to between 10 years

167. Court, "North Carolina v. Alford."
168. Ibid.
169. A minor note here is that Alford undermined the court's rationale, based on Newman (as noted in a previous footnote), that the plea required the defendant to acknowledge guilt in a way that would speed rehabilitation. Alford established precisely that the defendant could effectively plead guilty without acknowledging guilt.

and life, and received a 17-21 year sentence. The defendant submitted a writ of habeas corpus that was summarily dismissed. The primary holding of the Court was that, in light of the promise the defendant claimed was made and the holding in Santobello, the writ should not have been summarily dismissed.[170] The relevance of Blackledge to the rationalization of plea bargaining is that, in the decision, the court explicitly analogizes plea bargains and contracts, as a way to clarify a rather complicated section of the decision ("An analogy is to be found in the law of contracts.").

The last case considered here is Bordenkircher v. Hayes, decided in 1978. Hayes was indicted for forging a check for $88.30, an offense carrying a sentencing range of 2 to 10 years. The prosecutor threatened that if Hayes did not plead guilty, the prosecutor would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act, which would subject Hayes to a mandatory minimum of life imprisonment, due to his prior convictions. Hayes refused to plead, the prosecutor secured the new indictment, Hayes was found guilty, and was sentenced to life for the forged check.[171]

The Court, based on the logic of the prosecutor and the defendant as informed actors making a voluntary contract, ruled that "the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment."[172] For the purposes of this account, this case completes the rationalization of plea bargaining as a contract between actors in an imagined courtroom where power is immaterial. The defendant was making a choice. The fact it was a choice between "unpleasant alternatives" was immaterial.

These decisions, starting in 1969 and ending in 1978, formally imported the social relations of the market contract into criminal procedure, with all the accompanying (lack of) protections, completing the process of recombinant innovation that Newman initially observed in *Conviction*.[173] Discourse around criminal procedure would shift from maximizing justice to focus on satisfying fairness

170. Court, "Blackledge v. Allison."
171. Court, "Bordenkircher v. Hayes."
172. Ibid.
173. Newman and Remington, *Conviction: The determination of guilt or innocence without trial*, 137.

requirements (see Fig 1), allowing judicial and elected officials to focus explicitly on the value of plea bargaining's efficiency. This was reflected in three of the documents that formed the basis for the Court's early decisions on plea bargaining, all of which highlighted efficiency as a central positive feature of the practice (*Convition*,[174] *Standards Relating to Pleas of Guilty*,[175] and the Katzenbach *Task Force Report: The Courts*[176] In the background of these decisions was the Court's, and the country's, continual rightward movement with the election of Nixon and his focus on law and order.[177] The Court, having taken the lesson from the backlash to its "activist" decisions defending the rights of criminal defendants in the early 1960s[178] had decided that plea bargaining could be made into a procedure fitting for a democratic society. It just so happened that this was also the course that would least interfere with the nation's punitive turn.

5 Three Procedural Diffusions

The developments of criminal procedure in Section 4 give the genealogy of the Napoleonic Criminal Procedural Code, penal orders, and plea bargaining. This section gives brief accounts of the diffusion of these three procedural elements toward drawing out a model of the mechanisms underlying the much more successful diffusion of the Napoleonic Code and plea bargains as opposed to penal orders. France and the United States were hegemonic powers that took an active role in diffusing their respective procedures. Germany was an empire, but did not have the same interest in spreading penal orders to other countries. I take this as the key difference between these cases.

5.1 The Napoleonic Code

> My real glory is not the forty battles I won, for Waterloo's defeat will destroy the memory of as many victories ... What nothing will destroy, what will live forever, is my Civil Code. - Napoleon Bonaparte

174. Newman and Remington, *Conviction: The determination of guilt or innocence without trial*.
175. Schaefer, *American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty (Tentative Draft)*.
176. Law Enforcement and Justice, *Task Force Report: The Courts*.
177. Simon, *Governing through crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*.
178. Stuntz, *The Collapse of American Criminal Justice*.

Napoleon conceived his code as an instrument of imperial rule. He imagined the code as a legal system that would be universally applicable, a uniting framework that would bind his empire together under his Law and Order. He realized this idea by instituting the code in the territory he conquered.[179] His rationale for promulgating the code was partially predicated on the need for a criminal code in France[180], but it was also to assist in the goal of global governance. Upon its completion in 1808 Napoleon immediately instituted the code in Belgium, Geneva, parts of western Germany, northwestern Italy, Luxembourg, and Monaco. Of course Napoleon continued to conquer Europe until 1813, and as he did he imposed both the Civil and Penal codes on his expanding empire. By the end of the French empire Holland (the Netherlands), Poland, Spain, Portugal, Switzerland, West Germany and the rest of Italy had all come under Napoleonic rule and all had versions of the Napoleonic code during the occupation.[181,182] Many countries would retain domestic models of the code at the sub-national or national level after liberation from French rule, and those that retained sub-national models often ended up adopting the code.[183] The code was also used to govern many French colonies: Haiti, Equatorial Guinea, Senegal, Morrocco, Madagascar, Mozambique, and was frequently retained when colonies gained independence. The persistence of criminal procedures even through independence is a testament to institutional inertia – the capacity of systems to maintain patterns of formal and informal practice,[184] but it also shows how the French code was still respected over a hundred years after its inception, when there were certainly viable alternatives.

Outside of countries directly conquered by Napoleon that retained the code and French colonies, Brazil was the first country to adopt the a criminal code inspired by the French code.[185] Brazil's code took cues from the Napoleonic procedure because it was the legitimated model – there were simply no other options that attended to issues of justice with the requisite attention.[186] The Brazilian code in turn influenced the Spanish code of 1848,[187] which would become the model for essentially all the

179. Martyn Lyons, *Napoleon Bonaparte and the legacy of the French Revolution*, vol. 1 (Springer, 1994), 94.
180. See Sec. 4.1.
181. Lobingier, "Napoleon and his Code."
182. "Appendix 10. List of Penal Codes, Statutes, and Projects," *The American Journal of International Law* 29 (1935): 645–651.
183. See Appendix B
184. Meyer and Rowan, "Institutionalized organizations: Formal structure as myth and ceremony."
185. Aniceto Masferrer, *The Western Codification of Criminal Law* (Springer, 2018), 345.
186. Ibid.
187. Raúl Zaffaroni and Manuel Rivacoba, "Siglo y Medio de codificación penal en Iberoamérica," *Valparaíso, Edeval*, 1980, 30.

former Spanish colonies in Latin America as they searched for codes that could replace the colonial legacies they'd been saddled with at independence.[188] This pattern of diffusion is distinct from the more straightforward conquest or imposition of the code on colonial subjects that characterized the first wave of adoptions of Napoleonic-descending procedures. It was in fact Napoleon's conquest of Spain in 1807 that emboldened many revolutionaries in Latin America and shortly thereafter many Latin American states won their independence, most before 1825.[189] The fact that former Spanish colonies which were then independent turned to Spain as a model of statehood provides interesting insight into the way even after formal colonial relations are dissolved the patterns of power still effect practice – this seems to clearly fit a mimetic model of diffusion where uptake is driven by legitimacy concerns.[190]

Spain's adoption of a French-inspired code would set off a wave of adoptions in Europe, with Portugal and Italy not far behind. When these colonial powers adopted criminal codes, like France itself had, they often promulgated them on to their colonial subjects as well, and again similar to the French case when these subject states did finally win independence they often kept the codes in place with sometimes minor modifications.[191]

The main dynamics characterizing diffusion of the Napoleonic criminal procedure were first Napoleon's conquests, second colonial powers foisting their criminal codes on their subject states which were carried forward by institutional inertia when independence was won, and third mimetic diffusion driving adoption of the codes so that less powerful states conformed to the model being championed by nearly every European country.

5.2 Penal Orders

The diffusion of penal orders is decidedly less driven by active pressure from the German empire, at least early in the process. The first two countries to take up penal orders, and the only other countries in the sample to do so during the 19th century, were Japan in 1885 and Austria-Hungary

188. Iñesta-Pastor, "The Influence Exerted by the 1819 Criminal Code of the Two Sicilies upon Nineteenth-Century Spanish Criminal Law Codification and Its Projection in Latin America," 270-1.
189. Victor Bulmer-Thomas, *The economic history of Latin America since independence* (Cambridge University Press, 2003), 20-4.
190. DiMaggio and Powell, "The Iron Cage Revisited : Institutional Isomorphism and Collective Rationality in Organizational Fields."
191. See Appendix B

in 1896. Japan was in the midst of the Meiji restoration and had adopted a criminal code in 1880 modeled on the Napoleonic code. Throughout this period in Japanese history there was a great deal of German influence on the law due to the *O-yatoi Gaikokujin*, the advisors hired by the Japanese government to assist in modernizing the country. German legal advisors played a significant role in the wording of the Japanese constitution,[192] and advised on the construction of numerous Japanese codes.[193] It does not appear there were concrete efforts from Germany to coerce Japan into adopting penal orders, it rather seems Japan saw Germany as a model of the modernized state, and imported the practice along with other policies ranging from medical science to education policy. Germany and Austria-Hungary were enmeshed in the Dual alliance and then the Triple Alliance (when Italy joined in 1882) for over a decade prior to Austria-Hungary's uptake of penal orders; German culture seems to have been an important part of Austrian statehood,[194] and furthermore it seems that close relations led to crossover in legal ideas and criminal procedural elements.

Following these initial adoptions, early in the 1900s penal orders found utility in colonial administration. Penal orders' diffused to Taiwan occurred under Japanese colonial rule. Japan had formally established many Western-style criminal procedural practices in Taiwan, but these were rarely used in practice due to the suppression of colonial police.[195] In 1904 penal orders were introduced to allow police to more effectively manage the colonized population, and immediately became the de facto method or managing the criminal legal system averaging well over 75% of resolved cases from 1904-1922.[196] Penal orders were kept in place when Japan applied its own criminal code of 1922 to Taiwan in 1924[197] and in the revised code of 1930.[198] A similar story unfolds in Japanese-controlled South Korea starting in 1912 when the Japanese enforced the colonial criminal code and with it penal orders,[199] which were preserved in the first code post-independence in 1955.[200] Ethiopia and

192. Junji Banno, *The establishment of the Japanese constitutional system*, vol. 4 (Psychology Press, 1995).
193. Richard Sims, *Japanese Political History Since the Meiji Restoration, 1868-2000* (Springer, 2019).
194. Francis W Hirst, "A Dissolving Empire.," *Fortnightly* 64, no. 379 (1898): 1.
195. Tay-Sheng Wang, "Criminal Justice and Changing Society," in *Legal Reform in Taiwan under Japanese Colonial Rule, 1895-1945: The Reception of Western Law* (University of Washington Press, 2000), 104, ISBN: 9780295978277, `http://www.jstor.org/stable/j.ctvcwnbqc.8`.
196. Ibid., 100-2.
197. Ibid., 55.
198. Kai-Ping Su, "Criminal court reform in Taiwan: a case of fragmented reform in a not-fragmented court system," *Wash. Int'l LJ* 27 (2017): 109.
199. Poh-Ling Tan, *Asian Legal Systems: Law, Society, and Pluralism in East Asia* (Lexis Pub, 1997).
200. Langer, "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions."

Eritrea – then Italian colonies – would adopt penal orders in 1909,[201] likely via a similar exposure mechanism to Austria-Hungary: the procedure moving from Germany to Italy via the exchange facilitated by alliance, and then identified as useful in colonial administration as Japanese colonial administrators had found. The summary procedure persists in the Ethiopian code that governed Eritrea under Ethiopian control after World War II[202] and the more recent Eritrean criminal code of 2015.[203]

The second wave of diffusion of penal orders occurred in the late 1920s and through the run-up and outbreak of World War II. Poland had been under German imperial control up to 1918 – penal orders had been developed during the Prussian occupation (see Sec. 4.2) – and Germany had instituted its criminal code in the parts of Poland under German control. Upon independence in 1918 inertia carried these codes forward, and in 1928 when Poland codified its criminal law these codes represented local models of criminal procedure, and so penal orders were incorporated into Polish procedure.[204] In 1930 penal orders were formally introduced to Italy as part of the new national Criminal Procedural Code. They had previously been taken up in Messina and Reggio Calabria to manage a large spike in minor theft after an earthquake. This first internal diffusion from Ethiopia and Eritrea to mainland Italy bears a resemblance to the importation of population policing strategies from subject states to the metropole.[205] The second internal diffusion from sub-national to national is also quite similar to German uptake of French criminal procedure via Bavaria. Diffusion to Sweden seem to be via the route of economic/cultural dependence. During the Wiemar Republic Germany was an important importer of Swedish iron and more generally German firms owned significant portions of many Swedish companies. Along cultural lines Swedish elites saw German universities as models to be emulated.[206] The centrality of the German university to law and of law to German universities no doubt meant emulating German education brought with it German legal thought, and ended in Swedish uptake of penal orders in 1942.

201. Thaman, "The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?," 160.
202. Minister of Pen, Government of Ethiopia, *Criminal Procedure Code of Ethiopia, Proclamation No. 185*, 1961.
203. Government of Eritrea, *Criminal Procedure Code of the State of Eritrea*, 2015.
204. Langer, "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions," Supplement.
205. Julian Go, "The imperial origins of American policing: militarization and imperial feedback in the early 20th century," *American journal of sociology* 125, no. 5 (2020): 1193–1254.
206. Hans Karl Gunther, *German-Swedish Relations, 1933-39: The Background for Swedish Neutrality* (Stanford University., 1954), 138-40.

These initial diffusions were followed by a few more incidences from 1950 to 1990, where penal orders would be taken up in South Africa, France, the Czech Republic and Portugal. A slightly wider wave of diffusion began in 1998 which saw uptake in 11 countries.[207]

5.3 Plea Bargains

> [T]he rule of law is one of the United States' greatest exports. - U.S. Attorney General Eric Holder[208]

The United States has not recently conquered any countries in the way Napoleon did, but US politicians, legislators, and legal experts have nonetheless been spreading US criminal procedural practices around the world. Colonial/imperial powers have historically found it useful to institute criminal procedural systems in their colonies;[209] historically these efforts were oriented to secure imperial power, suppress dissent, and ensure colonial holdings could continue functioning productively. In fact the Phillipines during U.S. occupation is the earliest case of coercive diffusion of plea bargaining. The practice, then still 30 years from legimization in the U.S. would be adopted in the colony in 1940. But most U.S. efforts to export criminal procedure are more modern, and these emerged from two distinct initiatives.

In the mid 1980s US led efforts emerged to convert several countries in Latin America (Colombia, El Salvador, Guatemala, Honduras and Panama)[210] from "inquisitorial" to "hybrid" or "adversarial" systems of criminal procedure.[211] As discussed in Sec. 4.1 the distinction between adversarial and inquisitorial systems was significantly blurred with the French code of 1808, which was imagined at the time as precisely the kind of hybrid procedure U.S. advocates claimed to want to implement in Latin America. This speaks first to the endurance of the discourse developed by Héliè in the 1850s legitimating the Napoleonic code, which is used to this day in procedural documents from countries around the world. Second it raises a non-instrumental rationale for the imperial powers

207. See Appendix B
208. Allegra M McLeod, "Exporting US Criminal Justice," *Yale Law & Policy Review* 29 (2010): This quote leads McLeod's paper and is too apt to exclude here.
209. See Sec. 5.1 and Sec. 5.2.
210. Government Accountability Office of the United States of America, *Foreign Assistance: U.S. Rule of Law Assistance to Five Latin American Countries*, 1999, 3-4.
211. McLeod, "Exporting US Criminal Justice," 101.

spreading their procedures. These efforts to convert Latin American countries to U.S.-style criminal procedures were part of wider Cold War era democracy promotion efforts, and consequently were undertaken to "improve their justice system institutions as a way to strengthen democracy."[212] Of course in the on-the-ground reality in the United States, and in the countries it converted, trials (the democratic part of the U.S. procedure) were and remain rare, with plea bargains and other (former) decoupled proceedings dominating. These initial efforts were primarily driven by USAID, which supported the drafting of new criminal codes in El Salvador, Guatemala and Honduras, all of which came into force before the turn of the millennium.[213] Plea bargaining was incorporated into these wider reforms, which generally reshaped procedures to resemble the US process.

The Soviet Union had two major consequences for these nascent efforts at reconstructing criminal legal systems. First, the domestic anxieties about crime (like those discussed in Section 4.3) and specifically drugs developed into worries about international narcotics trading and transnational crime more generally.[214] Precisely which domestic worries have underlaid U.S. efforts at global governance have shifted and expanded over time, variously including: the narcotics trade, human sex trafficking, terrorism (especially post-9/11),[215] and more recently intellectual property violations and cybercrime have become important as well.[216,217] Regardless of the precise crimes meant to be regulated, a bipartisan consensus crystallized in the late 1980s that "trans-national crime" was (1) on the rise and (2) a major threat to global stability, despite a lack of any empirical evidence supporting such claims.[218] These would form the second basis of contemporary U.S. efforts. Initial U.S. efforts predicated on spreading democratic practices and the post-War developments combined to form the current legitimating regime for U.S. overseas legal reform efforts. This quote from Martin Andersen, then Senior Advisor for Policy Planning in the Office of Professional Development and Training (OPDAT) captures the synthesis:

212. Government Accountability Office of the United States of America, *Foreign Assistance: U.S. Rule of Law Assistance to Five Latin American Countries*, 1.
213. Government Accountability Office of the United States of America, *Foreign Assistance: Rule of Law Funding Worldwide for Fiscal Years 1993-98*, 1999, 4.
214. McLeod, "Exporting US Criminal Justice," 100-4.
215. Government Accountability Office of the United States of America, *Foreign Assistance: Rule of Law Funding Worldwide for Fiscal Years 1993-98*.
216. Government Accountability Office of the United States of America, *Rule of Law Assistance: Agency Efforts Are Guided by Various Strategies, and Overseas Missions Should Ensure that Programming Is Fully Coordinated*, 2020.
217. McLeod, "Exporting US Criminal Justice," 103.
218. Ibid., 106.

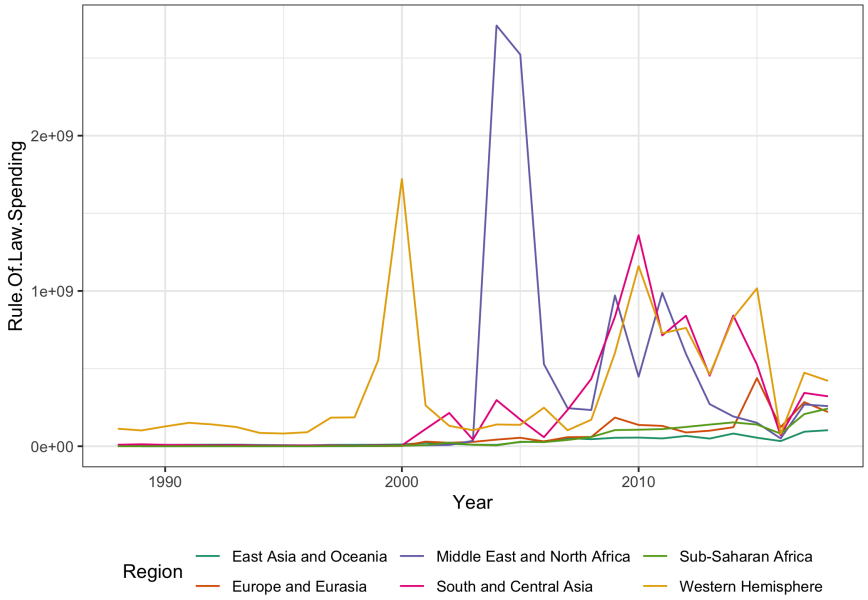


Figure 2: U.S. obligations for rule of law initiatives by fiscal year of fund allocation.

> In the past few years, the Criminal Division's [OPDAT] has become an important weapon in the U.S. crime fighting arsenal abroad. Established in the Department in 1991 to enhance the administration of justice both in the U.S. and overseas, OPDAT is a key element in U.S. efforts to promote the effective and fair administration of justice within these new and developing democracies, affording their citizens protection from lawlessness and support for basic human rights.[219]

This rationale has justified a multifaceted campaign to reshape criminal justice globally, but it is worth noting that these efforts have also served to maintain U.S. influence which had been developed throughout the Cold War.

The second major change was that the U.S. immediately expanded efforts at procedural reconstruction (among wider efforts at political reform) to the Soviet states.[220] This was just the beginning of the expansion of U.S. efforts abroad though, which would quickly also extend to South and Central Asia and the Middle East (see Fig 2), eventually spilling over to Africa and more of Asia. As U.S.

219. Martin Edwin Andersen, "OPDAT: On the Frontiers of America's Newest National Security Challenge," *US Att'ys Bull.* 44 (1996): 1-2.
220. Government Accountability Office of the United States of America, *Foreign Assistance: Rule of Law Funding Worldwide for Fiscal Years 1993-98*.

efforts continued to expand overseas so has the number of agencies responsible for "Rule of Law"[221] initiatives.

Initially USAID and the Department of Justice (DoJ) were the primary agencies.[222] Within the Department of Justice two offices – the International Criminal Investigative Training Assistance Program (ICITAP) which was started in 1986, and the Office of Overseas Prosecutorial Development and Training (OPDAT), founded in 1991 – are responsible for efforts at international criminal justice reform. ICITAP focuses primarily on reforming police and investigative practices while OPDAT works training prosecutors, judges, and more generally on procedural reform. Early on the Department of State and the Department of Defense, as well as USAID were less involved,[223] but as these initiatives developed and crystallized these structures evolved; since 2014 the primary agencies funding rule of law assistance have been the Department of State and USAID, with the Department of Defense (DoD), the Department of Homeland Security (DHS), and the Millennium Challenge Corporation (MCC) also financially supporting rule of law initiatives.[224,225] Separate from funding questions a handful of offices within these agencies are actually responsible for on-the-ground efforts at international criminal justice reform: the International Law Enforcement Academies (ILEAs) under through the Bureau for International Narcotics and Law Enforcement (INL) both of which are within the Department of State; country-level offices with the support of the Democracy, Human Rights and Governance Center (DRG Center) at USAID; and OPDAT and ICITAP which are sub-division of the Criminal Division at DoJ.[226,227]

221. "Throughout this report, we use the phrase "rule of law" to refer to U.S. assistance efforts to support legal, judicial, and law enforcement reform efforts undertaken by foreign governments. This term encompasses assistance to help reform legal systems (criminal, civil, administrative, and commercial laws and regulations) as well as judicial and law enforcement institutions (ministries of justice, courts, and police, including their organizations, procedures, and personnel). It includes assistance ranging from long-term reform efforts, with countries receiving funding over a period of years, to one-time training courses provided to the police or other law enforcement organizations." Government Accountability Office of the United States of America, *Foreign Assistance: Rule of Law Funding Worldwide for Fiscal Years 1993-98*

222. Ibid., 8.

223. Ibid.

224. David H Bayley, *Changing the guard: Developing democratic police abroad* (Oxford University Press, 2005), 39-42.

225. Government Accountability Office of the United States of America, *Rule of Law Assistance: Agency Efforts Are Guided by Various Strategies, and Overseas Missions Should Ensure that Programming Is Fully Coordinated*, 3-4.

226. Government Accountability Office of the United States of America, *Foreign Assistance: Rule of Law Funding Worldwide for Fiscal Years 1993-98*, 4.

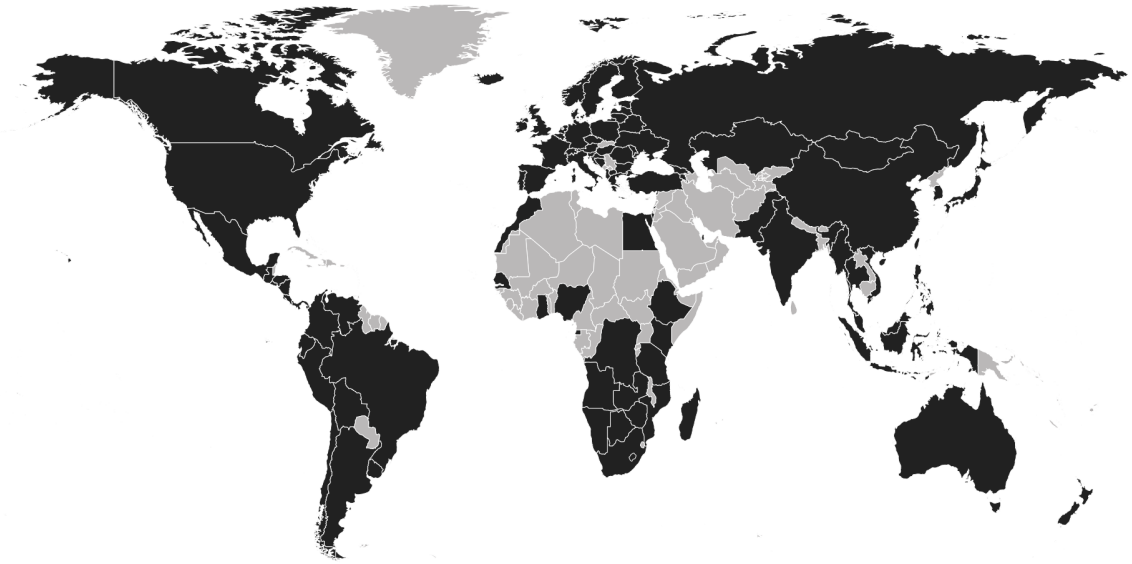
227. Government Accountability Office of the United States of America, *Rule of Law Assistance: Agency Efforts Are Guided by Various Strategies, and Overseas Missions Should Ensure that Programming Is Fully Coordinated*, 3-4.

Aside from straightforward efforts to construct completely new criminal codes (as was done in Latin America and Afghanistan), there were several key strategies that these agencies deployed in service of reforming criminal procedure.[228] An early and important step for many agencies was establishing a local mission or office and setting up employees who lived in-country. These employees would become *de facto* consultants for how things are done in the United States, conducting regular training sessions for prosecutors, judges, and police, as well as advising on legislative reform. The training practices employed by OPDAT, ICITAP, and the ILEAs are a direct continuation of U.S. democracy promotion practices from the Cold War.[229]

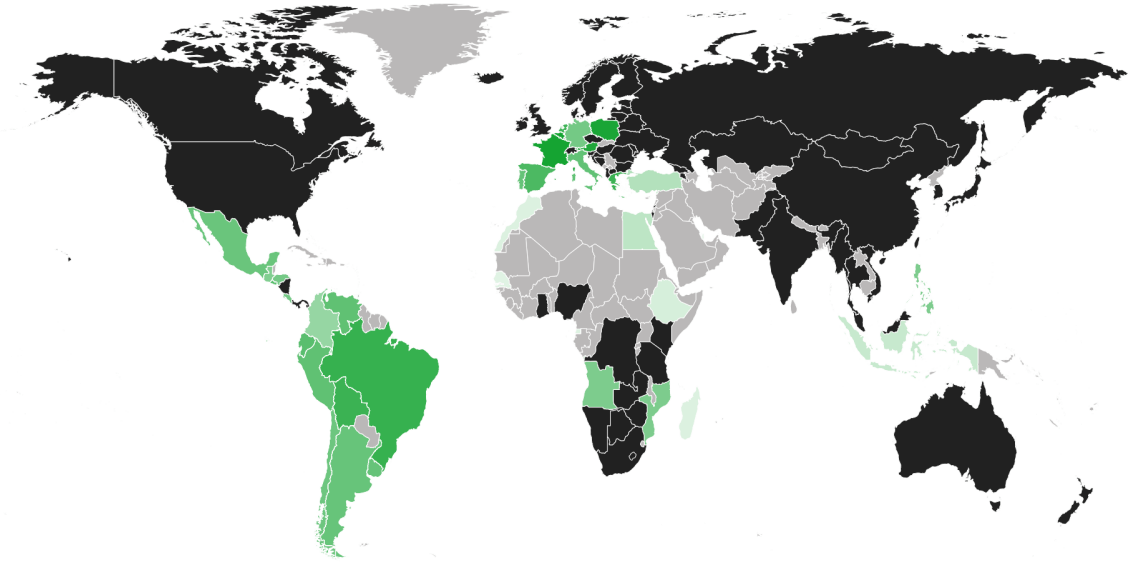
These routes of U.S. influence have led to the diffusion of plea bargaining as OPDAT in particular has hosted U.S. prosecutors overseas as Resident Legal Advisors (RLA), performing the trainings and reform consulting. Máximo Langer conducted a series of anonymous interviews with local legal reformers in Latin America and DoJ officials. Reformers note that DoJ was "explicitly exporting the U.S. criminal procedure code" and DoJ officials themselves acknowledged "DoJ pushed the U.S. model on everybody and was very insensitive culturally."[230] Plea bargaining features prominently in the procedures OPDAT RLAs spread internationally – usually touted as an effective way to reduce backlogs – often being the most impactful reform to criminal procedural practice.[231]

The diffusion process described here focuses on U.S. efforts to spread plea bargaining, but many reformers in other countries actively pursued its adoption for exactly these reasons.[232] Local legal experts tend to understand plea bargaining's adoption as driven by its efficiency and the ability to develop cooperation agreements with the accused (see Table 2). Plea bargaining spread not just because of U.S. influence but because plea bargaining is viewed as the legitimate way to efficiently arbitrate criminal procedure. Early U.S. efforts contributed to this understanding of plea bargaining, and must be understood as partially responsible for the subsequent diffusion that institutionalized the procedure much more widely.

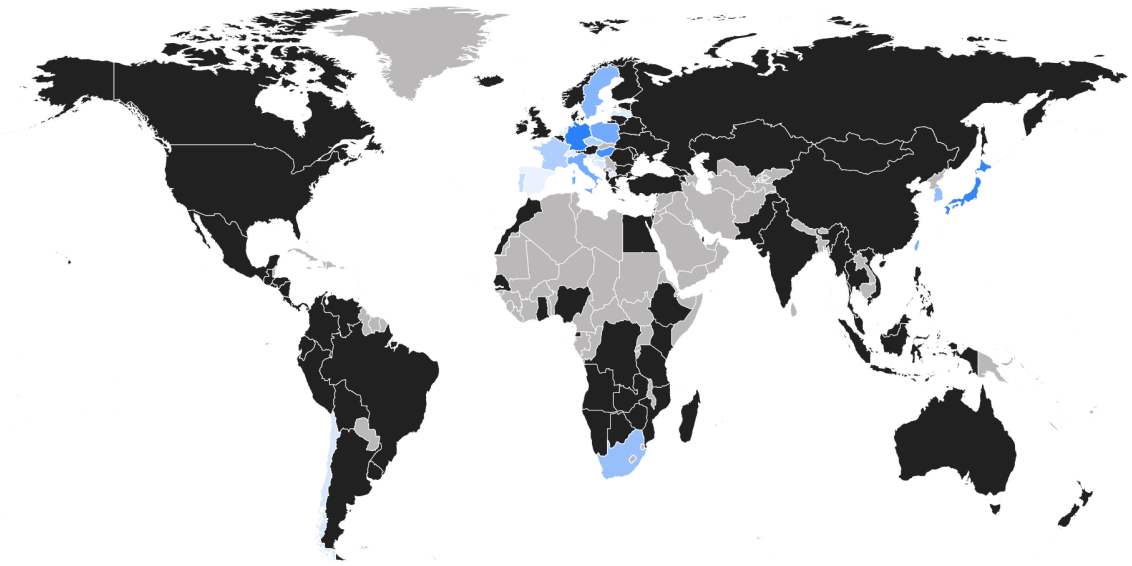
228. And a much similar set of strategies for altering police practices, but that is not the focus here.
229. McLeod, "Exporting US Criminal Justice," 126.
230. Langer, "Revolution in Latin American criminal procedure: Diffusion of legal ideas from the periphery," 658.
231. McLeod, "Exporting US Criminal Justice," 147-8.
232. Langer, "Revolution in Latin American criminal procedure: Diffusion of legal ideas from the periphery."



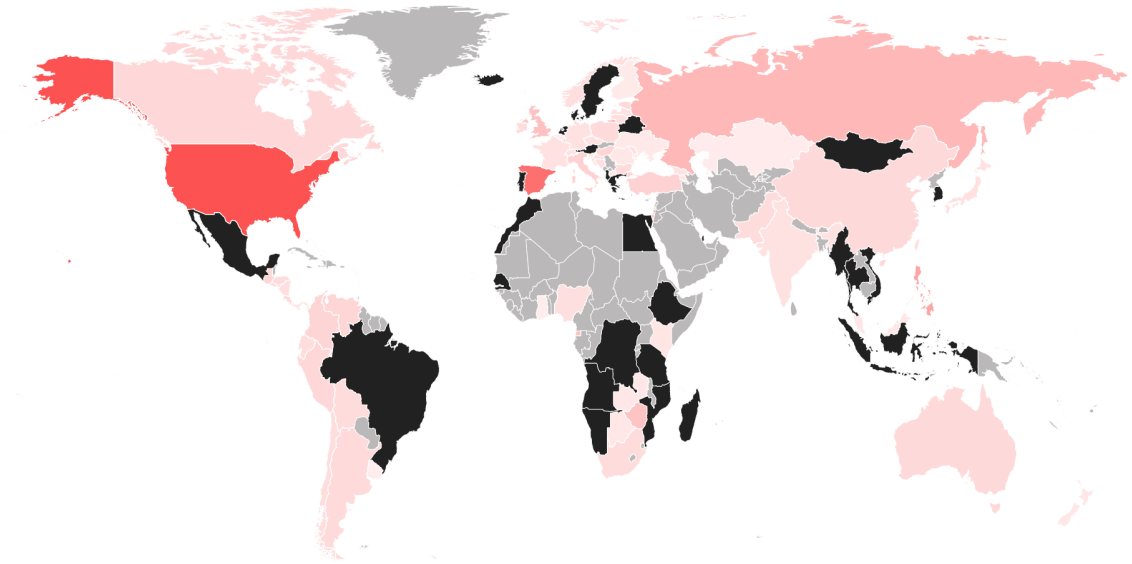
(a) **Sample**: light grey indicates out-of-sample countries, dark grey indicates in-sample countries.



(b) **Diffusion of the Napoleonic Code**: light grey indicates out-of-sample countries, dark grey indicates in-sample countries, green indicates adoption of the Napoleonic code, with darker countries having adopted the code earlier.



(c) **Diffusion of the Penal Orders**: light grey indicates out-of-sample countries, dark grey indicates in-sample countries, blue indicates adoption of the penal orders, with darker countries having adopted the penal orders earlier.



(d) **Diffusion of the Plea Bargains**: light grey indicates out-of-sample countries, dark grey indicates in-sample countries, red indicates adoption of the plea bargains, with darker countries having adopted the plea bargains earlier.

Figure 3: Summary view of which countries (a) are in sample (b) adopt the Napoleonic code (of those in sample) (c) adopt penal orders (of those in sample) and (d) adopt plea bargaining (of those in sample).

6 Mechanisms Driving Criminal Procedural Diffusions

The three diffusions of criminal procedure discussed in Section 5 immediately suggest two important mechanisms driving the uptake of criminal procedure: colonialism and mimesis. Colonialism must be understood as central to the diffusion of criminal procedural elements. The French Empire under Napoleon, the French colonies after Napoleon, Prussia in Poland, Japan in Taiwan and South Korea, Italy in Eritrea, the Philippines under the United States – these are all cases where colonial powers coercively imposed their criminal procedural practices. A related colonial mechanism is a kind of "echo" effect: even after independence, when Spain takes up a criminal procedural reform in 1848, its former colonies in Latin America adopt extremely similar codes in the following decades. Both of these colonially-driven effects are crucially linked to institutional inertia. The systems in place would require substantial effort and capital to significantly change, but these systems also persist because they are legitimated. Procedure changes when that inertia is overcome by the delegitimation of the procedure.

In France and the United States, efforts to diffuse criminal procedure widely were explicit and seen as good in themselves, above and beyond instrumental questions of expanding the capacity for control of their empires. Germany does not seem to have taken a similar approach – the other countries that took up penal orders early on were themselves colonial powers often seeking to use the procedure in their colonies. This difference seems to have led to serious differences in the later diffusion of these respective procedures. Due in part to the initial spread of the Napoleonic Code and plea bargaining, these procedures later saw much wider waves of mimetic diffusion.

These two mechanisms are not disconnected: the early coercive diffusion is a precondition for the later mimetic diffusion. When France and the United States developed and promulgated their respective procedures, they were undeniably at the head of global hegemonic structures. France had conquered all of Europe, the Soviet Union had fallen leaving the United States the winner of the Cold War. From this position, both imperial powers were uniquely legitimated models of statehood, and were actively investing in spreading their model: the French Criminal and Civil

codes; American democracy, human rights, and law. To understand the dynamics here it is worth examining it from the perspective of the hegemon and the reforming state.

Within the hegemon, an important part of the development of these models was the construction of arguments that legitimated them: in the French case the idea of the "hybrid procedure" taking the best elements of the adversarial and inquisitorial model, in the U.s. case the contractual reconceptualization of plea bargaining that turned violence into fairness and allowed arguments on the basis of efficiency. The development of these arguments, these theories of why these procedures were superior was an important factor in why France and the U.S. sought to spread their procedures and why they diffused so widely. The reification of these procedures within the hegemon was clearly a factor in the decision to coercively spread the procedure. French jurists believed the hybrid system was the best.[233] For U.S. officials the solution to anxieties about global crime was for countries where that crime was happening to adopt U.S. procedural practices, clearly bearing the implication U.S. practices would be more capable of stopping the crime problem.[234] Turning to rest of the world, the fact of French/U.S. hegemony and the concordant conformation to global culture meant the theories that underlaid French/U.S. perceptions of procedural superiority were bound to be amenable to the global culture of the time. The fact these theories were convincing within the hegemon meant they were likely to be convincing in the rest of the world. This further shows how standard sociological views about diffusion, in this case theorization as a diffusion mechanism,[235] are accelerated in the hegemonic context.

Furthermore, in actively diffusing these models, France and the U.S. reinforced the idea that these were not simply French or American procedures, but general models that should be deployed everywhere.[236] The fact a global hegemon was promulgating arguments for the models no doubt altered global culture, shaping global expectations about criminal procedure, but French/U.s. coercive diffusions go beyond that. Each country that adopted the model (by force) became invested in the arguments for that model and simultaneously became another piece of evidence in favor of those arguments.

233. Hélie, *Traité de l'instruction criminelle: ou théorie du Code d'instruction criminelle*.
234. McLeod, "Exporting US Criminal Justice."
235. David Strang and John W Meyer, "Institutional conditions for diffusion," *Theory and society*, 1993, 487–511.
236. Meyer and Jepperson, "The 'actors' of modern society: The cultural construction of social agency."

From the view of the reformer in a state in crisis: there is a legitimacy crisis, perhaps a revolution or a scandalous publication exposing a decoupled system; reformers are desperate for a solution. If there is another state that seems to be having particular success and legitimacy – where success is understood in terms of conformation to global culture and position withing a global hierarchy[237] – and that state is employing a particular model for a given policy – such as a particular conception of criminal procedure – then it makes sense to import the policy of the hegemon – if it works there it will work here.

This logic does not even require reformers to not personally subscribe to the nation state model; if elites and citizens in the crisis state believe this story of hegemonic success and tie it to the hegemonic models that is enough for importing the hegemonic model to make sense as a solution to the legitimacy crisis. Even without crisis, the professional outside the hegemon may feel a tension and be driven to direct policy in accordance with hegemonic models: given the interconnectedness of the contemporary world all practitioners within a profession will be exposed to the theories mobilized in the hegemonic state. The *negative* arguments developed in the hegemon also become important here: arguments like Héliè's which characterized the inquisitorial system as fundamentally *lacking* or U.S. critiques of inefficient systems leading to a failure to carry out justice at all carry tremendous weight.[238] These arguments can delegitimize the system in the eyes of local professionals, driving them to institute the hegemonic model (here Héliè's model of Napoleon's hybrid code or U.S. style plea bargaining) because it is more theoretically sound.

Legitimacy is intangible, socially constructed, and mediated by the dominating models of actorhood and the nation state. Hegemony magnifies the diffusion of policy models in the world polity, and this magnification is directed from the hegemon to the periphery. This process generates the kind of building legitimacy cascade that culminates in waves of mimetic diffusion. Propelled by hegemonic status critiques emerge and force the reconsideration of what had once been considered the status quo. Institutional inertia, as mentioned above, is difficult to overcome in criminal procedure. But

237. Arguably this hierarchy is structured by two related factors: the state's economic output and ability to advance *the state's* material interests, whatever those are understood to be (through conquest, coercion, economic pressure, or softer means).Du Bois, *The souls of white folk*

238. This is especially true in the case where the elite education system itself is exported from empire elsewhere, a phenomenon that itself arises out of the imperial legitimacy dynamic outlined here, but that also serves as to reinforce these processes.

these negative arguments that spread from the hegemon do disrupt local understandings of what "makes sense," fundamentally altering the perceived policy landscape. At the same time, these negative arguments were developed in tandem with arguments to justify and legitimate the new policy model (the hybrid procedure or plea bargaining), and so as this critique ripples across the globe local reformers desperate to maintain legitimacy adopt the hegemonic policy.[239] Combined with the hegemons actively diffusing these models it is clear how this altered global culture, in turn making the adoption of these criminal procedural models by other states more likely in the future.

Taken together the active diffusion by the hegemon and the pressure to take up the hegemonic model in the rest of the world are at the heart of mimetic diffusion. The process tracing accounts in Section 5 make clear that the feedback loop here – the fact each state that adopts the policy further contributes to the policy's perceived legitimacy – is an important driver in the construction and legitimation of the modern criminal procedural landscape. The following sections seek to validate the mechanisms outlined here using quantitative techniques. First I will give an overview of the data used for this empirical evaluation. Then I will run a series of event history models to demonstrate the centrality of colonial and mimetic effects in driving diffusion. Then I will develop several alternative explanations for diffusion and explore how well they are capable of explaining the dynamics described above. In exploring these alternatives I will make heavy use of a survey of local legal experts, who were asked to provide the rationales for their country's adoption of plea bargaining and plea bargaining/penal order utilization data for select countries.

6.1 Data

6.1.1 Dependent Variables

Three datasets form the backbone of this study, documenting the key events which are the dependent variables in the model described below. The first comes from Langer's 2020 Review article,[240] which offers the first public article collecting data on the adoption of what he terms "trial avoidance procedures" (plea bargaining and penal orders). Langer samples a set of countries and determines

239. John W Meyer, "Globalization: Sources and effects on national states and societies," *International sociology* 15, no. 2 (2000): 233–248.
240. Langer, "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions."

whether they have adopted plea bargaining, whether they have adopted penal orders, and the years of adoption. The second dataset comes from a partnership with the non-profit FairTrials. The FairTrials dataset is based on a survey of legal experts in 70 countries, whose responses were used to code three key features: whether a country has adopted plea bargaining; the (open-ended response) rationale (according to legal experts in that country) for adoption; and the kind of plea bargaining adopted (e.g..: charge bargaining or sentence bargaining).[241] Both of these datasets also include some data on the utilization of these procedures for a limited set of countries in their respective samples, where available. Langer does not document the rationale for his sampling methodology.[242] The FairTrials countries were selected for inclusion based on several criteria. The first is regional representativeness: as many major regions should be in the dataset as possible (e.g. North America, Latin America, Northern Africa, sub-Saharan Africa, East Asia, etc.). The second was wanting to ensure as many countries as possible were in the sample, meaning that if the survey was translated into a particular language, other countries with that language were also included in the initial survey. The third criterion was sufficient responses to identify the formal/informal presence of plea bargaining – if the survey was sent out to legal experts in a country and there was no response, or the response did not indicate the presence of plea bargaining in that country, then that country was excluded from the sample. The actual survey was conducted by identifying legal experts, practicing prosecutors/defense attorneys, judges or academics for countries in the sample and emailing them the survey. A sample survey is included in Appendix C. Both of these datasets identify whether countries have adopted the relevant procedures or not, and also identify the year of adoption. Pooling these two datasets gives a sample of 105 countries (see Appendix A). In pooling these datasets there was one key issue – whether any countries in the FairTrials data had adopted penal orders. This was not explicitly asked in the survey, although the survey did include a question about diversion practices (non-trial outcomes other than plea bargaining). I analyzed the surveys to identify countries where penal orders were mentioned as alternate diversion practices, and added

241. Russell and Hollander, "The Disappearing Trial: The global spread of incentives to encourage suspects to waive their right to a trial and plead guilty."
242. Langer, "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions."

those countries to a modified Langer dataset. I exclude all countries where it was not clear whether they adopted penal orders from the penal order analysis.

The third dataset I collected is the set of countries in the sample that have adopted plea bargaining. The collection process for this dataset started by looking in the secondary literature for countries which had adopted the Napoleonic Criminal code.[243,244,245] I confirmed the relevant piece of legislation and the year enacted for countries identified by these sources. I also used the legal origins literature, where possible, to identify countries with legislation inspired by the Napoleonic Penal code.[246,247] The legal origins datasets do not identify the year of adoption of these codes, so for each country in these datasets identified as of French origin, or French-with-German-influence origin, I identified the piece of legislation formally adopting a close relative of the Napoleonic code.

Fig. 3b visualizes the adoption of the Napoleonic Code, Fig. 3c the adoption of penal orders, and Figure 3d the adoption of plea bargaining over time. For a plot of the cumulative adoption and a summary table see Fig. 4.

6.1.2 Independent Variables

The main dataset from which the independent variables are derived is "From Empire to Nation-State: 1815-2001" (FEtNS).[248] This dataset includes a number of variables which may be interesting or relevant to models in this paper, including GDP and population, type of government (democracy, autocracy, etc.), and whether countries were experiencing instability, among others. Most important though is that the dataset documents, going back from territories existing in 2001, whether a country was independent or under imperial control, and which empire was in control, and for what period. Two modifications were necessary to use this dataset, extending it back to 1804 and forward to 2019. Extending the dataset back in time was reasonably straightforward: most variables in the dataset

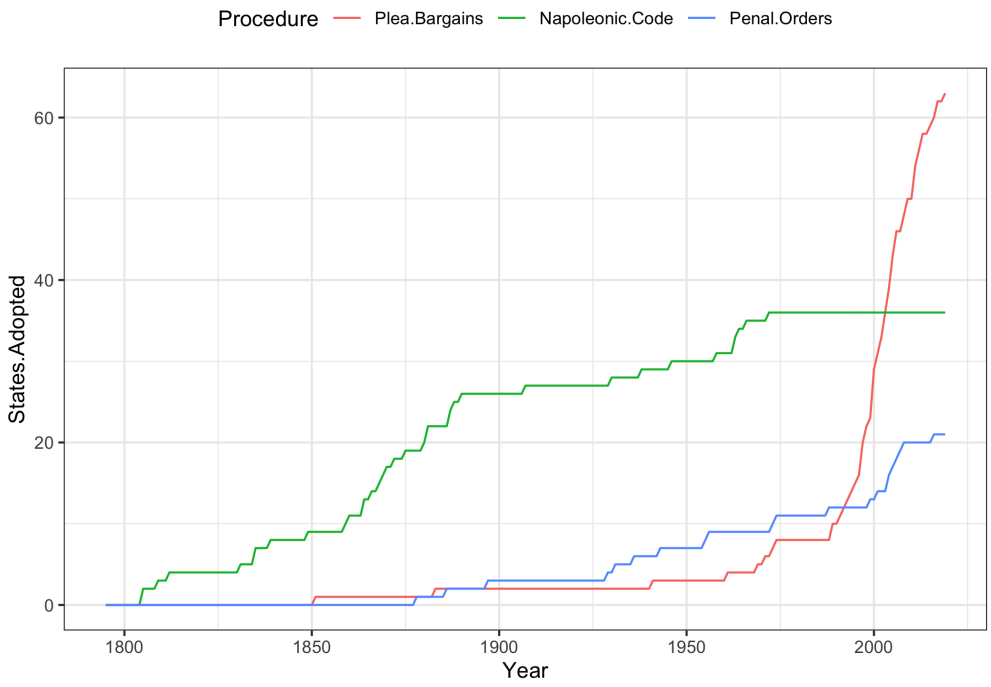
243. Lobingier, "Napoleon and his Code."
244. "Appendix 10. List of Penal Codes, Statutes, and Projects."
245. Iñesta-Pastor, "The Influence Exerted by the 1819 Criminal Code of the Two Sicilies upon Nineteenth-Century Spanish Criminal Law Codification and Its Projection in Latin America."
246. Carmine Guerriero, "A novel dataset on legal traditions, their determinants, and their economic role in 155 transplants," *Data in brief* 8 (2016): 394–398.
247. Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, "The economic consequences of legal origins," *Journal of economic literature* 46, no. 2 (2008): 285–332.
248. Andreas Wimmer and Brian Min, "From empire to nation-state: Explaining wars in the modern world, 1816–2001," *American sociological review* 71, no. 6 (2006): 867–897.

that change over time are not available before 1819 at all, and it was only necessary to extend the dataset back for countries that either (1) Napoleon directly conquered or (2) adopted the Napoleonic Code before 1815. These countries were: Egypt, Belgium, the Netherlands, Italy, Germany, Poland and Spain. I did not extend the conflicts variable back for these countries, as it is not used in this analysis; I only extend the imperial-power variable which records the subjugation status and the subjugating power. Extending the dataset forward was similarly straightforward, merging in more recent data on GDP and population, and extending the imperial power variable according to the original methods.

For assessing the importance of U.S. rule of law efforts I use public Foreign Assistance disbursement data,[249] filtering to activities annotated as being intended for "Rule of Law and Human Rights" (DAC code 15130). This category covers all activities oriented toward procedural reform described in Section 5.3 as well as more general rule of law activities (training police forces). Ideally this study would use data on spending exclusively on procedural reform efforts, but that data is not available on a by-year by-country basis.

Joining the pooled Langer and FairTrials data with the FEtNS data results in dropping 14 countries (see Appendix A). Combined, these datasets represent the full sample of countries examined in this study, which is visualized in Fig. 3a. All countries are included in all analyses in this study, unless otherwise indicated.

249. Downloaded from `https://foreignassistance.gov/`.



Procedure	Year First Adopted	Year Last Adopted	Total Adoptions
The Napoleonic Code	1804	1972	36
Penal Orders	1878	2016	21
Plea Bargains	1883	2018	63

Figure 4: Adoption information for the three procedures in the countries in the sample from 1804-2018.

6.1.3 Data for Exploring Alternatives

In exploring alternative explanations I make use of two kinds of data mentioned above. First I rely heavily on the utilization data included in both the Langer and FairTrials datasets. These data represent the fraction of cases resolved via plea bargaining (or penal orders) in a given year. For most countries only a single observation is available because this data is difficult to gather. Where multiple datapoints are available I use the maximum utilization figure (this assumption is intended to make alternative explanations as strong as possible). Second, I make use of the open-ended explanation data from the FairTrials survey.

As a part of the FairTrials survey, respondents were asked: "If possible, please state when the practice was introduced and explain the reasons for its introduction." The open-ended responses to this questions contain local legal experts' post-hoc rationalizations for the adoption of plea bargaining their country. Explanations given in the survey responses tend to point to several reasons why plea bargaining was adopted. Many reasons given are common across countries, but some are unique. Even among unique rationales, there seem to be some patterns across responses. To categorize this data I employ a bottom-up hierarchical approach for response coding.[250] All responses are initially coded into the narrowest possible primary category, often based on the use of particular words or phrases (efficiency, reducing costs, cooperation).[251] The categories that emerge from this analysis are then analyzed for commonalities, and placed into meta-categories (e.g. cost reduction and efficiency are clearly similar kinds of reasons). I repeat this process twice, resulting in three levels of categories, six top-level categories, nine mid-level categories, and 20 primary categories, which can be seen in Table 2. Each primary category corresponds to a reason for adopting plea bargaining, and the mid/top-level categories correspond to types of reasons for adopting plea bargaining. Example responses coded in each primary category are available in Appendix D.

6.2 Event History Models of Diffusion

6.2.1 Specifications and Variables

To quantify the effect of colonial imposition, imperial echoes, and mimetic diffusion on the spread of the Napoleonic Code, penal orders and plea bargains, this study employs a series of event studies, modeling each case of diffusion identically but independently and allowing for comparison and then making modifications to capture the different dynamics at play in the more recent diffusion of plea bargaining.

Because the data are discrete (annual), I employ a discrete-time model for these analyses. Each year is treated as a separate unit of analysis, and each country is coded as either a 0 if the country has not

250. Tom Richards and Lyn Richards, "Using hierarchical categories in qualitative data analysis," *Computer-aided qualitative data analysis*, 1995, 80–95.
251. Russell and Hollander, "The Disappearing Trial: The global spread of incentives to encourage suspects to waive their right to a trial and plead guilty."

adopted the procedure or a 1 if the country has adopted the procedure, where observations after the initial adoption of the procedure are dropped.[252] I use a c-log-log link to ensure the coefficients are comparable with continuous time-hazard models. The main modeling choice in this setting is how to handle time. It is not computationally tractable because in many years only one state adopts a new criminal procedure so its not possible to simply estimate year fixed-effects as is sometimes done for discrete time data with fewer periods. I opt for assuming a linear trend in time. I estimate two different specifications, for a total of four different models.

$$\begin{aligned} Y_{ijt} = \alpha_0 + \alpha t \\ + \beta_1 \text{Currently.Occupied}_{it} \\ + \beta_2 \text{Total.Adoptions}_t \\ + \beta_3 \text{Prev.Occ.Model}_{ijt} \\ + \beta_4 \text{Prev.Occ.Model.Now}_{ijt} + \epsilon_{ijt} \end{aligned} \tag{1}$$

In this equation Y_{ijt}, the dependent variable, is a binary variable indicating whether country i has adopted procedure j in year t. The years of adoption are listed in Appendix B. The α_0 and α coefficients are an intercept and a linear time effect respectively. The β_1 variable is primarily included as a control. Countries are usually only coded as having adopted a procedure after independence, so Currently.Occupied$_{it}$ indicates that country i is occupied in some year t, which implied – due to the coding – that country i is unlikely to adopt a procedure.

The remaining coefficients each correspond to one of the mechanisms described above. The β_2 coefficient indicates whether there is a mimetic effect, that is: it will be positive and significant if the Total.Adoptions$_t$ the total number of countries having adopted the model by year t effects the probability of a country adopting the procedure in year t. The β_3 and β_4 coefficients capture the effects of colonial mechanisms. Imperial diffusion corresponds to β_3, demonstrating the effect of Prev.Occ.Model$_{ijt}$, where Prev.Occ.Model$_{ijt}$ is a binary variable that is set to 0 unless a country has been occupied by an imperial power which had the procedure j during the years of occupation.

252. Paul D Allison, "Discrete-time methods for the analysis of event histories," *Sociological methodology* 13 (1982): 61–98.

Colonial echoes are reflected in β_4. The Prev.Occ.Model.Now$_{ijt}$ variable is a binary variable that is set to 0 unless a country has been occupied by an imperial power which had not adopted model j during the period of occupation, but later adopted model j; Prev.Occ.Model.Now$_{ijt}$ is set to 0 until the imperial power adopts model j in years t, after which it is set to 1.

Imperial diffusion is a key variable in this study, but as discussed in Section 5.3 the primary channels of imperial influence in the plea bargaining case were not direct imperial rule – as in France – but rather U.S. "rule of law" initiatives. I include an additional model that captures this different channel of influence:

$$\begin{aligned}\text{Plea.Bargains}_{it} = \alpha_0 + \alpha t \\ + \beta_1 \text{Currently.Occupied}_{it} \\ + \beta_2 \text{Total.Adoptions}_t \\ + \beta_3 \text{Prev.Occ.Model}_{it} \\ + \beta_4 \text{Prev.Occ.Model.Now}_{it} \\ + \beta_5 \text{Rule.Of.Law.Spending}_{it} \\ + \beta_6 \text{Total.Adoptions}_t * \text{Rule.Of.Law.Spending}_{it} + \epsilon_{it}\end{aligned} \tag{2}$$

This specification is identical to Equation 1 except that it includes β_5 a coefficient capturing the effect of Rule.Of.Law.Spending$_{it}$, that is the effect of each additional million dollars in U.S. spending on rule of law initiatives in country i in year t. This specification also includes an interaction effect between the Total.Adoptions$_t$ and the Rule.Of.Law.Spending$_{it}$, which I expect to capture the temporal difference between the initial U.S.-driven diffusion and the later mimetic dynamics.

Table 1: The results of the four model specifications outlined in Sec. 6.2.

	Dependent variable:			
	Napoleonic.Code	Penal.Orders	Plea.Bargains	
	(1)	(2)	(3)	(4)
Year	-0.061^{***}	0.005	0.031^{***}	0.028^{***}
	(0.012)	(0.012)	(0.009)	(0.009)
Currently.Occupied	-2.657^{***}	-0.429	-2.095^{**}	-2.084^{**}
	(0.455)	(0.631)	(1.047)	(1.050)
Total.Adoptions	0.229^{***}	0.103	0.018^{*}	0.026^{**}
	(0.049)	(0.079)	(0.010)	(0.010)
Prev.Occ.Model	2.689^{***}	1.514^{**}	0.929^{**}	0.933^{**}
	(0.391)	(0.600)	(0.370)	(0.371)
Prev.Occ.Model.Now	1.783^{***}	-0.656	0.455^{*}	0.351
	(0.363)	(0.819)	(0.274)	(0.279)
Rule.Of.Law.Spending				0.103^{***}
				(0.032)
Total.Adoptions:Rule.Of.Law.Spending				-0.003^{**}
				(0.001)
Constant	105.660^{***}	-17.490	-67.219^{***}	-59.996^{***}
	(21.052)	(21.809)	(18.177)	(17.445)
Observations	13,903	10,960	17,410	17,410
Log Likelihood	-205.700	-149.448	-311.400	-303.795
Akaike Inf. Crit.	423.400	310.896	634.800	623.591

Note: *p<0.1; **p<0.05; ***p<0.01

6.2.2 Results

The results of running these four models can be found in Table 1. The use of the cloglog link in modeling allows the interpretation of the exponentiated coefficients as the percent increase in the likelihood of a country adopting the given procedure relative to the baseline hazard rate.

Model (1) describes the Napoleonic Code. As expected the effect of Currently.Occupied$_{it}$ is significant and negative. The mimetic effect is strong and significant: each additional country that adopts the Napoleonic Code corresponds to a 25% increase in the likelihood of an additional country adopting the Code. The effects of having been previously occupied by an imperial power promulgating the Napoleonic Code translates to a 1371% increase in the likelihood of that country adopting the Code. The effect of a country's former colonizer adopting a procedure is similarly large in magnitude and is equally significant, a 494% increase in the likelihood of adopting the code. These effects validate the theorized model in the case of the Napoleonic Code. Direct colonial imposition, imperial echoes and mimetic effects are all large and in the expected direction.

Model (2) shows the results for penal orders. This model is constrained to only the sample that confirms countries have not adopted penal orders, that is the sample from the original Langer data.[253] Again, as expected, there is no significant mimetic effect in the diffusion of penal orders. The effect of colonial imposition is significant and positive, though not as strong as in the Napoleonic case, corresponding to a 354% increase in the likelihood a country adopts penal orders over the baseline hazard rate. The imperial echo effect does not appear to drive uptake of penal orders – the coefficient is non-significant but, more important, it is in the wrong direction. All of this matches up to the theoretical expectations: penal orders was selected as a negative case where diffusion was not as successful as the French or U.S. procedures.

Models (3) and (4) describe the results for plea bargains. Model (3) uses the first specification above, making it comparable with the models used for the Napoleonic Code and penal orders, while Model (4) adds the additional variables and interaction effect described in the second specification capturing the additional channels of imperial influence identified in Section 5.3. Briefly, Model (3)

253. Langer, "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions."

only indicates a significant effect for direct colonial imposition – this is somewhat to be expected as the model is missing a key variable. Comparing Model (3) and Model (4) we see that the coefficients are largely similar, with important differences in the precision of the identified effects.

Most importantly, in Model (4) the effect of U.S. spending on rule of law initiatives is large and significant. For each additional $1 million dollars of U.S. rule of law spending in a given country in a given year, the likelihood of adopting plea bargaining increases by 11%. For countries where the U.S. spends any money on rule of law, the average U.S. spending per year per country is $9.5 million dollars, which implies an average effect of increasing the likelihood of adoption by 103%. The mimetic effect is more precisely identified in Model (4), corresponding to a 2.63% increase in the likelihood of a country adopting plea bargaining for each additional country that has already adopted the procedure. The interaction between the effect of U.S. spending and the mimetic effect is also significant, capturing the trade-off between these effects: as the mimetic diffusion accelerates, the specific impact of U.S. spending on rule of law diminishes. The effect of direct colonial imposition is largely unchanged, comparable in magnitude to the penal order case, corresponding to a 153% increase in the likelihood a country adopts plea bargaining. The imperial echo effect is changed the most between Models (3) and (4), seeing a significant decrease. This effect was capturing some of the variation that is actually explained by U.S. spending, hence its decrease. Model (4) shows the effect very clearly of the causal mechanisms drawn out of the process tracing accounts in Section 5. U.S. efforts to spread plea bargaining have been driving factors in plea bargaining's diffusion, catalyzing a mimetic effect that overtook the direct impact of U.S. efforts.

These results are in line with the expectations drawn from the process tracing accounts. In each of these successful diffusions, we clearly see the impacts of imperial influence (via colonial imposition and imperial echoes in France, and U.S. rule of law spending in the U.S.) and mimetic diffusion. Additionally, in the case of plea bargaining, we see the trade-off between the effect and the mimetic dynamics. Importantly, as expected, there is no mimetic effect in the case of penal orders.

Table 2

Efficiency	38	Efficiency	36	Faster Verdicts	28
				Reduce Costs	17
				Efficiency	11
		Avoid Trial Procedure	19	Reduce number of trials	15
				Handle minor cases	5
Increase Conviction Rate	22	Increase Conviction Rate	21	Incentivize cooperation	19
				Certainty of Resolution	2
		Punish More Offenders	3	Ensure Enforcement	1
				Increase Fraction Prosecuted	1
				Greater Access to Justice	1
Decrease Complexity	17	Decrease Complexity	17	Modernize Procedure	12
				Decrease Procedural Requirements	3
				Increase Transparency	1
Improve Victim Experience	10	Improve Victim Experience	8	Ensure Victim Compensation	4
				Avoid Revictimization	4
		Recognize harm	2	Acknowledge Victim Experience	1
				Perpetrator Acceptance of Guilt	1
Moderate Justice System	7	Moderate Justice System	7	Moderate Justice System	7
Religious Development	1	Religious Development	1	Religious Development	1

6.3 Discussion and Alternative Explanations

The central argument of this section has been that the initial coercive diffusion undertaken by both France and the U.S. functioned as an essential precondition to the later wave of wider, more

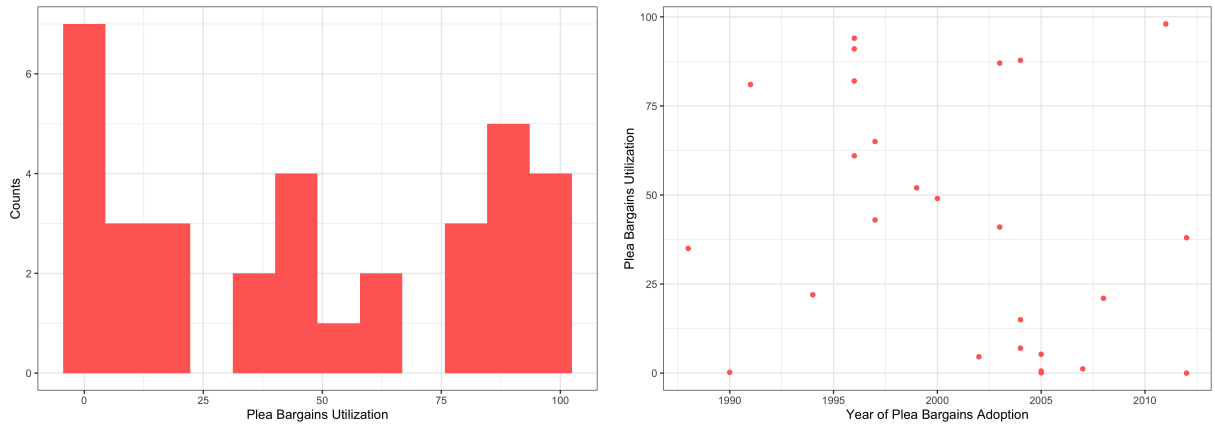
"voluntary" diffusion. Further the claim is that this later wave of diffusion was mimetic – it was driven by abstract obeisance to the concept of efficiency, rather than efficiency itself. These two mechanisms are linked by the idea that in spreading these procedures initially, imperial powers accumulated legitimacy for their respective procedure and constructed homogeneity in the criminal procedural policy space, which combined to create the isomorphic pressure that drives the second wave.

There are two important kinds of objection to this argument. The first would be that the later diffusion is independent of the initial coercion. The second is that the later diffusion is driven by some other, non-mimetic dynamic. I will focus on the diffusion of plea bargaining as I address the validity of these alternatives, because it is the case for which the most evidence is available to litigate these questions, namely reasons for adoption (see Table 2) and utilization data (see Figure 5).

Arguments that the initial diffusion is wholly irrelevant to the later diffusion seem somewhat facially untenable. The fact that two of the most important criminal procedural elements today were initially spread by coercive means is striking. More plausibly, arguments of this form might contend a different link between the initial coercive diffusion and the later diffusion. For example, it is possible that spreading these procedures functioned to saturate the information environment rather than to construct legitimacy – to adopt a procedure, reformers need to know about it. This kind of argument hinges on a different mechanism underlying the later diffusion though – it only makes sense to make an information environment argument if the underlying reason for adoption is incentive-based (e.g. efficiency). This means that objections of this first kind will tend to rely on objections of the second kind.

The second kind of alternative explanation proposes a different mechanism drives the second wave of diffusion. There are three alternative mechanisms in this vein that need to be addressed: normative diffusion, market incentives (e.g. efficiency), and actor incentives (e.g. prosecutors).

Before going through each of these alternatives, it is important to acknowledge the strongest evidence supporting mimetic diffusion, presented in Fig. 5(a). This figure shows that, of the



(a) Percent of cases resolved via plea bargaining in countries where utilization data are available.

(b) Percent of cases resolved via plea bargaining by year of adoption for countries that adopted after 1980.

Figure 5: Utilization of plea bargaining. Panel (a) includes all data on plea bargaining utilization, panel (b) includes only data after 1980 to focus on the later diffusion. This excludes 5 countries, all of which had a high (75%+) share of plea bargain utilization. See E for the plot with these countries included.

countries where utilization data are available, there are many countries that have formally adopted plea bargaining that do not seem to use the procedure. That is, the fraction of cases resolved via plea bargaining is less than 5%. It is possible that this is because plea bargaining has not been available in the country long enough to take hold. To that end Fig. 5(b) shows the utilization by countries that adopted plea bargaining after 1980, which demonstrates there is not a strong relationship between adoption date and utilization.[254] The fact that plea bargaining is adopted but not used is an indicator that the driving force behind adoption is a legitimacy concern, not any of the other proposed mechanisms. Nonetheless it is useful to go through these alternatives.

Normative Diffusion Criminal procedural reform is almost entirely normative. Criminal procedure is not a process connected to some output that responds to changes in procedure in any obvious way.[255] Legitimacy concerns in the criminal procedural context are tightly linked to normative objections. This makes it difficult to disentangle mimetic and normative effects in the cases presented here. Further complicating things is the way global hegemony constructs normativity. In developing their respective procedures, France and the U.S. both created rationalizations for these procedures, and

254. See Appendix E where the relationship between adoption year and utilization is estimated. For post-1980 adopters the relationship is negative but non-significant, and even including early adopter outlying points (e.g. the U.S.) the relationship remains non-significant.

255. Meyer and Rowan, "Institutionalized organizations: Formal structure as myth and ceremony."

through the actions these countries took to spread these procedures, they spread the rationalizations as well. Having adopted a procedure, a country becomes, in some important sense, invested in that procedure, and therefore in the legitimacy of that procedure. This is directly connected to the weight of legitimacy the criminal procedure bears as the mediator between citizens and state violence. By constructing this base of states invested in the legitimacy of the respected procedures, France and the U.S. were (re-)constructing common sense about how criminal procedure should work in a normative sense. Put another way, if plea bargaining were not normatively acceptable, it would not diffuse because that would entail its illegitimacy.

One way to get at whether normative arguments are driving plea bargaining is to look at why legal experts in various countries claim they have adopted plea bargaining. Table 2 outlines the reasons legal experts gave for their country adopting plea bargaining, coded at various levels. Paying attention to the high-level reasons, both Improve Victim Experience and Moderate Justice System seem to be normative reasons for adopting plea bargaining.[256] This accords with some accounts of plea bargaining's early use in the United States as well.[257] But there are no countries that *only* give normative rationales – almost all countries with normative rationales also give other types of reasons (Efficiency, Increase Conviction Rate, Decrease Complexity).[258] This is not true for these other types of reasons, which often exclude normative accounts. Taken together, then, the fact that oftentimes plea bargaining is taken up but not utilized; the reality that normative arguments for procedures are intertwined with mimetic explanations; and the lack of exclusively normative arguments as post-hoc explanations of adoption, all seem to make it difficult to argue the case for exclusively normative diffusion.

Incentive-based Accounts Incentive-based accounts present serious alternatives to the mechanisms described here. Market-based incentives – that is, incentives to save costs and shorten procedural timelines by developing efficient procedures – are particularly compelling in that they match up to the original legitimization of plea bargaining in the United States, and they are the primary

256. One could argue that Religious Development does too, although this category is something of an outlier.
257. Vogel, "The social origins of plea bargaining: An approach to the empirical study of discretionary leniency?"
258. Austria and Mongolia only give normative reasons. This is 2 of the 52 countries that have adopted plea bargaining and gave reasons for its adoption.

kind of post-hoc rationale preferred by local legal experts for plea bargaining's uptake (see 2). Actor incentives – which come into play if, for example, prosecutors are evaluated based on their conviction rates and can improve those rates with a new procedure like plea bargaining – are a key reason cited in plea bargaining's development and diffusion within the United States[259] and many of the post-hoc reasons can be interpreted as implying plea bargaining's adoption was intended to increase the conviction rate, making it similarly plausible as an alternative factor.

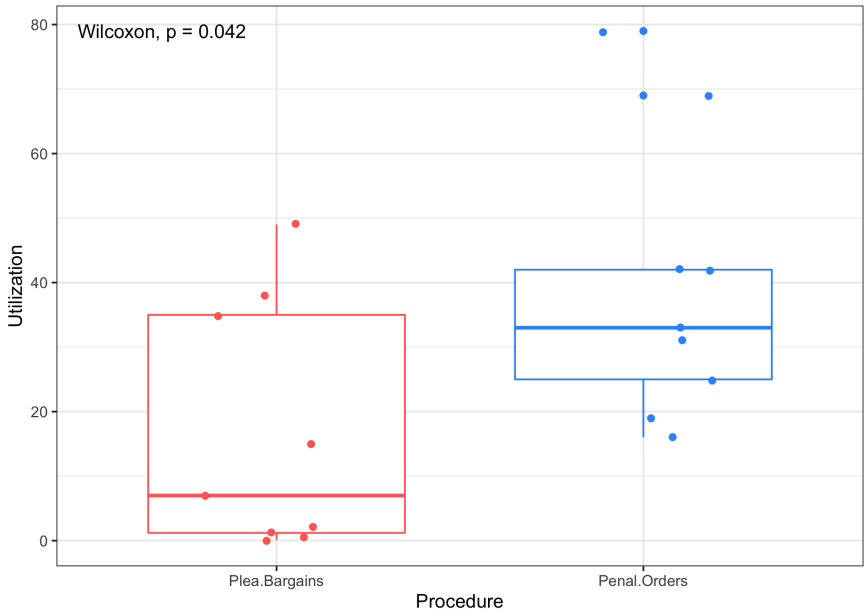


Figure 6: Subsetting to countries that have formally adopted both plea bargaining and penal orders where utilization data is available we compare the percent of cases resolved via plea bargaining and penal orders. Mean utilization is higher for penal orders. A Wilcoxon difference-in-means test indicates this is statistically significant (p = 0.042).

An important, high-level response to both of these explanations is the reality (explained above) that in many countries where plea bargaining takes hold, it isn't utilized (see 5). If efficiency or raising the conviction rates is the driving factor, it seems odd that countries adopt plea bargaining but do not use it. Additionally, and this is particularly consequential, it is not as though plea bargaining is the only available procedure that efficiently dispenses with cases and raises the conviction rate. Penal orders, which function very similarly to plea bargains, do both those things.[260] Leveraging the fact that penal orders and plea bargains can function as partial substitutes clarifies these critiques. To assess the relative value to actors within a given country (in efficiency gains or increases to

259. Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America*.
260. Langer, "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions."

conviction rates), we can look at the relative shares of utilization of plea bargains and penal orders conditional on a country having adopted both procedures. Fig 6 shows this comparison, and a difference-in-means test indicates that penal orders enjoy significantly higher utilization in countries that have adopted both procedures. This presents a serious problem for purely incentive-based accounts, because it requires an explanation of either why plea bargaining diffuses due to efficiency if penal orders are more efficient; or why penal orders enjoy higher utilization in countries which have both penal orders and plea bargaining. Incentive-based accounts can be amended to include normative effects, but in that case the issues of the entanglement of normative and mimetic effects arise (as discussed above).

Having examined several alternative diffusion mechanisms, it seems that the core mechanisms originally identified here are important factors in the diffusion of criminal procedure. Normative accounts struggle because normative reasons are not central in experts' post-hoc explanations. Incentive-based accounts may be useful for explaining the rise of plea bargaining and penal orders, but cannot distinguish the two. Furthermore, all these non-mimetic explanations struggle to account for uptake without utilization, a pattern that mimetic diffusion (in service of abstract efficiency) handily explains. This analysis validates the model developed earlier in this section, in which initial coercive diffusion creates the pre-conditions for later mimetic diffusion.

7 Conclusion

Criminal legal systems have historically been deeply entrenched in moral discourse, with a focus on ensuring the procedures that stood between a citizen and state violence were sophisticated enough to determine guilt or innocence. In practice these procedures ended up decoupled: the formal proceedings ended up being too cumbersome, were rarely implemented, and were supplanted in practice by informal practices that ensured the day-to-day functioning of the system. But this started to change in the 1990s. Since then the world has adopted plea bargaining. Criminal procedural reform became dominated by a focus on efficiency, where efficiency means American-style plea bargaining.

Rationalization is one of the defining characteristics of modernity, but sometimes sociologists discuss rationalization as though it just happens. The first object of this study has been to give a microsocial answer to the macrosocial question: How did criminal procedure become rationalized?

The story begins when questions of morality that had preoccupied reformers were subsumed as the U.S. Supreme Court oversaw the transplant of market logic into the criminal court. This recombinant innovation occurred against the backdrop of a crisis in U.S. criminal justice, as rising crime rates, the civil rights movement, and a series of court decisions limiting the power of police and prosecutors prompted backlash on several fronts.[261] Rather than checking the executive and legislative branches in their punitive turn, the Court legitimized plea bargaining, greasing the gears of American criminal justice as they began to grind lives away.

Plea bargaining does not diffuse simply because it is a uniquely efficient procedure (in fact it is not, see Fig. 6). It initially diffused because the United States, motivated by the same anxiety about crime that had dominated its politics since 1960,[262] created a number of agencies and spent billions of dollars to spread the procedure around the world.[263] This initial coercive diffusion reshaped global culture enough to create isomorphic pressures and a wave of mimetic diffusion as more states to adopted plea bargaining, even if in practice they do not use it much (see Fig. 5).

This is not a particularly standard account of rationalization, placing significant causal importance on the policy and politics of one country, the United States, in stripping the traditional values from a discursive field. But because the rationalization of criminal procedure is distinctive as rationalization processes go, it offers important lessons for social theorists.

In developing this account of the rationalization of plea bargaining and its spread around the world, this study documents the development and diffusion of three different criminal procedural practices from three different political cultures. Taking a comparative approach to the development process allows us to identify the tension between justice and efficiency that sits at the heart of criminal

261. Clark, "American Bar Association Standards for Criminal Justice: Prescription for an Ailing System"; Weaver, "Frontlash: Race and the development of punitive crime policy."
262. McLeod, "Exporting US Criminal Justice."
263. Government Accountability Office of the United States of America, *Foreign Assistance: Rule of Law Funding Worldwide for Fiscal Years 1993-98*; Government Accountability Office of the United States of America, *Rule of Law Assistance: Agency Efforts Are Guided by Various Strategies, and Overseas Missions Should Ensure that Programming Is Fully Coordinated*.

procedure, as well as documenting the ways different political cultures resolved this tension (see Sec. 4). It also becomes clear that the case of criminal procedure is a useful touchstone for neo-institutional sociology more broadly, because it so well exemplifies so many of the theoretical expectations of the school.

The comparative approach applied to the diffusion processes (see Sec. 5) enabled the development of a model of the factors driving criminal procedure. The model is described above: a hegemonic power takes steps to coercively diffuse its criminal procedure, reshaping global culture and precipitating a wave of mimetic diffusion (see Sec. 6). Finally the model is subjected to quantitative evaluation using event history models of each diffusion process. The results of these models substantially bear out the theoretical expectations. The theory developed in service of this model of how coercive, normative, and mimetic diffusion function within global hierarchy bears useful insights into global diffusion processes for other institutional practices, more generally.

There are a huge number of avenues for further research in the world of criminal procedure. Developing methods for the quantitative evaluation of legitimacy for historical institutions would be invaluable. Similarly, gathering data to study the impact of the adoption of plea bargaining on crime rates, incarceration rates, duration of pre-trial detention, clearance rates, and a handful of other measures of the criminal justice system, is paramount, given plea bargaining's likely role in American mass incarceration.[264] Furthermore, the methods and theoretical propositions developed here can be fruitfully applied to the diffusion of other policies around the world, particularly those actively diffused by imperial/hegemonic powers. A study investigating the spread of the export-led growth development model,[265] for example, would speak to an essential question in the stratification of nations, and offer a valuable test for the theoretical predictions developed here.

This thorough examination of three influential justice systems, their own internal tensions, and their impact on the rest of the world, makes clear not just that justice is no longer the primary goal of judicial systems — but how that shift happened, and the beginning of an answer to why it happened.

264. Pfaff, *Locked in: The true causes of mass incarceration-and how to achieve real reform*.
265. Ha-Joon Chang, *Kicking away the ladder: development strategy in historical perspective* (Anthem Press, 2002); Bulmer-Thomas, *The economic history of Latin America since independence*.

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A Countries in Sample

Full set of countries in the pooled sample: Albania, Angola, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Bolivia, Bosnia And Herzegovina, Botswana, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czech Republic, Democratic Republic Of The Congo, Denmark, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Honduras, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Kazakhstan, Kenya, Latvia, Lithuania, Macedonia, Madagascar, Malaysia, Mexico, Moldova, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russia, Senegal, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, Tanzania, Thailand, Turkey, Ukraine, United Kingdom, United States Of America, Uruguay, Venezuela, Vietnam, Zambia, Zimbabwe.

Countries in Langer sample: Angola, Argentina, Australia, Belgium, Bolivia, Bosnia And Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czech Republic, Ecuador, El Salvador, United Kingdom, Estonia, France, Georgia, Germany, Guatemala, Honduras, Hungary, India, Indonesia, Israel, Italy, Japan, Latvia, Lithuania, Macedonia, Malaysia, Moldova, Montenegro, Netherlands, New Zealand, Nicaragua, Nigeria, Panama, Peru, Philippines, Poland, Portugal, Romania, Russia, Scotland, Serbia, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, Ukraine, United Arab Emirates, United States Of America, Uruguay, Venezuela.

Countries in FairTrials sample: Albania, Angola, Argentina, Armenia, Australia, Austria, Bahrain, Belarus, Belgium, Bolivia, Bosnia And Herzegovina, Botswana, Brazil, Canada, Cayman Islands, Chile, Colombia, Democratic Republic Of The Congo, Costa Rica, Croatia, Czech Republic, Denmark, Egypt, United Kingdom, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Italy, Japan, Jersey, Kazakhstan, Kenya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malaysia, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Netherlands,

New Zealand, Nigeria, Norway, Pakistan, Peru, Philippines, Poland, Portugal, China, Qatar, Romania, Russia, Saudi Arabia, Scotland, Senegal, Serbia, Singapore, South Africa, South Korea, Spain, Sweden, Switzerland, Tanzania, Thailand, The Bahamas, Turkey, United Arab Emirates, Ukraine, United States Of America, Vietnam, Zambia, Zimbabwe.

Countries dropped when merging From Empire to Nation State with Pooled Langer and Fair-Trials data: Bahrain, Cayman Islands, Hong Kong, Jersey, Liechtenstein, Luxembourg, Mauritius, Montenegro, Saudi Arabia, Scotland, Serbia, Singapore, the Bahamas, the United Arab Emirates.

B Adoption Years for the Napoleonic Criminal Code, Penal Orders, and Plea Bargains

Table 3: Dates of adoption of the Napoleonic Criminal Code, Penal Orders, and plea bargains for each country in the sample. A blank indicates the country did not adopt the given procedure in the period from 1808 - present.

Country	Napoleonic.Code	Penal.Orders	Plea.Bargains
Albania			
Angola	1886		
Argentina	1869		1997
Armenia			2007
Australia			1996
Austria	1811		
Belarus			
Belgium	1867		2016
Bolivia	1834		1999
Bosnia And Herzegovina		2003	2003
Botswana			2011
Brazil	1830		
Bulgaria			1999
Canada			1995
Chile	1874	2000	2000
China			1996
Colombia	1906		1991
Costa Rica	1880		1996
Croatia		1998	2002
Czech Republic		1973	2005
Democratic Republic Of The Congo			
Denmark			
Ecuador	1858		2000
Egypt	1937		
El Salvador	1859		1998
Equatorial Guinea	1963		1968
Eritrea		2015	
Estonia			1996
Ethiopia	1957	1961	
Finland			2014
France	1808	1972	2004

Country	Napoleonic.Code	Penal.Orders	Plea.Bargains
Georgia			2004
Germany	1879	1877	2005
Ghana			2018
Greece	1834		
Guatemala	1889		1992
Honduras	1880		1999
Hungary		1896	1990
Iceland			
India			2005
Indonesia	1945		
Ireland			1999
Israel			1972
Italy	1865	1930	1988
Japan	1880	1885	2004
Kazakhstan			2015
Kenya			2008
Latvia		2005	2004
Lithuania			2002
Macedonia		2004	2010
Madagascar	1962		
Malaysia			2010
Mexico	1871		
Moldova			2003
Mongolia			
Morocco	1962		
Mozambique	1886		
Myanmar			
Namibia			
Netherlands	1838	2006	
New Zealand			2011
Nicaragua			2001

Country	Napoleonic.Code	Penal.Orders	Plea.Bargains
Nigeria			2002
Norway			2001
Pakistan			1999
Panama			2008
Peru	1863		1994
Philippines	1887		1940
Poland	1808	1928	1997
Portugal	1852	1987	
Qatar	1971		
Romania			2010
Russia			1960
Senegal	1965		
Slovenia		2003	2012
South Africa		1955	1999
South Korea		1954	
Spain	1848	2015	1882
Sweden		1942	
Switzerland		2007	2007
Taiwan		1930	2003
Tanzania			
Thailand			
Turkey	1929		1988
Ukraine			2012
United Kingdom			1970
United States Of America			1850
Uruguay	1868		2016
Venezuela	1863		1993
Vietnam			
Zambia			2010
Zimbabwe			1973

Plea bargaining research template	
	Definition of plea bargaining for the purposes of completing this questionnaire: A process not prohibited by law under which criminal defendants agree to accept guilt and/or cooperate with the investigative authority in exchange for some benefit from the state, most commonly in the form of reduced charges and/or lower sentences.
	Research question
1	Is there a practice (or practices) caught by the above definition?
2	If yes, please provide reference (including dates) to any legislation, case law or other policy guidance which governs the practice (if accessible/available).
3	If possible, please state when the practice was introduced and explain the reasons for its introduction.
4	Please describe the process of plea bargaining and explain how it works in practice. In your response, please consider whether any of the following apply: a) Is the process of plea bargaining part of the full criminal trial? b) Is there a hearing at which the guilt or innocence of the accused is determined? c) Is there a hearing at which the fairness of the plea bargain/agreement is reviewed (for example, to assess whether any required procedural steps have been followed)? d) To what extent is evidence considered during the plea bargaining process, and how does this differ from equivalent cases where a plea bargain/agreement is not reached? **Please note**: when answering this questions, please also explain if process of plea bargaining in your jurisdiction varies depending upon specific circumstances (for example, different processes may apply depending upon the severity of the crime).
5	If public data is available on the number/percentage of criminal cases resolved through plea bargaining/agreements, please provide the figures for one year in the 1990s, one year in the 2000s and one year (as recent as possible) in the 2010s. The following statistics would be of particular assistance: a) % of cases resolved through plea bargaining/agreements; b) % of convictions in trials where plea bargaining/agreements not used; and c) % of guilty pleas in all trials. **Please note:** when answering this question, please state clearly the basis for, and source of, the statistics provided.
6	Please list and briefly summarise any further information (articles, blogs, legal commentary, statistics etc.) which you have identified relating to the practice which may be of relevance to our work on this issue. Any articles available in English would be particularly helpful.
7	Please provide the details of any experts on the subject of plea bargaining/agreements in your jurisdiction of whom you are aware.

D Plea Bargaining Reasons Coding Examples

E Plea Bargaining Utilization

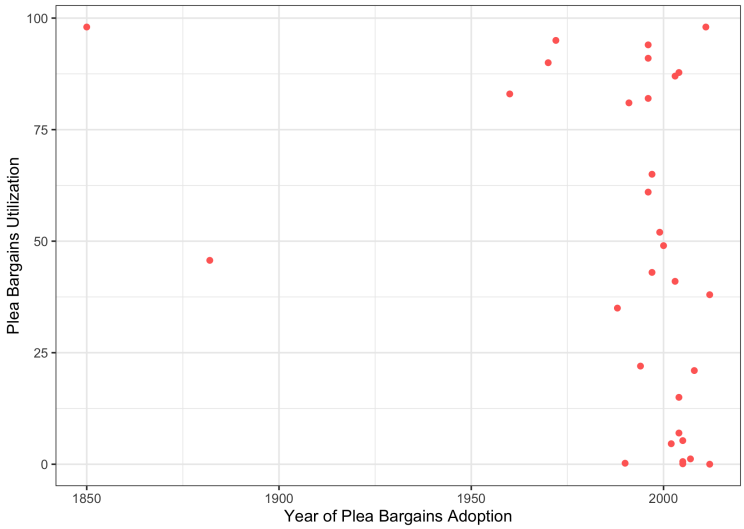

Figure 7: Percent of cases resolved via plea bargaining by year of adoption for countries where utilization data are available.

Table 4

	Dependent variable:	
	Plea Bargains Utilization	
	All Years	Post-1980
Year of Plea Bargaining Adoption	−0.344*	−1.324
	(0.181)	(1.052)
Constant	731.893*	2,689.913
	(359.738)	(2,104.830)
Observations	31	26
F Statistic	3.613* (df = 1; 29)	1.583 (df = 1; 24)
Note:		*p<0.1; **p<0.05; ***p<0.01