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Modern Justice and the Bill of Rights

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The first 10 Amendments to the United States Constitution, known throughout the world as the Bill of Rights, are one of America's most impressive accomplishments. Among these rights are celebrated criminal trial rights, including the privilege against self-incrimination, the right to call defense witnesses and cross-examine prosecution witnesses, the right to counsel, and the right to a speedy and public trial by an impartial jury. These rights, embraced by all Americans, have a special connection to Virginia. They were drafted by James Madison who drew his inspiration from the Virginia Declaration of Rights.

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More than 200 years since their enactment, and untouched by formal amendment, the trial rights enshrined in the Bill of Rights continue to be a source of pride for the American people. Yet, the modern criminal justice system could not be more different from the world Madison envisioned. Although there is remarkably little discussion of this fact in the media, this country, founded to preserve liberty, currently locks up its own people at a rate that is unprecedented in our own history and unmatched in the world. State and federal governments incarcerate more than 2 million Americans. Another 5 million are on probation or parole. Altogether, about one in every 34 American adults — or almost 3 percent of the adult population — lives under some form of correctional supervision. This ballooning correctional population is the result of an ever-increasing number of criminal laws, including severe sentencing provisions and sweeping drug prohibitions, all passionately embraced by "tough-on-crime" politicians (Republicans and Democrats), and vigorously enforced by prosecutors and judges.

The Bill of Rights seems irreconcilable with America's embrace of mass incarceration. Even a country as wealthy as ours cannot possibly find enough courtrooms, judges and jurors to conduct the hundreds of thousands of jury trials mandated by the Constitution's text. The solution to this conundrum is a more recent product of American ingenuity, plea bargaining. The primary attribute of a plea bargain is that the defendant waives the trial rights described above, giving up the opportunity to test the prosecution's evidence in a jury trial. Instead, the accused admits guilt (or pleads "no contest") in a pro forma proceeding that takes minutes rather than weeks or days. In exchange for this concession, prosecutors reduce the charges or agree to a lighter sentence. The courts long ago blessed plea bargains as a form of individual choice, perfectly consistent with the Constitution.

The sheer volume of criminal cases coursing through the system places enormous pressure on prosecutors, judges and defense attorneys to resolve cases through guilty pleas. These actors, in turn, put pressure on defendants to plead guilty. As a consequence, the typical resolution of a criminal case looks a lot more like a used car sale than the glamorous trials in television shows, with similar risks of error. The recent wave of exonerations of falsely convicted prisoners through DNA testing demonstrates that this pressure causes even innocent people to plead guilty. A New York Times profile of overburdened courts in the Bronx highlighted another sad fact: for defendants who are jailed pending trial, pleading guilty is often a shorter route to freedom than acquittal after trial.

Plea bargains, and not the Bill of Rights, reign supreme in modern American criminal justice. About 95 percent of convictions in state and federal court result from guilty pleas. The startling imbalance between guilty pleas and trials led none other than the Supreme Court of the United States to acknowledge in a recent case that plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system."

It is hard to know what our country's Founding Fathers would make of the modern American criminal justice system. A lot has changed in the past 225 years. Still, it is difficult to believe that James Madison and his colleagues would have gone through all the trouble of placing the trial rights at the heart of the Bill of Rights if they knew that the invocation of those rights would be the (rare) exception rather than the rule. Madison and his compatriots might be impressed with the efficiency of our assembly-line justice system, but they would certainly recoil at the fact that an essential ingredient of that system is the waiver of the very constitutional rights that were intended to define us as a nation.

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