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LAND WITHOUT PLEA BARGAINING: HOW THE GERMANS DO IT

*John H. Langbein**†

As the death grip of adversary procedure has tightened around the common law criminal trial, trial has ceased to be workable as a routine dispositive proceeding. Our criminal justice system has become ever more dependent on processing cases of serious crime through the nontrial procedure of plea bargaining. Unable to adjudicate, we now engage in condemnation without adjudication. Because our constitutions guarantee adjudication, we threaten the criminal defendant with a markedly greater sanction if he insists on adjudication and is convicted. This sentencing differential, directed towards inducing the defendant to waive his right to trial, makes plea bargaining work. It also makes plea bargaining intrinsically coercive. I have elsewhere had occasion to point to the host of irremediable deficiencies — moral, juridical, practical — that inhere in the plea bargaining system.[1]

Plea bargaining is such a recent[2] and transparent evasion of our cherished common law tradition of criminal trial that its well-meaning practitioners and proponents feel a deep need for reassurance that what they are doing is not so bad as it looks. Rather lately, apologists for American plea bargaining have been sounding a theme purportedly derived from comparative law. As a corollary to the proposition that plea bargaining is not really so bad, the claim is advanced that everybody else does it too. Plea bargaining is said to be universal, at least in the legal systems of advanced industrial countries.[3]

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1. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978), expanded in a revision in THE PUBLIC INTEREST, Winter 1980, at 43.

2. *See* Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979), abridged as Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOCY. REV. 211 (1979); Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOCY. REV. 261 (1979).

3. *E.g.*, McDonald, *From Plea Negotiation to Coercive Justice: Notes on the Respecification of a Concept*, 13 LAW & SOCY. REV. 385, 386 (1979); Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 264-79 (1977).

The present Article demonstrates the error of this universalist theory of plea bargaining by showing how and why one major legal system, the West German, has so successfully *avoided any form or analogue of plea bargaining in its procedures for cases of serious crime*. The German criminal justice system functions without plea bargaining not by good fortune, but as a result of deliberate policies and careful institutional design whose essential elements are outlined in Part I. Part II addresses the American claims that a clandestine plea bargaining system lurks behind veils of German pretense.

By way of preface we should say a word about the raison d'être of American plea bargaining, which is after all nothing more than simple expediency. We indulge in this practice of condemnation without adjudication because we think we have to, not because we want to. We know that plea bargaining lacks foundation in our constitutions and in our legal traditions.[4] Even among the proponents of plea bargaining, few indeed would contend that it is an intrinsically desirable mode of rendering criminal justice. The largest claim for plea bargaining is that it may approximate (although it cannot equal) the outcomes of true adjudication, but at lower cost. The Supreme Court has been mercifully frank in explaining why it feels obliged to treat plea bargaining as "an essential component of the administration of justice. . . . If every criminal charge were subjected to a full-scale trial, the States and the federal government would need to multiply by many times the number of judges and court facilities."[5]

The reasons for our latter-day dependence on plea bargaining are also tolerably well understood, although much of the detail of the historical development remains to be traced out. Over the two centuries since the Americans constitutionalized jury trial, we have transformed it, submerging it in such time-consuming complexity that we can now employ it only exceptionally. Eighteenth-century criminal jury trial was a summary proceeding, still largely judge-directed and lawyer-free; the law of evidence lay all but entirely in the future; the extended voir dire was unknown; appeal was as a practical matter unavailable.[6] Felony trials took place with such remarkable dispatch that judges actually discouraged defendants from

4. *See* Alschuler, *supra* note 2; Langbein, *supra* note 2. *See also* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

5. Santobello v. New York, 404 U.S. 257, 260 (1971).

6. This point is developed in Langbein, *supra* note 1, at 9-11; the historical evidence is presented in Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263 (1978). *See also* the summary in Langbein, *supra* note 2, at 262-65.

tendering guilty pleas.[7] Plea bargaining is now "an essential component of the administration of justice" because what the Supreme Court calls "full-scale trial"[8] (meaning of course jury trial) has become so complicated. The vast elaboration of adversary procedure and the law of evidence has made our constitutionally guaranteed trial procedure so costly that it can be used in only a tiny fraction of cases of serious crime.

I. THE GERMAN WAY OF TRIAL[9]

The Germans do without plea bargaining because they do not need it. German criminal procedure has resisted adversary domination and exclusionary rules of evidence. Trial procedure has been kept uncomplicated and rapid. Accordingly, all the reasons of principle that would (and in former times did) incline us to try our cases of serious crime can still be felt and obeyed in Germany.

A. *Routine Nonadversary Trial*

German trial courts for cases of serious crime come in two varieties, each composed of a panel of professional judges and laymen who together deliberate and decide all issues of culpability and sentence. The more serious cases are tried before a court of three professional judges and two laymen;[10] the court that deals with lesser imprisonable offenses and with many nonimprisonable offenses[11] sits with one professional and two laymen.[12] In both courts a two-thirds majority is necessary to convict and to sentence. Accordingly, the laymen can veto the professionals, and in the lesser court override them.[13] The laymen are selected and assigned for service through a rigorously randomized scheme paralleling that used to assign caseloads to professional judges and are subject to pretrial challenge only on the narrow grounds that may disqualify the professional judges.[14] At the conclusion of a trial before one of these so-called

7. Langbein, *supra* note 6, at 277-79.

8. Santobello v. New York, 404 U.S. 257, 260 (1971).

9. This account follows J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 61-86 (1977), where the relevant sections of the Code of Criminal Procedure (STRAFPROZESSORDNUNG) [hereinafter abbreviated as STPO, following German convention] are translated or summarized and discussed.

10. The grosse Strafkammer.

11. The Schöffengericht.

12. For details on the division of business among the courts, see Casper & Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135, 141-43 (1972).

13. *See* J. LANGBEIN, *supra* note 9, at 61-63, 79-80.

14. *Id.* at 141-42 & n.1.

"mixed" courts (mixing professional judges and laymen), the court deliberates and decides on verdict and sentence simultaneously. The court's judgment discloses its findings of fact and its applications of law in a reasoned opinion written by a professional judge. Both defense and prosecution have a liberal right to seek appellate review on issues of sentence as well as liability.[15]

Virtually all of the features of German court structure that strike an Anglo-American observer as distinctive have the effect of accelerating the conduct of trial by comparison with our own arrangements. Because it is so difficult to identify and to remedy error behind the one- or two-word verdict of an Anglo-American jury, we have concentrated over the last two centuries on devising prophylactic procedures to prevent error — for instance, the voir dire of prospective jurors, the vast exclusionary apparatus of the law of evidence, and the bewildering technique of multiple contingent judicial instructions to the jury ("If you find such-and-such, then . . ."). By contrast, the German system has no analogue to voir dire or to the law of jury control, despite having laymen sit on every trial for serious crime and despite extending the laymen's authority to matters of sentence as well as guilt determination. Professional judges speak to points of law only when legal issues become relevant in deliberations; important legal rulings show up in the written judgment and are available for scrutiny on appeal. The Germans also believe that the presence of professionals in deliberations and the requirement of written findings of fact and law are sufficient safeguards against the misuse of potentially prejudicial varieties of evidence; accordingly, the general principle is that virtually all relevant evidence is admissible, and time is not spent arguing about exclusion and otherwise manipulating evidence in the familiar Anglo-American ways.[16]

The nonadversarial character of the proof-taking further accelerates the oral public trial. To use our parlance, the presiding judge both "examines" and "cross-examines," after which he invites his fellow judges (professional and lay), the prosecutor, the defense counsel, and the accused to supplement his questioning. In examining, the presiding judge works from the official file of the case, the dossier, which contains the pretrial statements and public records gathered by police and prosecutors. These officials work under a statutory duty to investigate exculpatory as well as inculpatory evidence. This duty is reinforced in the pretrial phase by giving to the

15. *Id.* at 80-85.
16. *Id.* at 66-70.

defense liberal rights to inspect the dossier, together with the right to motion the prosecution to investigate (at public expense) any defensive claims and evidence that might have been overlooked.[17]

This thorough, open, and impartial pretrial preparation effectively eliminates surprise and forensic strategy from the trial. It also enables the presiding judge who determines the sequence of witnesses to control for relevance and to minimize needless duplication of trial testimony. Thus, the court that must decide the case conducts its own trial inquiry in a businesslike and undramatic fashion, overseen by prosecution and defense.[18] Nonadversarial procedure recognizes no party burdens of proof. German law adheres to a standard of proof not materially different from our beyond-reasonable-doubt;[19] but without the system of adversary presentation of evidence, there is no occasion to think of the "prosecution case" (or, indeed, of the defendant's burden of proving an "affirmative defense"). The only burden is the court's. In order to convict, the court must satisfy itself of the truth of the charges after taking the relevant evidence, including that requested by prosecution and defense.

A German trial begins with the examination of the accused. The presiding judge must instruct him about his right to remain silent,[20] but for a variety of reasons the typical German accused feels little incentive to invoke his privilege against self-incrimination. In the Anglo-American system of adversary presentation of evidence and party burdens of poof, the accused is effectively silenced for the duration of the prosecution case. Our rule admitting past conviction evidence only if the accused speaks in his own defense further encourages him to rely wholly upon the intermediation of counsel.[21] German procedure, being free of adversary domination of the proofs and of exclusionary rules of evidence, has a privilege against self-incrimination that is not overused. The German trial court thus typically hears from the accused, who is almost always the most efficient testimonial resource. This sequence is also an important time-saver:

17. *See* Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1563 (1978), and authorities cited therein at 1563 nn.52-53.

18. The court's discretion to refuse to hear witnesses requested by prosecution and defense is narrowly circumscribed. STPO § 244. The so-called rule of orality obliges the court to call major witnesses (subject to a few exceptions), assuring confrontation with the accused at trial.

19. *See* J. LANGBEIN, *supra* note 9, at 78-79.

20. *See id.* at 72.

21. *See* Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 527 (1973); J. LANGBEIN, *supra* note 9, at 73.

by speaking first with the accused, the court establishes at the outset of the trial precisely which (if any) matters charged by the prosecution are genuinely contested, thus limiting the range and depth of the subsequent proof-taking.

The accused frequently confesses some or all of the charges against him, and in Part II of this Article I shall deal with suggestions that such confessions evince a form of plea bargaining. The important point for present purposes is that German procedure knows no guilty plea for cases of felony or grave misdemeanor. (For lesser offenses there is an analogue to our guilty plea, the penal order procedure discussed below.) By confessing to a major offense, an accused does not waive trial. Confession affects but does not abort the criminal trial. Confession shortens the trial by enriching the proofs but does not relieve the court of its duty of independent adjudication — its duty to satisfy itself of the accused's guilt beyond reasonable doubt.

In an empirical study of the German mixed-court system conducted in 1969-1970, Gerhard Casper and Hans Zeisel quantified trial duration data from a careful sample of about 600 cases. They found that "roughly one-half of all criminal trials (47 per cent) last no longer than one-third of a day, or approximately two hours. The average . . . duration of a [lesser court] trial is one-third of a day or about two hours, of a [major court] trial one day . . . ."[22] My mission in what I have thus far said about German criminal procedure has been to make these astonishing trial duration figures comprehensible to an American readership. For the rapidity of trial procedure is the essential factor that explains the absence of plea bargaining in Germany. German trial procedure, unlike American, has retained an efficiency that makes trial practical for every case of imprisonable crime.

The rapidity of German trial procedure is not, of course, the only important factor; another is that crime rates in the United States are higher than in Germany — four times higher is a good rule of thumb.[23] If the Germans had our levels of serious crime, they would

22. Casper & Zeisel, *supra* note 12, at 149-50 (1972). The term rendered above as "lesser court" is in the original Schöffengericht; as "major court," grosse Strafkammer. *See* text at notes 10-12 *supra*.

23. Population-adjusted figures for the following major offenses are given in J. LANGBEIN, *supra* note 9, at 110-11; the figures show the ratio of these offenses in America to those in Germany: murder 4.45; rape 2.38; robbery 6.63; aggravated assault 2.79; auto theft 4.64. For an indication of the difficulty in achieving precision in such figures see Arzt, *Responses to the Growth of Crime in the United States and West Germany: A Comparison of the Changes in Criminal Law and Societal Attitudes*, 12 CORNELL INTL. L.J. 43, 45 (1979).

find it much more costly than they now do to operate a system in which all cases of very serious crime go to full trial. They would almost certainly need to divert more of their caseload into the nontrial channels discussed below than they now do.[24] But the Germans would not need a sentence differential in order to redraw their trial/nontrial line at some higher point on the scale of gravity of offenses; and within the sphere of cases deemed appropriate for trial in such altered circumstances, all the factors of procedural dispatch previously discussed would continue to spare the Germans the need to subvert their trial procedures by plea bargaining.

Crime rates alone neither explain nor justify the American resort to plea bargaining. Plea bargaining has been documented in England[25] where crime rates are closer to German than to American levels;[26] the constant factor in both England and the United States is, of course, adversary criminal procedure.

B. *The Rule of Compulsory Prosecution*

Not only can the Germans do without plea bargaining, they want to do without it. That is the lesson of the German scheme for eliminating prosecutorial discretion in cases of serious crime.

Section 152(II) of the Code of Criminal Procedure prescribes the celebrated rule of compulsory prosecution (*Legalitätsprinzip*) that has been in force for a century.[27] In the field of serious crime the German prosecutor must prosecute "all prosecutable offenses, to the extent that there is a sufficient factual basis."[28] Section 153(I) of the Code permits the counterprinciple of discretionary nonprosecution (*Opportunitätsprinzip*) but only for misdemeanors (*Vergehen*) and then only if the culprit's guilt can "be regarded as minor" and "there

24. For the suggestion that this process is underway see Arzt, *supra* note 23.

25. Baldwin & McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOCY. REV. 287 (1979); J. BALDWIN & M. MCCONVILLE, NEGOTIATED JUSTICE: PRESSURES TO PLEAD GUILTY (1977).

26. English crime rates are actually lower than German for the three gravest offenses for which the data is unmistakably comparable. With the American-to-German ratios in note 23 *supra*, compare the population-adjusted ratios for American-to-English crime rates for the same year (1975); murder 9.25; rape 12.47; robbery 9.48. U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES: 1975, at 49 (1976); HOME OFFICE, CRIMINAL STATISTICS, ENGLAND AND WALES: 1976, at 358-59 (1977). (The population adjustment for England is based on the population figure in CENTRAL STATISTICAL OFFICE, MONTHLY DIGEST OF STATISTICS 16 (August 1979).)

27. An outstanding account of the historical development and modern scope of the rule of compulsory prosecution appears in T. WEIGEND, ANKLAGEPFLICHT UND ERMESSEN: DIE STELLUNG DES STAATSANWALTS ZWISCHEN LEGALITÄTS- UND OPPORTUNITÄTSPRINZIP NACH DEUTSCHEM UND AMERIKANISCHEM RECHT (1978). For an English-language account, see Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974).

28. STPO § 152(II).

is no public interest in prosecuting."[29] Consequently, the German law requires that all felonies (*Verbrechen*) and all misdemeanors that cannot be excused under the two statutory criteria of pettiness must be prosecuted whenever the evidence permits.[30]

The strongest incentives are created to enforce this rule of compulsory prosecution. If the prosecutor determines not to prosecute an offense that is subject to the rule — whether for want of sufficient factual basis or on grounds of legal insufficiency — the victim or kin may obtain departmental review of the determination; if the prosecutor's superiors uphold his decision, the citizen may appeal to the courts in a proceeding to compel prosecution. The prosecutorial corps is a career service with strictly meritocratic promotion standards. Prosecutors do not want their personnel records blotted with citizen complaints, especially successful complaints. Prudence counsels them to resolve doubts in favor of prosecution and trial.[31]

A crucial corollary of this system is that the form of plea bargaining called charge or count bargaining in American practice can have no counterpart in German procedure. The prosecutor, who is duty-bound to prosecute in every case, lacks authority, for example, to offer to reduce the charge in return for a concession of guilt. The rule of compulsory prosecution requires him to take the case to trial in the strongest and most inclusive form that the evidence will support; if he does not, the court itself is empowered to correct his error.[32] So strict is the rule that it prevents the Germans from employing that endemic device of Anglo-American prosecutorial practice, the grant of immunity for state's evidence.[33]

Obviously, the German rule of compulsory prosecution of serious crime is no happenstance. The statutory standards, limitations, and remedies have been meticulously designed to fit the institutional structure and to serve the larger policies of the German criminal justice system. The rule is meant to achieve ends that are immensely important in the German tradition: treating like cases alike, obeying faithfully the legislative determination to characterize something as a

29. StPO § 153(I).

30. There are a few statutory exceptions, of no quantitative importance, collected in Langbein, *supra* note 27, at 458 n.48.

31. For a discussion of these incentives to prosecute in tenable cases see *id.* at 448-50, 463-67.

32. StPO § 206, *discussed in* J. Langbein, *supra* note 9, at 9. *See also* StPO §§ 155(II), 264-66, *discussed in* J. Langbein, *supra* note 9, at 66-67.

33. Proposals to adopt the Anglo-American practice are periodically made and defeated in Germany. *See* the discussion and authorities cited in T. Weigend, *supra* note 27, at 35 & n.116; Arzt, *supra* note 23, at 49 n.20.

serious crime, preventing political interference or other corruption from inhibiting prosecution, and more.[34] The wisdom of these policies is not lost on Americans, but we lack the procedural institutions — above all a workable trial procedure — that would allow us to have a comparable rule of compulsory prosecution. As long as we depend upon plea bargaining to resolve our caseloads, we must give our prosecutors their bargaining chips.

Toward the bottom of the range of crimes so serious that they are subject to the rule of compulsory prosecution are those for which the sanction of imprisonment either is not allowed at all or would be inappropriate in the particular case. Some of these offenses are relatively common, including various smaller larcenies and serious motor vehicle offenses. In these cases prosecution may occur under a nontrial procedure called the penal order (*Strafbefehl*); here, therefore, compulsory prosecution does not mean compulsory trial. Immediately below in Part II, I shall describe the working of this short-form penal order procedure, which has been a main subject of American efforts to find plea bargaining analogues in German practice. I shall also take up in Part II certain facets of the German handling of petty crime — those misdemeanors that fall beneath the statutory reach of the rule of compulsory prosecution. For although the proposition that I am addressing is that German criminal procedure functions without plea bargaining in cases of serious crime, analogues drawn from German procedures for handling petty crime have a way of turning up in American critiques of the German system without due regard to the bright line that is drawn in Germany between the procedural standards appropriate to serious and to petty crime.

II. Confusions with Plea Bargaining

German law forbids plea bargaining, and German legal professionals of all sorts — judges, prosecutors, academics, and (most importantly) defense counsel — consistently maintain that the law is obeyed. The disdain that American plea bargaining evokes in Germany is not confined to legal circles. Even in the ordinary press, American plea bargaining is regarded with astonishment bordering on incredulity.[35]

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34. Langbein, *supra* note 27, at 448-50.

35. *See id.* at 457 n.44:

> Plea bargaining is all but incomprehensible to the Germans, whose ordinary dispositive procedure is workable without such evasions. In the German press the judicial procedure surrounding the resignation of Vice President Agnew was viewed with the sort of wonder normally inspired by reports of the customs of primitive tribes. "The resignation

So much is, I believe, conceded even by the American observers who purport to discern plea bargaining analogues in German practice. We can distinguish two main themes in this American writing. The more charitable critique is what we might call the delusion thesis: The Germans know not what they do; if they were to analyze certain of their procedures correctly, they would find that they have not eliminated plea bargaining but only concealed it from themselves. The harsher form of American critique is the deception thesis: German prosecutors and courts knowingly engage in plea bargaining, thus lying and lawbreaking.

Two facets of German criminal procedure inspire most of this critique, the nontrial penal order procedure and the use of confession evidence in trial procedure. These we now examine.

A. *Penal Order Procedure*

The rule of compulsory prosecution manifests itself in the requirement of compulsory trial, we have said, whenever prosecution may result in imprisonment. For cases of misdemeanor in which imprisonment is not in question, German law permits the penal order procedure, an alternative procedure that is both nontrial and concessionary. I have elsewhere called this procedure "the German guilty plea."[36] Penal order procedure lacks, however, that terrible attribute that defines our plea bargaining and makes it coercive and unjust: the sentencing differential by which the accused is threatened with an increased sanction for conviction after trial by comparison with that which is offered for confession and waiver of trial.

Penal order procedure is meant to be used in uncomplicated cases of overwhelming evidence — for instance, against the shoplifter caught-in-the-act or the drunk driver whose blood sample incriminates him. The Code of Criminal Procedure authorizes the prosecutor to prepare the penal order, which takes the form of a draft judgment of the lowest criminal court. After the prosecutor presents the draft and the official file to the court, the judge routinely approves and issues the order without a hearing or serious consideration of its merits.[37] The order speaks as a provisional judgment of the court: "Unless you object by such-and-such date, you are hereby

occurred as part of a 'cow-trade,' as it can only in the United States be imagined." Badische Zeitung, Oct. 12, 1973, at 3, col. 2.

36. Langbein, *supra* note 27, at 455.

37. "A judge in Hamburg told me that he could review 70 *routine* cases in fifteen minutes (shoplifting, for instance, or riding a subway without a ticket), an average of one case every 13 seconds; more attention is obviously paid to unusual cases." Felstiner, *Plea Contracts in West Germany*, 13 LAW & SOCY. REV. 309, 312 (1979) (emphasis original).

sentenced to such-and-such criminal sanction(s) on account of such-and-such conduct which offends such-and-such criminal proscription(s)." The document instructs the accused that if he makes a timely objection (within one week) he is entitled to a full criminal trial. If he does object, the penal order becomes nugatory and an ordinary trial will take place as though the penal order had never issued.

Two major aspects of penal order procedure distinguish it from American plea bargaining: the limitation to nonimprisonable misdemeanors and the absence of a sentencing differential. The former is explicit in the statute, and we need hardly belabor the contrast with American practice, where plea bargaining is routine for felonies and serious misdemeanors.

However, the statute does not by its terms prevent the imposition of a higher sentence on an accused who declines a penal order and is thereafter convicted at trial. Such a prohibition would collide with important principles of German criminal procedure — the prosecutor's duty not to recommend a sentence at trial until he has heard all the evidence adduced there, and the trial court's responsibility to inform itself similarly before imposing sentence. Thus, it remains open to the prosecutor to decide that the case appears more serious after trial than when he proposed the rejected penal order, and accordingly to recommend a higher sentence. He would, however, have to substantiate that view in order to persuade the court; and the cases in which prosecutors initially employ penal order procedure are just those relatively uncomplicated ones in which it would be hardest to make out such a claim, cases in which there will seldom be any incriminating evidence adduced at trial beyond that already known to the prosecutor (and so recorded in the dossier) at the time of the issuance of the rejected penal order.

For this "German guilty plea" to support a German plea bargaining system, prosecutors would have to recommend and courts would have to impose such increased penalties in rejected penal order cases *with sufficient frequency to achieve the necessary deterrent effect*. The American sentencing differential works by threat: "concede guilt and accept X penalty, or go to trial and risk X-plus." In the form of plea bargaining styled "explicit," the prosecutor delivers the threat in negotiations with the accused or his counsel. In so-called "implicit" plea bargaining, the differential is nonnegotiated. In either case the system depends upon a widespread understanding of the existence of the differential. The deal or tariff must be communicated to the accused, at minimum by his defense counsel, and

sometimes by the prosecutor or judge as well. Happily for the task of sensible researchers, a plea bargaining system must leave unmistakable traces in the work of the legal professionals. Even where, as for example, in contemporary England, official ideology has been until lately loath to acknowledge the existence of plea bargaining, researchers have been able to document regular patterns of sentencing differential from interviews with numerous accused and defense counsel.[38]

So far as I am aware, no one has even disputed the proposition that it would violate German law for prosecutors or judges to attempt to institute such sentencing differentials. Further, so far as I am aware, every American investigator who has explored the German practice in interviews with German legal professionals — *including defense counsel* — has found complete adherence to the position that no such sentencing differential exists.[39] The how-to-do-it handbooks for German defense counsel cover penal order practice without a hint of any sentencing differential that counsel might advise about or exploit,[40] a marked contrast to American literature of this genre. A real insight of the last decade's plea bargaining scholarship in the United States has been to show how extensively the plea bargaining system depends upon the cooperation and activity of defense counsel, and how clearly defense counsel finds it in his own interest to disclose — indeed exaggerate — the importance of his role.[41] Americans who think they find a plea bargaining system in German penal order practice have never reconciled their claim with the statements of German defense counsel that there is no sentencing differential for counsel to communicate, manipulate, or complain about.

In 1978 a pair of American coauthors did point to what they called "evidence"[42] of a sentencing differential in the penal order system: a remark in Bruns's treatise on sentencing law that penal orders are "often increased" (*oft erhöht*) following conviction at

38. *See* sources cited in note 25 *supra*.

39. *See, e.g.*, the remarks of Felstiner, *supra* note 37, at 317, 319-20.

40. The leading German work is H. DAHS, HANDBUCH DES STRAFVERTEIDIGERS (4th ed. 1977). The advantages that the author identifies for the accused in accepting a penal order are entirely of the "process cost" variety. He speaks of the emotional burden of defending criminal charges through all levels of trial and appeal, the time that elapses, the publicity, the injury to reputation, and the "moral and economic ruin" thereby occasioned. *Id.* at 558. There is no mention of sentencing leniency as a quid pro quo for accepting a penal order. A similar treatment appears in H. SCHORN, DER STRAFVERTEIDIGER 183 (1966).

41. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975).

42. Goldstein & Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570, 1574 (1978).

trial.[43] Bruns, however, makes no attempt to document this assertion. His only authority, on which he evidently expanded, is a complaint uttered in a law review article a quarter century ago (at the dawn of the routinization and expansion of the modern penal order system) by an appellate judge who suspected trial courts of engaging in this forbidden practice.[44]

Lamentably, the coauthors who relied upon Bruns's remark did not discuss the information in the remainder of Bruns's paragraph. Bruns there points out that the principal appellate case on the question of increased sentences in rejected penal order cases (decided in 1966) requires that the grounds for increasing a sentence beyond that recommended in the rejected penal order be clearly set forth in the trial court's judgment.[45] Bruns then endorses the views of a contemporary commentator on the 1966 case, who developed the court's reasoning and statutory interpretation to show that the only permissible ground for increasing or decreasing a sentence proposed in a rejected penal order was the appearance at trial of evidence not indicated in the pretrial dossier when the rejected penal order issued.[46] Since the American coauthors admit that a punitive sentencing differential would be illegal and a ground for reversal on appeal,[47] what is left of their claim is the notion that the first instance courts — despite the modern requirement that they state reasons for increased sentences — might be disobeying the law and imposing sentencing differentials so stealthily that neither defense counsel nor the appellate courts (staffed exclusively with former first instance judges) could detect it.

More recently, the American investigator Felstiner examined this question afresh in interviews with a cross section of German "judges, prosecutors, and academics," who persuaded him that "defendants are . . . not penalized for rejecting a penal order and insisting upon a trial."[48] Felstiner points out how the mechanics of penal order practice reinforce this conclusion:

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43. *Id.* at 1575 n.18 (citing H. BRUNS, STRAFZUMESSUNGSRECHT 607 (2d ed. 1974)).

44. Goldstein & Marcus, *supra* note 42, at 1575 n.18 (citing H. BRUNS, *supra* note 43, at 607). Bruns was discussing a section of an article on "mistakes in sentencing," Seibert, *Fehler bei der Strafzumessung*, 6 MONATSSCHRIFT FÜR DEUTSCHES RECHT 457, 459 (1952).

45. H. BRUNS, *supra* note 43, at 608 (citing the decision of the Oberlandesgericht Zweibrücken of Aug. 24, 1966 (*noted in* 21 MONATSSCHRIFT FÜR DEUTSCHES RECHT 236 (1967))). The case is also reported in a reporter not available to me, 32 Verkehrsrechtssammlung 219, the source to which Bruns cites.

46. Ostler, *§ 411 Abs. 3* STPO — *"klarer Wortlaut" und wirklicher Sinn*, 21 NEUE JURISTISCHE WOCHENSCHRIFT 486 (1968).

47. Goldstein & Marcus, *supra* note 42, at 1575 n.18.

48. Felstiner, *supra* note 37, at 314.

> First, the penal order is an open offer. The defendant can accept it at any time before trial simply by withdrawing his objection or paying the fine: even a failure to show up for the trial is treated as an acceptance. Once the trial has begun, the defendant — with the prosecutor's approval — can accept the penal order until final judgment is delivered. That approval is generally given. (A veteran prosecutor in Bremen told me that it is always given.) . . .
>
> German legal ideology, moreover, is opposed to penalizing people for their own tactical mistakes. For instance a German defendant who appeals from a trial court decision and secures a new trial cannot end up with a sentence more severe than that originally imposed. German legal principles, then, suggest to prosecutors that it would be unfair to penalize a defendant for not accepting a penal order at an earlier stage. This attitude is so strong that one prosecutor, after eight years in the role, told me *wrongly* that even the judge could not sentence a defendant more harshly than the sentence offered in a rejected penal order.
>
> In practice, when a trial appears to be going less well than a defendant had expected, he offers to accept the penal order and the prosecutor lets him do so.[49]

The attempt to infer a clandestine plea bargaining system from penal order procedure in violation of German law not only conflicts with the results of German and American legal scholarship, but also ignores the institutional contexts that explain both the existence of plea bargaining in America and its absence in Germany. As I have emphasized in Part I of this Article, German trial procedure is so rapid that the German prosecutor does not work under the same pressure that his American counterpart feels to divert cases of serious crime into the nontrial channel. The savings in trial time in the kind of case (misdemeanor, uncomplicated facts, overwhelming evidence) that is appropriate for penal order procedure could not be large enough to tempt the German officials to illegality, in view of the enormous sanctions that would threaten them upon detection.[50] Furthermore, the prosecutorial career structure does not place the German prosecutor under the incentive to "win" that his American counterpart feels. His performance is not judged by the electorate in a contest with a political opponent who may chide him for an inadequate conviction rate. German prosecutors undergo periodic departmental review on a variety of factors including dispatch in handling caseloads (dismissals as well as prosecutions); intra-office relations; legal analysis and drafting; and the avoidance of judicial rebuke and citizen complaint.[51] Whereas evidence suggests that American pros-

49. *Id.* at 314-15 (emphasis in original).

50. *See* K. PETERS, STRAFPROZESS 142 (2d ed. 1966).

51. *See* T. WEIGEND, *supra* note 27, at 98-102

ecutors do some of their hardest bargaining in their weaker or more doubtful cases,[52] the incentives of the German system point the German prosecutor firmly toward dismissing weak cases and trying the rest.

The penal order/plea bargaining fallacy is, therefore, rather a classic example of the false cognate in comparative law. Mechanical resemblances — nontrial and concessionary procedure — have been emphasized. Fundamental dissimilarities — the limitation to misdemeanor, the want of a sentencing differential, and the factors that explain those differences — have been disregarded. Actually, there is an analogy between the penal order system and American practice, but it gives no comfort to those who seek to find plea bargaining in Germany. The real parallel is the short-form American citation practice for traffic offenses: "Pay this fine or appear in court."[53] A German accused who waives trial and accepts a penal order for shoplifting or drunk driving does so for the same reasons that an American waives his right to trial on a charge of running a stop sign — not in exchange for a lesser sanction, but to save the time, nuisance, occasional notoriety, and occasional defense costs involved in waging hopeless contest. Penal order procedure does permit the accused who waives trial to spare himself these "process costs," but to equate such an inconsiderable inducement with the coercive force of the sentence differential of the American plea bargaining system is transparent casuistry.

B. *Confession at Trial*

Having explained why Germans accused of run-of-the-mill misdemeanors often confess without sentencing inducement in the nontrial penal order procedure, I now turn to the aspect of German *trial* procedure that has sometimes been misconstrued as evidencing plea bargaining. The accused is known to confess in a substantial proportion of the cases that go to trial. In the Casper and Zeisel sample there was an unrecanted confession in 41% of the cases tried.[54] That such figures would excite suspicion amongst Anglo-American ob-

52. *See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968).

53. I suggested this comparison in Langbein, *supra* note 27, at 457. Felstiner, *supra* note 37, at 323, calls this illustration inapt because "penal orders are used for offenses that are much more serious and complicated than traffic violations, including a considerable amount of predatory commercial practice." This criticism is misplaced. In advancing the comparison I was not saying that the Germans used penal order procedure only in cases in which we would use traffic citations. I was pointing out how the concessionary mechanics of German penal order procedure resemble those of our traffic citation system, which point Felstiner does not dispute.

54. Casper & Zeisel, *supra* note 12, at 146-47.

servers is natural, for in our procedural world the unrecanted confession and the trial are (practically speaking) mutually exclusive. It is tempting to treat such figures as evincing the "functional equivalent" of plea bargaining, a "regular pattern of expectations" that "[d]efendants who do not challenge the prosecutor's case can expect greater leniency than those who deny their guilt."[55]

This assumed case for a sentencing differential does not withstand careful analysis of the reality of German practice. Our starting point is to recall that German procedure requires that every offense which might result in imprisonment must go to trial (unless, of course, it is dismissed outright for want of factual basis). Because they have no nontrial procedure for felony and grave misdemeanors, the Germans bring to trial the cases of overwhelming evidence, including even the caught-in-the-act type, that the American system would most likely process through plea bargaining. Precisely because an accused will be put to trial[56] whether or not he confesses, he cannot inflict significant costs upon the prosecution or the court by contesting such a case.

Confessions are tendered at trial not for reward, but because there is no advantage to be wrung from the procedural system by withholding them. The accused knows what prospective evidence is in the dossier, he knows what evidence the prosecutor has asked the court to take at trial, and he is always examined about the matters charged against him (although, as indicated, he has the privilege to remain silent).

People do not like to be caught lying, even people who have already been caught committing serious crimes. It is ordinary human nature not to deny the obvious when the truth is certain to come out

55. McDonald, *supra* note 3, at 386.

56. Goldstein and Marcus see a "subtle analogue" to American plea bargaining in the case of serious crime in which the accused confesses at trial. "The uncontested trial is brief; few witnesses are called; and the judge sees his task in calling witnesses less as developing the facts than as confirming the confession." Goldstein & Marcus, *supra* note 3, at 267-68.

The analogue is in truth too subtle to make any sense. It is indeed true that a credible confession ordinarily has such probative force that it allows the court to call fewer witnesses and to probe less deeply than when guilt is contested. However, Casper and Zeisel found that the saving in trial time in cases with full confession compared to those without was only 50% for the two principal trial courts, "differences [that] are much smaller than one would expect on the basis of American experience." Casper & Zeisel, *supra* note 12, at 150, commenting on their Table 20, *id.* at 151 (data from Schöffengericht and grosse Strafkammer). Furthermore, in most confession cases the evidence is so overwhelming that the savings in trial time on account of the confession would not be substantial. Furthermore, even when the dossier records a pretrial confession, the court must prepare for a contested trial and summon sufficient witnesses to conduct one, since the accused may recant the confession at trial. There is still a world of juridical difference between an American court taking a plea and a German court adjudicating guilt beyond reasonable doubt on the basis of the evidence.

anyway. In such circumstances the accused who confesses needs no reward beyond his own dignity and self-esteem. Every schoolboy who has been caught with his hand in the cookie jar understands this point. Only the Anglo-American lawyer, mired in his uniquely deficient criminal procedure system, can regard such unbargained-for statements as unnatural.

The Continental criminal procedural tradition forthrightly encourages an accused to yield to this natural impulse to make a clean breast of the inevitable. Free of our system of adversary presentation of evidence and the attendant notions of party burdens of proof, German courts do not have to wait for a "prosecution case" to be established from the mouths of others before turning to the accused for his views on the charges against him. In the German code the only important rule of sequence that limits the discretion of the trial court in the conduct of its proof-taking is the requirement that the court hear first from the accused.[57] Important safeguards ensure that this examination of the accused — this invitation to confess —is not oppressive. The privilege against self-incrimination protects the accused in his right to remain silent; the court must instruct him about this right; and his counsel will have studied the dossier and have advised him about the strength and character of the evidence that is likely to be adduced at the trial.[58] Secure in the effectiveness of these safeguards, German law welcomes those confessions that can be obtained without American-style reward.

Furthermore, a prominent component of the 41% German trial confession rate is a type of case in which, far from concealing some American-style sentencing deal or tariff, the real dispute concerns the sentence. Where the disagreement between prosecutor and accused is not about liability but about sanction, the accused and his counsel will not waste time at trial contesting evidence that they know will establish culpability. They will concede guilt in order to concentrate on the mitigating factors that they hope will persuade the court against the prosecutor's views on sentence.

Those American critics who seize upon the 41% figure as ipso facto evidence of a German plea bargaining system have ignored the implications of the immense difference between 41% and the figures for felony disposition by plea that currently range upward from 95% in some American jurisdictions.[59] In a legal system like the German

57. STPO §§ 243(IV), 244(I).

58. *See* J. LANGBEIN, *supra* note 9, at 72-73.

59. Figures from 95 to 99% for various cities are collected in Langbein, *supra* note 1, at 9 n.11.

that has (1) effective pretrial dismissal mechanisms for groundless cases, (2) a rule that every case of imprisonable crime not thus dismissed must go to trial, and (3) a nonadversarial procedural system designed to encourage unbargained-for confessions in open-and-shut cases, there is nothing unreasonable about the proposition that 41% of the cases are so open-and-shut that the defendants admit the charges for no better reason than that contest is hopeless.

German courts do sometimes credit the contrition of the confessed defendant as a mitigating factor in sentencing,[60] and part of the motivation for some defendants to confess must be the hope of thereby inspiring sentencing leniency. All of the purposes of the criminal law, especially the reformative but the retributive and the deterrent as well, incline sentencing courts to distinguish where they can between remorseful and obdurate offenders. This intrinsically sound distinction is debased in American plea bargaining practice. Contrition has become a nominal justification for sentencing discrepancies developed for procedural expediency; real regard is given only to whether the accused has waived his right to trial. The Germans, who must fully try every imprisonable offense, are not living the American lie. The German supreme court has expressly prohibited sentencing courts from pressuring defendants to confess "through the threat of disadvantage — such as a more severe sentence . . . . Therefore, it is forbidden (*unzulässig*) to punish more leniently the criminal who confesses, solely on account of his confession . . . ."[61]

Accordingly, for the Germans to be running a plea bargaining system, thousands of professional judges have to be linked in a criminal conspiracy to conceal the real grounds of sentencing, a conspiracy so successful that it has remained impervious to all forms of detection other than conjecture in American law journals. We recall that two laymen deliberate and vote with the professional judges in setting the sentences in all these cases. If the professionals were op-

60. The statutory criteria for sentencing in Germany include, *inter alia*, the culprit's guilt and "his conduct after the crime, especially his efforts to make amends for the harm (sein Verhalten nach der Tat, besonders sein Bemühen, den Schaden widergutzumachen)." STRAFGESETZBUCH (Code of Criminal Law) § 46.

61. 1 Entscheidungen des Bundesgerichtshofes in Strafsachen 105, 106 (1951). The same decision recognized, however, that circumstances contained in a confession may bear on such permissible grounds of sentencing as the extent of the offender's culpability and his dangerousness to society. *Id.* Once again, it is instructive to see how the leading manual for defense lawyers treats this subject. The tendering of the confession of a genuinely guilty accused, says Dahs, *supra* note 40, at 260, permits counsel to narrow and direct the court's attention to ameliorating factors in the accused's background and his criminal conduct. Dahs gives not the least hint that confession is systematically rewarded, as in American plea bargaining practice.

erating a clandestine plea bargaining system, they would be faced with the extremely difficult task of deceiving the laymen in the actual course of sentencing deliberations regarding the objects of particular sentences, or attempting to make knowing accomplices out of the entire cohort of citizens who serve on these panels. In this connection it is revealing to notice that in the 41% of Casper and Zeisel's cases in which there was a full confession, the time spent on deliberation (as distinct from trial time) differed "hardly at all"[62] from the cases in which guilt was contested. Confession does not lead to rubber-stamp sentencing; sentencing is discussed and justified in all cases.

Intangibles may affect adjudication, and it is relatively costless for an accused thus to try to make a good impression. Counsel the world over instruct their clients to appear in court cleanly attired, although sentencing codes do not direct courts to take account of an accused's dress and grooming. I have no doubt that confession, like a clean shave, belongs to the realm of things that make a good impression on a German court. But there can be no difficulty in distinguishing between a clean shave and cutting one's throat; neither can there be a problem distinguishing the trivial inducements to confess that exist in German procedure from the enormous and systematic sentence differentials that Americans have constructed in order to subvert the right to trial. It is we, not they, who engage in condemnation without adjudication and who employ a sentence differential that risks pressuring the accused to bear false witness against himself.[63]

No modern multi-factored sentencing system, the German included, can lack for rubrics such as "contrition" or "degree of culpability" behind which it would be possible to conceal American-style sentence differentials. What the Germans lack is the need to engage in the perversion. Having kept their trial procedure workable, they have not had to coerce defendants into waiving either the form or the substance of trial. American detractors of German procedure have not been able to point to evidence of American-style sentence differentials in German practice, despite the considerable expertise that Americans have acquired in recent years in identifying and measuring this mainspring of their own plea bargaining system. Within Germany there are potent incentives for criminal defendants, defense counsel, legal academics, politicians, and journalists to un-

62. Casper & Zeisel, *supra* note 12, at 149.

63. *See* Alschuler, *supra* note 52, at 59-60.

mask the legal system in a lie so enormous. The American critics have, therefore, a great deal to account for when neither they nor interested Germans have been able to detect the German plea bargaining system. In truth, it is a figment of wishful American imagination, projecting onto others our own distinctive flaw. American plea bargaining results from the breakdown of American trial procedure. Blessed with an expeditious nonadversarial trial procedure, the Germans need no such subterfuge.

C. *Petty Crime*

Continental and Anglo-American criminal procedural systems both exhibit as an organizing principle the idea that the full set of procedures and safeguards appropriate for determining charges of serious crime need not be extended to cases of petty crime. In American law this distinction is most prominently reflected in the Supreme Court's refusal to apply the sixth amendment right to jury trial in petty cases.[64]

In German law, too, several of the most fundamental principles of criminal procedure have been restricted to cases of serious crime. We have previously noticed that the rule of compulsory trial applies only to imprisonable offenses, thereby permitting the nontrial penal order procedure for many misdemeanors. We have also emphasized that the rule of compulsory prosecution applies only to felonies and to those misdemeanors that cannot be fit within the two statutory criteria of pettiness (minor guilt and lack of public interest) under which section 153 permits discretionary nonprosecution.

At bottom, of course, this tendency of legal systems to remit cases of lesser crime to a more brusque procedural subsystem is a response to resource scarcity. Such cases usually raise only simple issues of fact and law. If parking tickets were to be proceduralized indistinguishably from homicides, the criminal justice system would need to be financed more lavishly than any modern society has yet shown itself able to afford. Accordingly, less meticulous fact-finding and otherwise lower levels of safeguard are permitted for offenses where the complexity, the sanctions, and the stigma are correspondingly lower.

I have elsewhere described at length the multi-faceted German procedural response to the twentieth-century explosion of petty regu-

64. Despite the seeming breadth of the constitutional language ("In *all* criminal prosecutions, the accused shall enjoy the right to . . . trial . . . by an impartial jury . . . ."). U.S. CONST. amend. VI (emphasis added); *see* Baldwin v. New York, 399 U.S. 66 (1970).

latory and motor vehicle offenses.[65] For present purposes it will suffice to repeat[66] that one of these procedures, the conditional nonprosecution scheme of section 153a, can correctly be characterized as a mild form of plea bargaining. In a case of misdemeanor that satisfies the pettiness criteria of section 153, section 153a authorizes the prosecutor to decline to prosecute on condition that the accused agree to make a charitable donation, make restitution to the victim, engage in stipulated charitable work, or the like.[67] The accused who accepts the conditions thereby waives trial and escapes with a lesser sanction, one that completely spares him the stigma and practical consequences of criminal conviction. Although section 153a has thus far been confined overwhelmingly to traffic violations and otherwise narrowly interpreted,[68] the only statutory limits on the misdemeanors to which it might be applied are the two general criteria of pettiness of section 153.

Americans seeking solace for American plea bargaining in German practice sometimes purport to find it in section 153a. They can succeed only by engaging in a fundamental confusion of categories. Nothing done under section 153a bears on the constancy with which German criminal justice prohibits plea bargaining or any analogue of plea bargaining in its procedures for serious crime. In the United States 95% of felony cases are disposed of by plea,[69] in Germany none. Hence in the realm of serious crime, serious criminal sanctions, and serious criminal procedure, Germany is indeed a land without plea bargaining.

III. Conclusion

Americans are justly wary of claims that plea bargaining does not exist. We are periodically subjected to the announcement that some prosecutor has abolished plea bargaining, after which we learn that implicit plea bargaining has continued, supported by sentencing differentials as drastic and coercive as before. We also know that in our own history plea bargaining was long pretended not to exist, and we have more recently seen the English duplicate our former reluctance

65. Langbein, *supra* note 27, at 451-61.

66. *Id.* at 460.

67. *See* the translation in J. Langbein, *supra* note 9, at 158.

68. *See* Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 468, 489-93 (1974) (discussing the procedure now authorized by StPO § 153a as of the time when its authority was in ministerial regulations under StPO § 153).

69. *See* note 59 *supra*.

to admit our dependence on plea bargaining.[70]

Healthy suspicion has healthy limits, however. What recent American critics of German procedure have failed to grasp (or at least failed to admit) is that the healthy American suspicion about plea bargaining has had a peculiarly indigenous context, in the breakdown of common law trial procedure under the ever mounting weight of the adversary system. Because the Germans have kept their trial procedure workable and nonadversarial, they have not had reason to subvert it. By overlooking that fundamental difference, the universalist theory of plea bargaining has rooted itself in error.

We are less likely in the long run to be able to preserve the strengths of Anglo-American criminal procedure if we refuse to admit the failings — or, what is the same thing, pretend that the failings are universal. The truth is that other procedural systems have not become dependent on plea bargaining because they have not corrupted their trial procedures. We must correct our blunder, not wish it on others.

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70. *See* text at note 38 *supra*.