



# The Disappearing Trial

What does justice mean in a world with  
more guilty pleas and fewer trials?

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**To many, the idea of justice  
conjures up distinct images.  
The wood-panelled courtroom.  
The judge in his gown.  
A jury sat attentively.  
Two sides fighting for justice.  
Grandstanding speeches.  
We've all seen the films.**

## In reality, the trial is disappearing

Plea deals, or trial waiver systems, are growing at an incredible rate. It's true that they can offer a faster and sometimes more efficient approach, and this can help bring down waiting times and save victims of crime from having to relive painful experiences. These days, millions of cases are settled without a trial, and without all of the procedural protections that come with it.

Fair Trials has, together with international law firm Freshfields Bruckhaus Deringer, produced an in-depth report – The Disappearing Trial – which maps the spread of trial waiver systems across over 90 countries.

You can find the full report online at [www.fairtrials.org](http://www.fairtrials.org)

## A word about language

Plea bargaining. Trial waivers. Sentence reduction schemes. Cooperation agreements. Summary procedures. Plea and sentence agreements. Charge negotiations...

Whatever you call them, the trial as we know it is disappearing as countries find new ways to encourage people to give up their right to a trial by pleading guilty or confessing.

## What are we talking about?

In this document, we have chosen to use the term ‘trial waiver’. We’re using it broadly to represent the different terms in different systems but, technically speaking, we mean:

*“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.”*

## What’s wrong with trial waivers?

When used properly, trial waivers aren’t a bad thing.

They don’t represent a silver bullet for criminal justice challenges, but they can reduce waiting times, help to reduce pre-trial detention, are cheaper, and can protect vulnerable victims from having to relive their ordeals.

However, they can also come with drawbacks.

They have a place in criminal justice systems, but without safeguards, trial waivers can cause injustice:

- Innocent people can be persuaded to plead guilty: an estimated 20,000 innocent people are in US prisons alone, after taking a deal.
- Easier convictions can encourage over-criminalisation and drive harsher sentences.
- There can be an inequality of 'arms' and a lack of transparency where 'deals' are done by prosecutors behind closed doors.
- Public trust in justice can be undermined.

The use of trial waivers in place of a full trial raises a number of potential human rights challenges. Instead of being protected by the procedural safeguards that occur during trial, people accepting trial waivers give up their rights to have the case against them tested by an impartial court and to have actions of the police scrutinised. Without fair trial protections, you can end up with a stacked deck in favour of the prosecution.

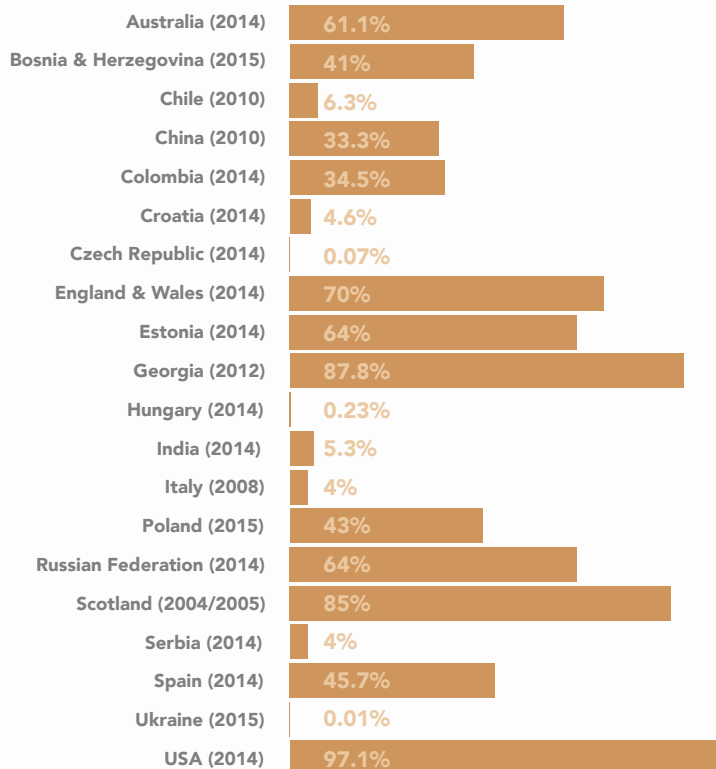
While trial waiver systems have developed and spread across the globe, the same cannot always be said for safeguards.

The dangers of trial waivers must be recognised. It is essential that legal systems with trial waivers are accompanied by effective safeguards that protect against unjust outcomes and maintain trust in criminal justice.

## How widespread are trial waiver systems?

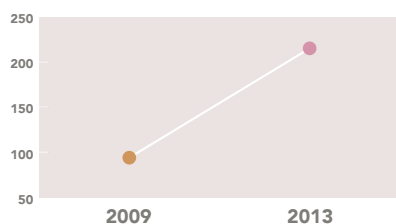
These kinds of systems have existed for centuries. They're not a new phenomenon, but their use is spreading. In some countries *most* convictions result from guilty pleas not trials: in the US, it's over 97%, in Georgia, it's 87%. Countries have been finding new ways to encourage defendants to give up the right to a trial and plead guilty.

This reliance on plea bargaining is growing, and it's time to wake up to this new reality of criminal justice and to agree ways to manage the risks.



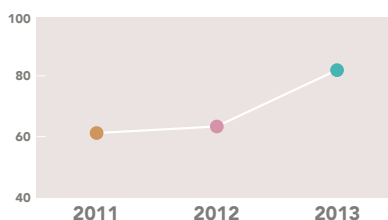
## Argentina

Number of cases disposed of using summary trial in the national federal criminal courts in the city of Buenos Aires



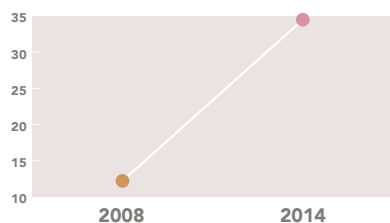
## China

Percentage of cases disposed of in the Basic People's Courts of Chongqing using the summary procedure



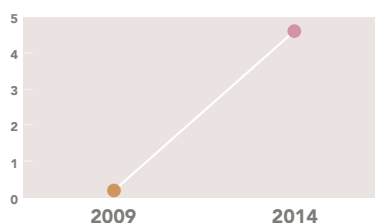
## Colombia

Percentage of cases resolved through trial waiver systems



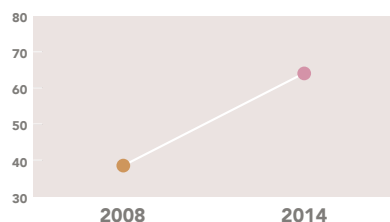
## Croatia

Percentage of cases resolved through trial waiver systems



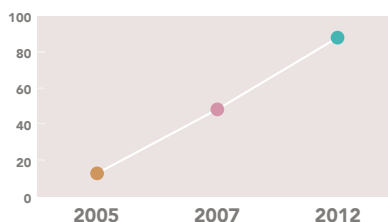
## Estonia

Percentage of cases resolved through settlement proceedings in the first instance criminal court



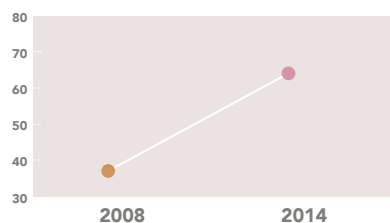
## Georgia

Percentage of cases resolved through trial waiver systems



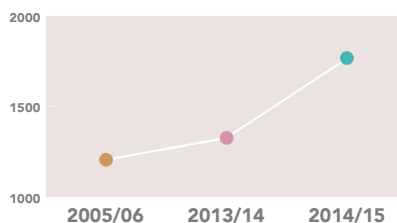
## Russia

Percentage of cases disposed of using an abbreviated trial procedure



## South Africa

Number of plea agreements concluded



## Date of introduction of trial waiver systems

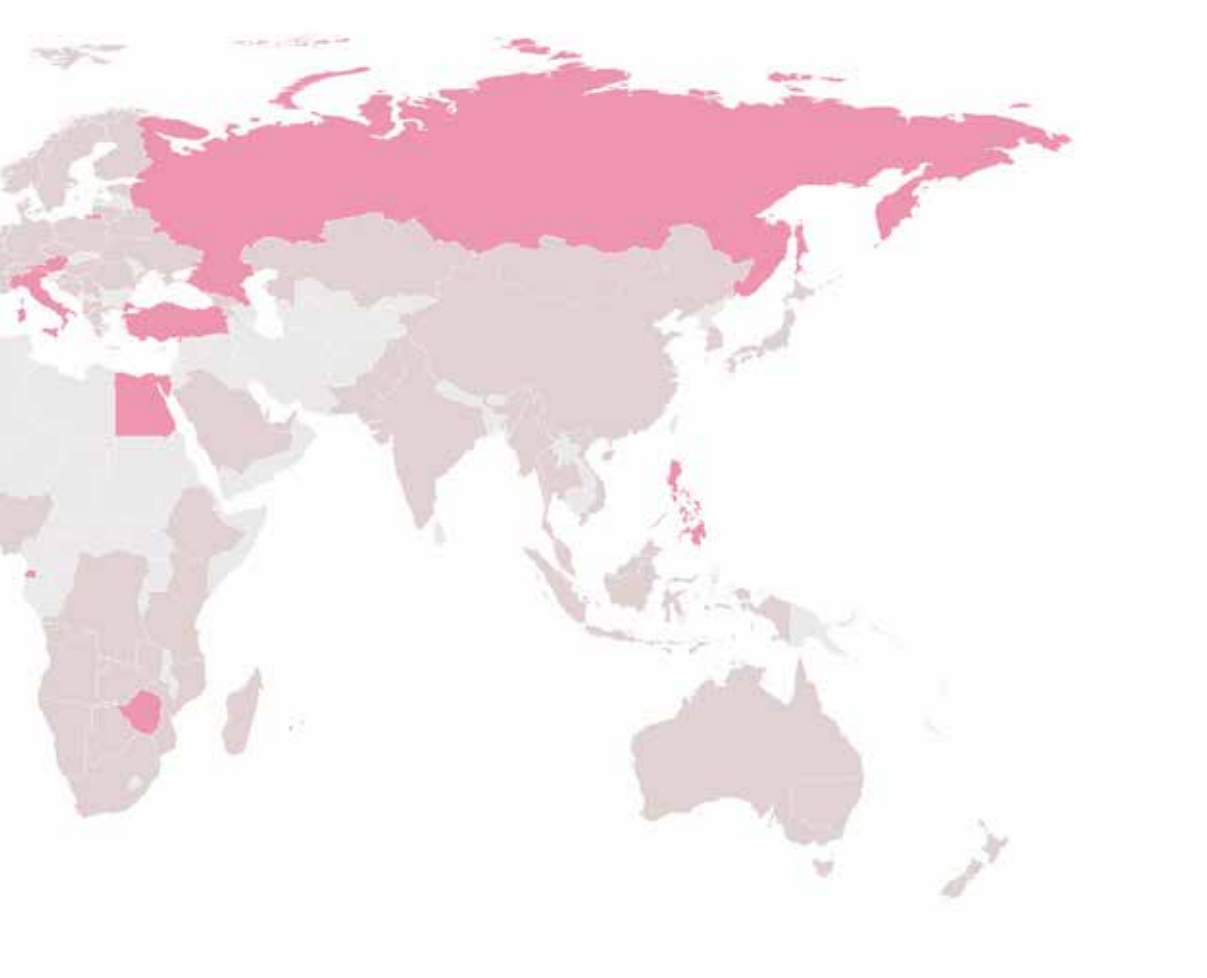
**19**  
countries

Austria  
Canada  
Cayman Islands  
Egypt  
England & Wales  
Equatorial Guinea  
Hong Kong  
Ireland  
Italy  
Jersey  
Mauritius  
Philippines  
Russian Federation  
Scotland  
Senegal  
Spain  
Turkey  
USA  
Zimbabwe



## **Pre-1990**

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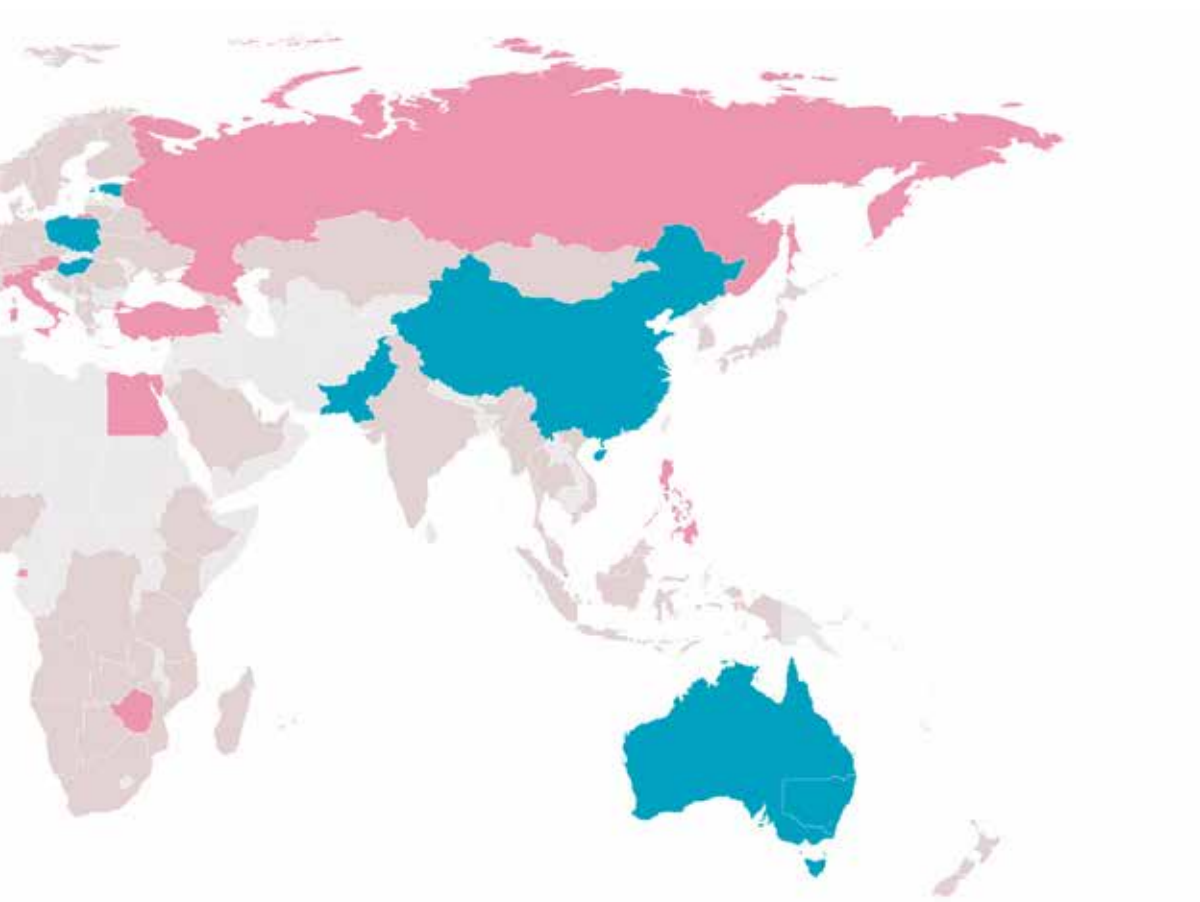
## Date of introduction of trial waiver systems

**13**  
countries

Argentina  
Australia (New South Wales)  
Bolivia  
Brazil  
China  
Costa Rica  
Estonia  
Guatemala  
Hungary  
Pakistan  
Peru  
Poland  
Singapore

## 1990 to 1999

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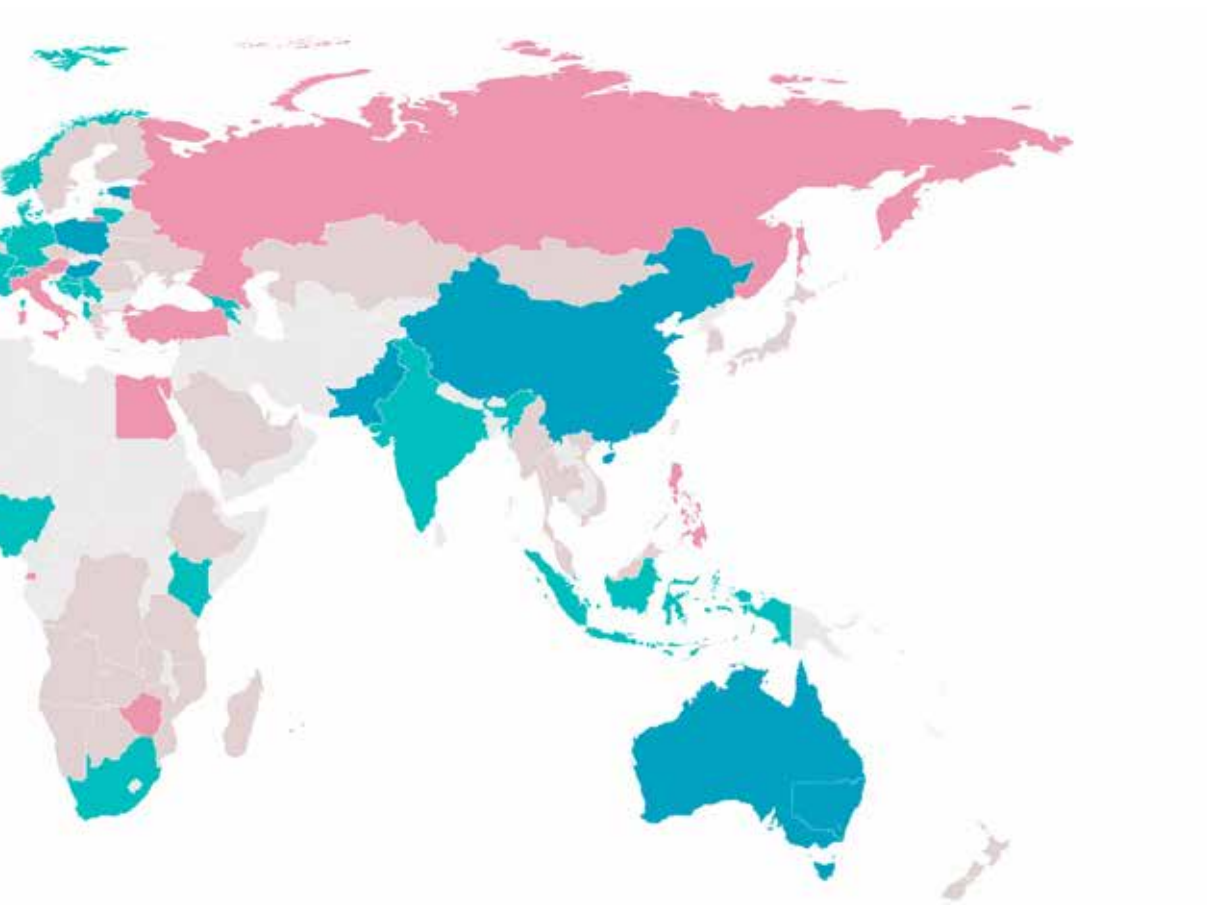


## Date of introduction of trial waiver systems

**22**  
countries

Albania  
Armenia  
Bosnia & Herzegovina  
Chile  
Colombia  
Croatia  
Denmark  
France  
Georgia  
Germany  
Iceland  
India  
Indonesia  
Kenya  
Lithuania  
Mexico  
Netherlands  
Nigeria  
Norway  
Serbia  
South Africa  
Switzerland

## 2000 to 2009

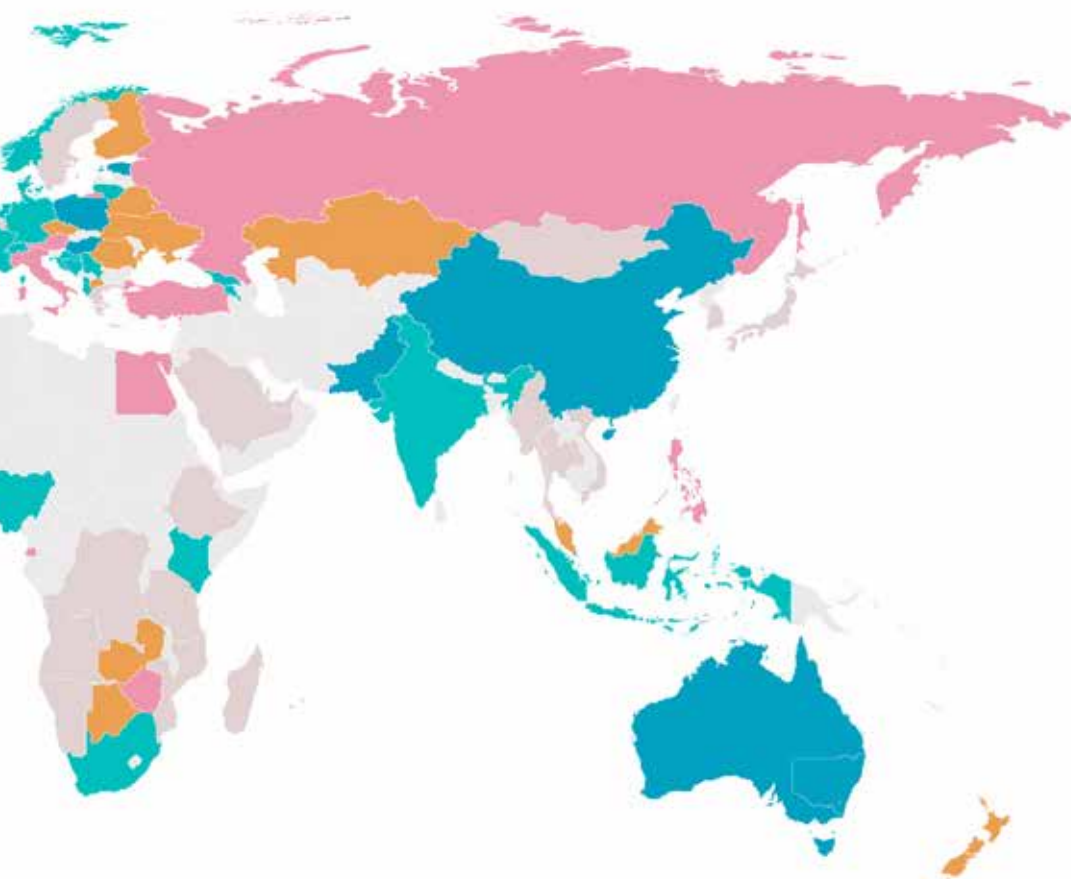


## Date of introduction of trial waiver systems

**12**  
countries

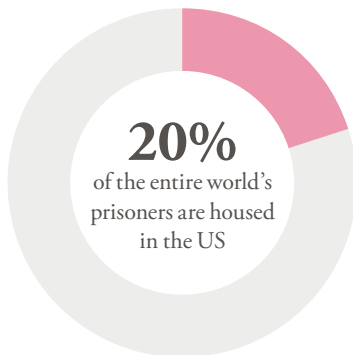
Belarus  
Botswana  
Czech Republic  
Finland  
Kazakhstan  
Luxembourg  
Macedonia  
Malaysia  
New Zealand  
Romania  
Ukraine  
Zambia

## 2010 to 2016



## Spotlight on US

It is well known that 20% of the entire world's prisoners are housed in the US. It has been suggested that as many as one in three Americans has a criminal record. As we've already seen, over 97% of federal cases in the US are settled through plea bargaining. It is surely no coincidence that US plea bargaining has made it possible to process huge quantities of cases quickly (without the need for a trial).

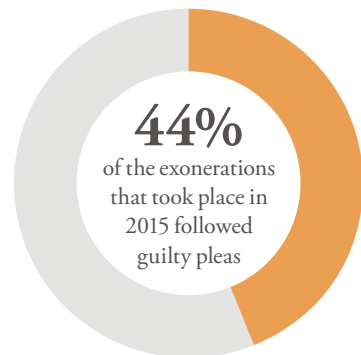


The trial waiver system in the US is remarkably unregulated. There are no legal limits on what can be negotiated between individual prosecutors and defendants. This even extends to the use of plea bargaining in cases involving juvenile defendants.

The US model for trial waivers has an impact beyond its borders: it has served at times as ideological inspiration for the adoption of similar trial waiver systems worldwide.

In Houston, Texas, hundreds of convictions following plea deals have been reopened in recent years. This followed the discovery that these were based on false positive results of unreliable roadside drug tests considered sufficient to establish probable cause to arrest, but not accurate enough to be used as evidence at trial due to high error rates. Despite their innocence, dozens of defendants accepted plea deals before the evidence was tested and have now been exonerated, with more exonerations likely to follow.

The National Registry of Exonerations for 2015 has shown that 44% of the exonerations that year followed guilty pleas. Innocent people are choosing to plead guilty, rather than 'gamble' with their chances of getting justice through trial.





## Case study: Mahdi Hashi

In 2012, Mahdi was arrested in East Africa, accused of being part of a terror group. He was stripped of his British citizenship and then rendered without legal process to the US, where he was held in solitary confinement for three years. He faced charges of material support to a terrorist organisation, which carried a potential sentence of 30 years to life.

After his three years of solitary confinement, he accepted a plea deal to a charge of conspiracy to provide material support for terror.

Juan Mendez, the then UN Special Rapporteur on Terror, said during an interview on Mahdi's case:

*“It seems to me that in terrorism cases, at least, that’s a very deliberate policy of the United States. I’ve seen cases in which people are held in solitary confinement for three or four years, and then they either go to trial or they plead – mostly they plead... And it seems to me that’s a coercive practice; it violates not only the right to be free from cruel, inhuman and degrading treatment, but also due-process rights in trial.”*

The prosecutor requested a sentence of 15 years, but the judge sentenced him to nine.

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# In the news

*Headlines from around the world*

THE WALL STREET JOURNAL

## The injustice of the plea-bargain system

Dec. 3, 2015

 <http://on.wsj.com/1N6Xtdr>

WASHINGTON POST

## Americans are bargaining away their innocence

Tim Lynch, Jan. 20, 2016

 <http://wapo.st/2ooVpJI>

THE CONVERSATION

## In plea bargaining, who really gets the bargain?

Nov. 14, 2014

 <http://bit.ly/2p8sObw>

POLITICO MAGAZINE

## How Rikers drove my innocent patient to plead guilty

Mary E. Buser, Oct. 6, 2015

 <http://politi.co/1PiTxuc>



THE INTERCEPT

## Three ways courts screw the innocent into pleading guilty

Natasha Vargas-Cooper, Nov. 7, 2014

 <http://bit.ly/2ooQYyg>

NEW YORK BOOKS

## Why innocent people plead guilty

Jed S. Rakoff, Nov. 20, 2014

 <http://bit.ly/1OD8rHb>

SAHARA REPORTERS

## The abuse of plea bargain in Nigeria

Peter Odia, June 23, 2011

 <http://bit.ly/2nYDKeV>

THE MARSHALL PROJECT

## Plea bargaining and the innocent

US District Judge John L. Kane, Dec. 26, 2014

 <http://bit.ly/2ol19OC>

## Cases of injustice



### Phillip Bivens, Bobby Ray Dixon and Larry Ruffin

Phillip, Bobby Ray and Larry spent most of their lives in prison due to coerced guilty pleas.

Under the threat of the death penalty, Phillip and Bobby Ray confessed to the murder and rape of a woman in Mississippi in 1979, and took plea bargains in exchange for life sentences and testifying against Larry at trial.

In 2010, over 30 years after their imprisonment, all three men were officially exonerated after DNA evidence proved that none of them had committed the crime.

Phillip, Bobby Ray and Larry are the most extreme example of how plea bargains can go wrong, but it happens on a smaller, but much more frequent scale, and it's not just in the US.



### Flavia Totoro

Flavia, an artist, was arrested at a public demonstration in Spain in 2011, together with eight more demonstrators. She was charged with assaulting a police officer. On the day of the trial, Flavia was offered a deal. As part of the deal, she and all the others accused would have to accept their guilt. In exchange, no one would go to prison. She was told by her lawyer that "she either plead guilty or all the others accused

would be at risk of being sentenced to imprisonment".

Despite having enough evidence to prove her own innocence at trial, she accepted her guilt to protect her fellow demonstrators. Flavia didn't know the other demonstrators, but she knew there was a risk that someone might be sentenced to prison if she maintained her innocence, a risk that she could not take.

## What is the international community doing about it?

Despite the widespread and growing use of trial waiver systems around the world and their potential impact on the rights of the accused and the rule of law, the international community has so far failed to address this phenomenon – continuing to treat the disappearing trial as the key to fair criminal justice systems.

A comprehensive framework for human rights protection in trial waiver systems is urgently needed.

A rare dissenting voice on trial waiver systems, the UN Special Rapporteur on Torture has said:

*“Promises of immunity or lighter sentences in exchange for confessions... are improper because they ultimately deprive a person of his or her freedom of decision.”*

## Safeguards we want to see

### Mandatory access to a lawyer

Some defendants are agreeing to waive their right to a trial without having had a chance to speak to a lawyer. For many it will be their first time in the criminal justice system. Lawyers know how to navigate what can be an incredibly stressful and confusing time.

### More disclosure

Many people, including in the Texan example (p.16), waive their right to trial without knowing the case against them. This means there is sometimes no scrutiny of the prosecution's case. People shouldn't have to make these life-changing decisions without seeing the evidence.

### Timing of agreements

In a lot of places, the earlier a defendant agrees to a trial waiver the better the deal they get. It increases the potential savings. However, the push for greater efficiency at greater speeds comes at the cost of procedural protections and increases the likelihood of coercion.

### Judicial oversight

Many countries already have some level of judicial scrutiny, but in others, including England & Wales, there's very little oversight by the court. Added judicial scrutiny can add a layer of transparency.

Judges could also be involved in negotiations, as in Singapore. There, any admissions made or contemplated in these meetings can't be used as evidence later if an agreement isn't reached. Judges can also review evidence to make sure that convictions aren't being imposed on the basis of an unreliable confession or guilty plea alone.

### Enhanced recording/ data collection

Keeping a better record of the negotiations would also improve transparency. Shining a light on deals done by prosecutors behind closed doors would help the public to trust the system and the outcome, and could help avoid claims of corruption. Electronic recording of negotiations can also help to protect vulnerable suspects, such as children, people with mental disabilities, and people without lawyers, in order to help courts ensure that decisions to waive trial rights are truly voluntary and knowing.

### Limitations on benefits

Having a huge gulf between the sentence if you go to trial and the sentence you get for a guilty plea can distort how people act. This has been recognised in Germany, where courts and legislators have identified that a significant sentence differential between agreement and trial can act as an 'illegal influence' on the defendant's free will.



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