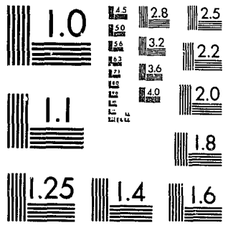

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ALTERNATIVES TO THE PLEA BARGAINING SYSTEM*

by

Albert W. Alschuler+

[T]he process of plea bargaining is not one which any student of the subject regards as an ornament to our system of justice.

Justice William H. Rehnquist[1]

The present state of affairs was brought about by willingness to reduce standards of justice to conform to the resources made available for its administration. I suggest that the time has come for the judiciary to start moving in the other direction, and to insist on a return to first principles. . . .

Justice Charles L. Levin[2]

Those who predict disaster for our criminal courts system if we cease plea bargaining are really saying that the courts cannot provide a jury trial for those who have a right to trial. If this assessment were true, then the courts should declare themselves bankrupt. . . . But I do not believe that the courts system will collapse under the weight of too many trials if we eliminate plea bargaining.

Judge Arthur L. Alarcon[3]

An Introductory Overview of the Plea Bargaining Predicament and Alternative Solutions

In a series of articles, I have suggested some defects of plea bargaining.[4] The task has been lengthy, for plea bargaining has affected almost every aspect of our criminal justice system from the legislative drafting of substantive offenses[5] through the efforts of correctional officials to rehabilitate offenders.[6] Even a cursory listing of objections to this practice may consume several paragraphs. Plea bargaining makes a substantial part of an offender's sentence depend, not upon what he did or his

personal characteristics, but upon a tactical decision irrelevant to any proper objective of criminal proceedings.[7] In contested cases, it substitutes a regime of "split the difference" for a judicial determination of guilt or innocence, elevating a concept of "partial guilt" above the requirement that criminal responsibility be established beyond a reasonable doubt.[8] This practice also depricates the value of human liberty and the purposes of the criminal sanction by viewing these things as commodities to be traded for economic savings (savings that, when measured against common social expenditures, usually seem minor).[9]

Plea bargaining leads lawyers to view themselves as judges and administrators rather than as advocates; it subjects them to serious financial and other temptations to disregard their clients' interests; and it diminishes the confidence in attorney-client relationships that can give dignity and purpose to the legal profession and that is essential to a sense of fair treatment on the part of defendants.[10] In addition, this practice makes figureheads of court officials who typically prepare elaborate presentence reports only after the effective determination of sentence through prosecutorial negotiations.[11] Indeed, it tends to make figureheads of judges, whose power over the administration of criminal justice has been largely transferred to people of less experience, who commonly lack the information that judges could secure, whose temperament has been shaped by their partisan duties, and who have not been charged by the electorate with the important responsibilities that they have

assumed.[12] Moreover, plea bargaining perverts both the initial prosecutorial formulation of criminal charges and, as defendants plead guilty to crimes less serious than those that they apparently committed, the final judicial labeling of offenses.[14]

The negotiation process encourages defendants to believe that they have "sold a commodity and that [they have], in a sense, gotten away with something."[15] It sometimes promotes perceptions of corruption.[16] It has led the Supreme Court to a hypocritical disregard of its usual standards of waiver in judging the most pervasive waiver that our criminal justice system permits.[17] It is inconsistent with the principle that a decent society should want to hear what an accused person might say in his defense--and with constitutional guarantees that embody this principle, a disapproval of compelled self-incrimination and other professed ideals for the resolution of criminal disputes.[18] Moreover, plea bargaining has undercut the goals of legal doctrines as diverse as the fourth amendment exclusionary rule,[19] the insanity defense,[20] the right of confrontation,[21] the defendant's right to attend criminal proceedings,[22] and the recently announced right of the press and the public to observe the administration of criminal justice.[23] This easy instrument of accommodation has frustrated both attempts at sentencing reform[24] and some of the most important objectives of the due process revolution.[25]

Plea bargaining provides extraordinary opportunities for lazy lawyers whose primary goal is to cut corners and to get on to the next case; it increases the likelihood of favoritism and

personal influence; it conceals other abuses; it maximizes the dangers of representation by inexperienced attorneys who are not fully versed in an essentially secret system of justice; it promotes inequalities; it sometimes results in unwarranted leniency; it merges the tasks of adjudication, sentencing and administration into a single amorphous judgment to the detriment of all three; it treats almost every legal right as a counter to be traded for a discount in sentence; and it almost certainly increases the number of innocent defendants who are convicted.[26] In short, an effort to describe the evils that plea bargaining has wrought may require an extensive tour of criminal justice.

This is an article about exorcism. However unjust plea bargaining may seem, it has become fashionable to contend that the process is inevitable. Indeed, scholars and practitioners proclaim that "to speak of a plea bargaining-free criminal justice system is to operate in a land of fantasy,"[27] and they advance two arguments in support of this contention. First they emphasize the extent of the demon's possession. In view of the overwhelming number of cases that currently are resolved by pleas of guilty,[28] they maintain that providing the economic resources necessary to implement the right to trial would be impractical; their view is apparently that our nation cannot afford to give its criminal defendants their day in court.[29] Second, they suggest that in view of the mutuality of advantage that prosecutors and defense attorneys are likely to perceive in the settlement of criminal cases, an attempt to prohibit this process

would be countered by widespread subterfuge. In practice, they argue, the only choice is between a system of negotiated case resolution that is open, honest and subject to effective regulation and one that has been driven underground.[30]

This article responds to these contentions and explores a number of choices that might be made within the context of American criminal justice to end an unjust practice. Part I examines the obvious solution to today's excessive dependency on the guilty plea--spending the money necessary to implement our constitutional ideals without shortcuts. Focusing first on felony prosecutions, it argues that the United States could provide three-day jury trials to all felony defendants who reach the trial stage by adding no more than $850 million to annual criminal justice expenditures. It contends, moreover, that the actual cost of implementing a plea bargaining prohibition would be far less than this figure, partly because most cases now resolved through plea bargaining could be tried in less than three days and, more importantly, because many defendants would plead guilty without bargaining. The article then turns to misdemeanor prosecutions and proposes a "short form" nontrial procedure modeled after the West German "penal order." It argues that this procedure could permit the prohibition both of explicit plea bargaining and of implicit sentencing concessions for pleas of guilty without any increase in the amount that Americans spend on misdemeanor justice. Part I ends by discussing the enforcement of a plea bargaining prohibition, contending that although evasions of this

prohibition might not be suppressed altogether, they could be kept within tolerable limits.

Part II takes a different tack. It examines the relationship between trial procedures and plea negotiation practices and describes ways in which plea bargaining might be ended in felony cases without an increase in resources. This part notes initially that the Anglo-American legal system afforded defendants an unfettered right to trial during most of its history and that most legal systems of the world apparently survive without plea bargaining today. Nevertheless, every legal system that has managed without plea bargaining has employed much more expeditious trial procedures than ours. After a brief review of our history and a more extensive description of the current practices of other nations, the article considers how American trial procedures might be simplified in the interest of making trials more available. It argues that, contrary to common understanding, the federal constitution as interpreted by the Supreme Court would not preclude a substitution of mixed tribunals of professional and lay judges for criminal juries in state-court proceedings. The article discusses a variety of innovations that might accompany this reform, some of them controversial and perhaps even startling but worthy of serious consideration even apart from their facilitation of a plea bargaining prohibition. Recognizing that a reconsideration of the right to jury trial and of other central facets of American trial procedure is unlikely in the forseeable future, the article also discusses a number of less sweeping proposals that already

have some currency in the American legal system. It notes that each of these reforms could conserve substantial resources that might be used to implement the right to trial.

Finally, the article suggests a less restrictive form of bargaining that could be substituted for plea bargaining--bargaining for waiver of the right to jury trial but not for waiver of the right to trial before a court. The analysis begins with a description of practices in Philadelphia and Pittsburgh during the 1960's, where to a large extent this substitution had occurred. A concluding section suggests that "waiver bargaining" coupled with sentencing guidelines could treat together two issues that merit this unified treatment, sentencing reform and plea negotiation.

Part I. Matching the Reality of Criminal Justice to Constitutional Ideals

A. Toward Full Implementation of the Right to Jury Trial in Felony Cases

The frequent claim that our nation cannot afford to provide jury trials to all defendants who want them and are entitled to them is plainly unattractive. Chief Justice Burger wrote in 1971, "An affluent society ought not be miserly in support of justice, for economy is not an objective of the system."[31] The Chief Justice earlier had said, "No one should challenge any expense to afford a defendant full due process and his full measure of days in court."[32] Moreover, the Supreme Court has

said that "the Constitution recognizes higher values than speed and efficiency,"[33] that "'to secure greater speed, economy, and convenience in the administration of the law at the price of fundamental principles'" is to pay too high a price,[34] that "congestion in the courts cannot justify a legal rule that produces unjust results,"[35] and that "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law."[36]

Those who assert this idealistic position seem to tremble, however, when they confront some perceived "realities" of the plea bargaining process. Chief Justice Burger, for example, apparently abandoned his statement that economy is not "an objective of the system" when he noted America's lopsided dependency on the guilty plea:

> The consequence of what might seem on its face a small percentage change in the rate of guilty pleas can be tremendous. A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities--judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 per cent trebles this demand.[37]

Although the Chief Justice's analysis has been often repeated,[38] in some respects it is fallacious. It is commonly estimated that 90 percent of all criminal convictions in America are by guilty plea,[39] but guilty pleas do not occur in anything close to 90 percent of all criminal prosecutions. A federally sponsored study of thirteen state-court jurisdictions reported, for example, that guilty pleas accounted for 85 percent of the convictions in cases commenced by felony arrests but for only 53 percent of the dispositions of filed cases.[40] Somewhat

surprisingly, cases that end in dismissal appear to be more costly to the criminal justice system than cases that end either in guilty pleas or in jury waived trials,[41] and the Chief Justice's projection of necessary percentage increases in the commitment of resources simply neglected the very significant resources consumed by cases that do not end in conviction.[42]

Moreover, even when one focuses only on those cases that end in conviction, the Chief Justice's assertion that a reduction in the rate of guilty pleas from 90 to 80 percent would require a doubling of manpower and facilities apparently rested on the assumption that the plea bargaining system consumes only negligible resources. In reality, the bargaining process leads to substantial expenditures of resources, many of which seem difficult to justify in a supposedly overburdened system.

The bargaining process has been increasingly surrounded by time-consuming courtroom rituals whose function seems more the appeasement of troubled consciences than any genuine safeguarding of the quality of guilty-plea justice.[43] It has led defense attorneys to file absurd pretrial motions simply because "it takes time to refute even a bad contention" and "every motion added to the pile helps secure a better plea."[44] It has led prosecutors to inflate and multiply criminal charges so that, when defendants refuse to yield, trials are lengthy and complex.[45] It often has led to vacant courtrooms as defendants, for both strategic and psychological reasons, have delayed their acceptance of prosecutorial offers until shortly before their cases were scheduled to be tried. It has led in addition to

frequent court recesses for the purpose of facilitating negotiations. Perhaps most importantly, the bargaining process itself is no masterpiece of efficiency. As an Alaska prosecutor described this process prior to its prohibition by the state's Attorney General,

> A defense attorney would come in, talk about his kids and his lake house, and then start begging at length for a lenient sentence recommendation. If we said no, he'd be back a week later to announce that the defendant had a job and to beg some more. If we still said no, he would be back in another week to tell us that the defendant's wife was pregant and then, the week after that, to tell us that the defendant's bills were due. Sooner or later, we'd give in, more to be rid of the case than anything else.[46]

A recent study of Alaska's plea bargaining prohibition reported a 37 percent increase in the number of trials and, at the same time, a substantial decrease in the length of time between the filing of felony charges and their final disposition.[47] Although in Anchorage this change might have been attributable partly to personnel changes and to a new calendaring system, a similar phenomenon was observed in other cities. The study concluded that it might be explained primarily by a reduction in the dilatory tactics that plea bargaining had encouraged.[48] In seeking the resources needed to implement the right to jury trial, one might begin with the substantial resources now devoted to plea bargaining gamesmanship. Still, even if Chief Justice Burger's estimates are discounted substantially, the high rate of guilty pleas in America may make the prospect of affording jury trials to all defendants who want them seem almost unthinkable.

A multiplication of the resources devoted to the resolution of felony cases becomes less unthinkable, however, when one recognizes how limited the current resources are. In my home jurisdiction, Boulder County, Colorado, with a population of 170,000, a single judge conducts all trials, hearings on motions and guilty plea proceedings in felony cases. In nearby Denver, with a population of approximately one-half million, five judges are responsible for the conduct of felony proceedings. The city of San Francisco, California, has approximately two-thirds of a million people, but four judges in San Francisco hear felony cases on a full-time basis while two others hear felony cases part-time. In El Paso, Texas, with one-third of a million people, two judges, aided occasionally by the part-time efforts of a third, have until recently conducted all felony proceedings. Indianapolis, Indiana, with three-quarters of a million people also has only two judges hearing felony cases at any given time.

A doubling, a tripling or even a quadrupling of the resources now devoted to felony prosecutions therefore might require one, two or three additional judges in cities like Boulder; two, four, or six additional judges in cities like El Paso and Indianapolis; and five, ten or fifteen additional judges in cities like Denver and San Francisco. Even when the necessary additions in physical plant, support personnel, jurors, prosecutors and defense attorneys are considered, this sort of investment need not inspire panic.[49] Indeed, in almost every American jurisdiction, a multiplication several times over of the

resources devoted to the resolution of felony cases apparently would require no more than the building and staffing of a single new courthouse. This task might be about as burdensome as the building and staffing of a new high school; it would be less burdensome than the building and staffing of a new hospital. If the need were in medicine or education, however, responsible citizens would at least talk about meeting it. They would not insist that "practical necessity" required bargaining with patients to "waive" their operations or with students to "waive" their classes.

Although the current era is marked by taxpayer rebellion and by retrenchment in some governmental services, Americans are seriously concerned about crime.[50] They are so concerned that an overwhelming majority even tell pollsters that they would support increased expenditures to deal with this problem.[51] Nevertheless, Americans now spend approximately 14 billion dollars each year for police protection, more than four times as much as they spend for judicial services in both civil and criminal cases.[52] Because no more than one-third of today's judicial budgets are expended on criminal matters,[53] the criminal courts probably receive less than one twelfth as many resources as the police. A relatively slight reallocation of today's "crime fighting dollars" or a slight overall increase in the total "crime fighting budget" probably would be sufficient to implement the right to jury trial in felony cases. Indeed, the necessary expenditure might prove cost-effective even if judged solely in economic terms. One econometrician has estimated that

every additional dollar expended on the criminal courts would reduce the current costs of crime by somewhere between five and eleven dollars.[54] He has suggested that an "optimal" American court system, judged only in terms of its crime-reduction efficiency, would be triple its current size.[55] (The same scholar has estimated that every additional dollar expended on the police would reduce the costs of crime by only about 33 cents.[56]) One need not have great faith in the figures yielded by this analysis or even in its underlying assumptions to recognize at least the possibility that greater expenditures on the criminal courts could be offset to some extent by resulting gains in crime control.[57]

It may be instructive to estimate roughly the maximum possible cost of abolishing plea negotiation in felony cases throughout America. A significant difficulty in making this estimate, however, is that the effect of a plea bargaining prohibition on trial rates is almost entirely a matter of conjecture. One federal district judge who does not permit plea agreements in his court has reported that he cannot discern any notable disparity in trial rates between his court and others.[58] In Alaska, where guilty pleas accounted for 91 percent of all felony convictions in the year before a plea bargaining prohibition, the rate declined to 84 percent in the year after.[59] Nevertheless, when a reasonably high guilty plea rate persists despite an announced prohibition of plea negotiation, one may suspect that some form of "explicit" or "implicit" bargaining or at least a general perception of "implicit"

bargaining on the part of defendants and their attorneys continues to exert a dominating influence.[60]

If today's plea bargaining process is not a sham, an effective plea bargaining prohibition certainly ought to lead to more trials. At the same time, the claim that almost every defendant would insist on a trial in the absence of plea negotiation is unwarranted. Because juries are unpredictable and prosecutors may make errors, it sometimes is suggested that any defendant ought to seek a trial unless he receives some concession for foregoing it.[61] Nevertheless, the chance that all state witnesses will suffer heart attacks on their way to the courthouse is not, in practice, a sufficient reason for most defendants and most defense attorneys to insist on trial; and in many cases, the possibility of multiple heart attacks or multiple typhoons is apparently the best hope that defendants may have. As Professor Malvina Halberstam has observed, "While it is true that a defendant would have little to lose by going to trial, the typical criminal defendant would also have little to gain. . . ."[62]

Following a judicially initiated prohibition of plea negotiation in El Paso, Texas, I interviewed a number of prosecutors, defense attorneys, probation officers and trial judges in that city. At the conclusion of these interviews, I was persuaded that prosecutorial bargaining had been abolished entirely; not one of my sources hinted that there was a "back door" to the district attorney's office or a system of winks and dances that might achieve the effects of bargaining. Moreover, although I was not conviced that all forms of judicial bargaining

had been eliminated, most defense attorneys were; they insisted that El Paso's judges would not sentence defendants more severely after convictions at trial than following pleas of guilty.[63] I therefore asked these attorneys why they advised some clients to plead guilty, sometimes suggesting that it might be a denial of effective representation not to take whatever chance of acquittal a trial might offer. One lawyer seemed to capture the pervasive common sense of most others when he said, "I had a client last week who was charged with escape, and he was still in the handcuffs when they arrested him two hours later. If I had known how to try that case, I guess that I might have given it a shot."[64]

Apart from the fact that defendants and their attorneys have little reason to seek trials that offer no realistic hope of acquittal,[65] trial would not become an entirely cost-free alternative even in the absence of plea bargaining. Nonindigent defendants would continue to pay at least the costs of their legal services, and even indigent defendants would invest the time and energy and suffer the delay, the uncertainty and the psychological anguish that trials inherently require. The "process costs" of trial might well lead to a significant number of guilty pleas.[66]

Although many defendants might plead guilty without the inducements that today's plea bargaining process provides, one can only guess how many. The best way to approach the task of estimating the maximum possible cost of a plea bargaining prohibition therefore may be to assess the cost of providing jury

trials to <u>all</u> felony defendants. Even this task is not easy. For one thing, despite recent federal efforts to develop criminal justice statistics and to study the operation of the criminal justice system, no one has a very good idea how many defendants are charged with felonies each year in state and federal courts. In 1967, the President's Commission on Law Enforcement and Administration of Justice estimated this number at 338,000.[67] If the figure had since increased at the same rate as the United States population, it would now be 376,000.[68] If it had increased at the same rate as arrests reported to the Federal Bureau of Investigation, however, it would be much larger, 591,500.[69] Although it may seem doubtful that the capacity of the courts has increased as rapidly as the number of arrests, this larger figure can serve as a generous "ballpark" estimate.

Approximately one-third of the felony cases filed each year in the United States are dismissed prior to trial or the entry of pleas of guilty.[70] There is no reason to suppose that this figure would be reduced if plea bargaining were prohibited. To the contrary, to the extent that a plea bargaining prohibition strained available resources, prosecutors probably would be even more selective both in the cases that they filed and in the cases that they pressed to completion. The number of filings therefore might decline and the number of dismissals increase. If, however, the hypothesized 591,500 felony filings each year were reduced merely by one-third, the remaining 394,333 cases would represent the maximum number of cases in which jury trials might be required. Moreover, in something like 47,320 of these cases,

jury trials are afforded already.[71] The maximum number of additional jury trials that a plea bargaining prohibition might require in felony cases would be 347,013.

A recent study of felony prosecution in thirteen diverse state court jurisdictions compared the costs of guilty plea cases with those of jury trials. It reported that the entry of a guilty plea resulted on the average in "court savings per case" of $1528 and in "prosecutor savings per case" of $450.[72] Although the total savings per case ($1978) did not include any reduction in the cost of defense services, the "defense savings" effected by a guilty plea certainly do not exceed the "prosecutor savings."[73] If the "defense savings" per case are also assumed to be $450, the total savings per case becomes $2428.

This $2428 figure is almost certainly a gross overestimate of the total additional cost that might be incurred by affording a jury trial to a typical felony defendant who now pleads guilty.[74] It is based on the assumption that this defendant's trial would consume 25.2 hours of court processing time, a figure derived from a 1974 study of jury trials in California.[75] California seems atypical, however; other, nationally based studies have concluded that jury trials are usually completed, not in more than three days, but in less than two.[76] Moreover, even this smaller figure probably is not an appropriate guide. Estimates based on the current costs of jury trials overlook the fact that jury trials occur far more frequently in complex cases involving serious charges than in more routine prosecutions.[77] Most of the cases now resolved through plea bargaining undoubtedly would require fewer resources to try than most of the cases tried today. (Indeed, if the trial even of a routine burglary or simple street crime truly would require more than three days and cost approximately $2500,[78] that circumstance would illustrate the need for a radical simplification of the American trial process that would make a prohibition of plea bargaining substantially less burdensome.)

Of course some of the 347,013 cases in which jury trials might be required are currently resolved at jury waived trials. In these cases, the incremental expenditure necessary to afford jury trials would be less than the additional cost of affording jury trials in the cases now resolved by guilty plea.[79] If, however, one disregards this additional cost-reducing factor and simply multiplies the $2428 "guilty plea savings" by 347,013, it becomes apparent that the annual cost of providing three-day jury trials to every felony defendant who reaches the trial stage would not exceed $843 million. Because the estimate of the cost savings per case was based on the assumption that a guilty plea proceeding consumes only fifteen minutes of court processing time (one ninety-seventh of the time required for a jury trial), the cost of providing two-day trials would be about $559 million. The cost of providing one-day trials (which ought to be adequate to permit a careful development of the factual circumstances surrounding most crimes and which would facilitate and encourage much more attention than most felony prosecutions currently receive) would be about $275 million.

Even the $843 million figure represents only about one-third

of Lockheed's cost overrun on the C5A aircraft[80]; it is less than the cost of a single Aegis cruiser[81]; and it is also less than the amount that the Law Enforcement Assistance Administration recently spent annually on improving state criminal justice (an amount of which no more than ten percent, and perhaps as little as 2.2 percent, was devoted to the courts and an expenditure that was widely regarded as wasteful--so much so that the LEAA now has been largely disbanded.)[82] Overall, an additional $843 million per year would represent a 3.2 percent increase in civil and criminal justice expenditures in the United States.[83] As a prestigious national study group concluded ten years ago, "The basic problem is not financial; the cost of a model system of criminal justice is easily within the means of the American people."[84] When one glances behind the plea of poverty that advocates of plea bargaining have used to justify this practice, one sees mostly the desire of a comfortable legal profession to rationalize the way things are.

B. Toward an Unencumbered Right to Trial in Misdemeanor Prosecutions

Although the abolition of plea bargaining certainly would not require so radical a change, even the prospect of affording jury trials to all felony defendants in America ought not cause one to blanche. Felony prosecutions comprise no more than ten percent of all criminal cases, however,[85] and the prospect of affording jury trials to all misdemeanor defendants might well inspire fiscal terror. Of course, as a first step toward reform (or perhaps even as a final step), a legislature might prohibit

plea bargaining only in felony cases. This ten-percent solution would be a major reform, and prudence might suggest that its consequences should be evaluated before going farther. Moreover, even as a final accommodation, this solution would accord with the generally accepted notion that less careful and less safeguarded procedures are appropriate when lesser sanctions are at issue.[86]

Nevertheless, the elimination of plea bargaining in misdemeanor cases probably would be easier and less costly than its elimination in felony cases It might require no influx of resources whatever. Indeed, a reformed misdemeanor system in which full trials were afforded to all defendants who wanted them but in which the costs of administering justice actually were less than those that Americans currently incur is at least within the realm of possibility.

Before developing these positions, it will be useful to advance a typology of the basic motivations that prompt criminal defendants to plead guilty. This typology, applicable to both misdemeanor and felony prosecutions, will suggest some doctrinal and normative distinctions among practices that may encourage guilty pleas. It will set the stage for an argument that unobjectionable procedures could yield as large a number of guilty pleas in misdemeanor courts as plea bargaining yields in those courts today.

Some observers apparently do not recognize any difference between plea negotiation and other governmental practices that

sometimes lead to guilty pleas. In Brady v. United States,[87] for example, the Supreme Court considered whether the threat of execution, seemingly one of the most coercive threats in the government's arsenal, had rendered a guilty plea involuntary. Although the court assumed for purposes of decision that the threat of a death sentence had prompted the defendant "to plead guilty and thus limit the penalty to life imprisonment,"[88] it said that this assumption merely identified the threat of capital punishment "as a 'but for' cause of the plea." This circumstance did "not necessarily prove that the plea was coerced."[89] The Court explained:

> The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas . . . .[90]

Nevertheless, there are differences in kind as well as degree among the circumstances that the Court described.

At one extreme, a defendant may plead guilty because he is remorseful or, even if not remorseful, because he recognizes that he has no possible defense to the government's charge. A guilty plea in this situation does not reflect the consensual resolution of a criminal dispute, for there truly is no dispute concerning the defendant's guilt between the defendant and the state. Of

course one might favor trial even in this situation on paternalistic grounds (the defendant might be mistaken) or on the ground that trials serve important "symbolic" functions[91]; indeed, with a seeming abundance of caution, nations on the European continent do require the trial of all serious cases even when defendants do not desire trials.[92] Nevertheless, most observers within our own legal system probably would consider a requirement of trial in "no dispute" situations artificial. They would insist that disputes should not be manufactured when they do not exist in fact and that defendants should not be forced to use adjudicative procedures when they see no reason for doing so.

Even when a defendant recognizes the existence of disputable issues, he may yield to conviction because a trial would be bothersome or expensive. A familiar example is the situation in which a driver fails to contest a traffic ticket because a court appearance would be more burdensome to him than the payment of a fine. Guilty pleas induced by the "process costs" that defendants would incur by contesting the charges against them sometimes may be troublesome. One can imagine, for example, an extraordinarily elaborate procedure for the resolution of minor traffic disputes that would require every traffic defendant to spend the better part of a week in a courtroom. In practice, this procedure would not afford traffic defendants greater protection than they currently receive. Instead, it probably would prove as effective as any but the most virulent plea bargaining practices in inducing pleas of guilty. Procedural

protections plainly have backfired when those whom the protections were intended to benefit find them too burdensome to use. Although certain inducements to plead guilty ought to be called "process costs," the label cannot justify the exclusion of these inducements from further concern. A recent comment in the Yale Law Journal noted, for example, that defendants may plead guilty partly because trials would require them to pay substantial legal fees. It proposed that acquitted defendants be reimbursed to a certain level for their legal expenses in order to minimize this "process cost" inducement to sacrifice the right to trial.[93] Whatever the merits of this proposal or of the constitutional analysis used to support it, the effect of various process costs in inducing pleas of guilty ought to receive careful attention.

At the same time, significant process costs plainly are inherent in any form of adjudication. In shaping our courtroom procedures, lawmakers ought to be aware of these costs and of the burdens that they are likely to impose, not only on the taxpayers who finance them, but on defendants as well. Still, after these burdens have been considered, certain procedures will of course be considered essential to fair adjudication (procedures that are likely to vary with both the complexity of the issues presented and the severity of the sanctions threatened). Although the costs imposed by these procedures inevitably will lead some defendants to decline to contest the charges against them, this result should not cause notable concern. So long as the "adjudicative balance" is fair and the procedures seem

worthwhile, their "chilling effect" will be incidental. The purpose of these procedures will be the promotion of fair and accurate verdicts, not discouragement of the exercise of the right to trial. Any waiver of legal rights that these procedures induce will be an inevitable by-product of an appropriate adjudicative process, and a defendant who cares too little about his case to "fight" it through appropriate adjudicative procedures probably should not be forced to do so. Like guilty pleas in "no dispute" situations, guilty pleas induced by appropriate process costs seem unobjectionable.

Finally, a defendant may plead guilty, not because contesting the charges against him would be too much trouble, but because a judge or prosecutor has threatened to "up the ante" or to impose a more severe penalty if he exercises the right to trial. In this situation, the threat is not merely an incident of a procedure designed to promote fair and accurate verdicts. Instead its very purpose is to discourage the exercise of a constitutional right.[94] It is this gratuitous threat that opponents of plea bargaining consider offensive and that an effective plea bargaining prohibition must eliminate.

Perhaps a radical simplification of trial procedures in misdeameanor cases would permit the trial of all or most defendants without a notable expansion of resources.[95] Even if one assumes that the consensual resolution of most misdemeanor prosecutions is a "practical necessity," however, one should not confound this apparent necessity with a "practical necessity" for plea negotiation. For it is primarily the "process costs" of

misdemeanor justice that currently cause all but a small minority of defendants to yield to conviction; these process costs are in practice far more influential than plea bargaining. Moreover, a simplified nontrial procedure for misdemeanor cases could make judicial or prosecutorial threats to "up the ante" even less necessary than they are today. This procedure would (1) eliminate some costs currently and unnecessarily imposed on defendants who decline contest with the state, thereby making contest less likely; (2) reveal to defendants the limited sanctions realistically at issue in most misdemeanor prosecutions, thereby promoting intelligent decisions concerning the wisdom of incurring the costs of trial; (3) at the same time assure defendants that their sentences will be unaffected by the exercise of legal rights so that the burdens incurred by insisting on trials will be only those inherent in the adjudicative process itself; (4) bring substantially greater order and dignity to misdemeanor proceedings; and (5) conserve prosecutorial and judicial resources which might be used to afford trials to defendants who want them.

The most insightful recent study of American misdemeanor justice is undoubtedly a work by Professor Malcolm M. Feeley whose thesis is stated succinctly in its title. In The Process Is the Punishment,[96] Feeley described the functioning of the Court of Common Pleas in New Haven, Connecticut, a court with jurisdiction over misdemeanors and lesser felonies. In this reasonably typical lower court, although every defendant had a right to trial by jury, not a single defendant in a sample of

1,640 cases invoked the right.[97] The principal reason for the stunning lack of trials was not the practice of plea negotiation. Instead, as Feeley described them, the routine workings of American misdemeanor justice yield a troublesome conclusion--one expressed here in less cautious terms than Feeley himself expressed it: A misdemeanor defendant, even if innocent, usually is well advised to waive every available procedural protection (including the right to counsel) and to plead guilty at the earliest opportunity. This strategy is likely to minimize the painful consequences of criminal proceedings for the defendant even when he would be almost certain to be acquitted at trial and even when he receives no sentencing concession in return for his plea.

In the Court of Common Pleas, an immediate guilty plea is typically followed by a suspended sentence or a small fine (usually of less than $30). Although the defendant incurs the disabilities of a misdemeanor conviction as well, for a variety of reasons a person who appears as a defendant in a misdemeanor prosecution is unlikely to regard these disabilities as a serious burden.[98] The limited formal sanctions that follow a plea of guilty pale in practice beside the informal and largely unintended sanctions that flow routinely from an invocation of procedural protections.

When a misdemeanor defendant pleads not guilty, he may be unable to secure his pretrial release. A commonly noted irony of American misdemeanor justice is that, despite the widespread implementation of bail reform during the past two decades, many

more defendants are imprisoned before trial than are imprisoned after conviction (four times as many in Feeley's sample although the Connecticut bail reform statute is widely regarded as a model).[99] Moreover, when a defendant does not incur this most dramatic of the "process costs" that insistence on the right to trial may exact, a court may require him to post bond. To obtain his bond, the defendant ordinarily must locate a bondsman and pay a fee of $70 or $100, an amount greatly in excess of the fine that would follow conviction.[100]

Similarly, when a nonindigent defendant seeks the services of counsel, he is likely to pay a legal fee of about $350, an amount more than ten times larger than the average fine.[101] Even an indigent defendant entitled to "free" legal services may find the process of representation burdensome. Initially, the appointment of counsel may subject this defendant to minor indignities; an apparently irritated judge may ask, for example, why the defendant has not sold his car to hire a private attorney. Then the defendant's attorney invariably insists on an interview at the public defender office. The appointment usually is scheduled at a time when an employed defendant otherwise would be at work; it may well be cancelled and rescheduled; and when the time for the defendant's appointment does arrive, he is likely to be kept waiting. Finally, for several reasons including the scheduling conflicts of attorneys, representation by counsel may increase significantly the number of court appearances that a defendant is required to make. Apart from its more obvious burdens, each appearance may lead to a loss of wages

and may risk dismissal from the defendant's employment.[102] When a prosecutor in the Court of Common Pleas asks a defendant, "Do you want to get your own attorney, apply for a public defender, or get your case over with today?,"[103] he accurately describes the defendant's dilemma. Half of the defendants in Feeley's sample did forego the services of counsel.[104]

When a court appearance is scheduled, every defendant is required to appear at 10:00 a.m., an hour early enough that it usually will have been impractical for the defendant to report to work but late enough that he already will have missed a significant part of the working day. And when the court convenes, the defendant usually waits. Many cases are not called until after the court's noon recess, and after the defendant has waited he may be informed that his case will be continued and heard another day. If one assumes that a court appearance typically requires four hours of a defendant's time, a defendant who is paid only the minimum wage loses more in wages by virtue of his appearance than he ordinarily would have been required to pay in fines had he avoided this single appearance by pleading guilty.[105] Finally, when a case does go to trial, the defendant must incur the additional burden of locating witnesses and arranging their appearance and must suffer the anxiety and the frequent humiliation that trial is likely to involve.

When criminal defendants confront process costs that significantly exceed the sanctions at issue, plea negotiation plainly is unnecessary to induce the overwhelming majority to yield to conviction. Far from qualifying as a "practical

necessity," this practice becomes gratuitous overkill. As Feeley summarized his findings, "In essence, the process itself is the punishment. The time, effort, money, and opportunities lost as a direct result of being caught up in the system can quickly come to outweigh the penalty that issues from adjudication and sentence."[106]

Many of the process costs that Feeley described could of course be eliminated. Certainly a defendant should not be required to post a $1000 bond in a case in which the sanction realistically at issue is a fine of $30. It seems almost equally nonsensical to require all defendants to appear in court at the same early hour when most of their cases will not be called until substantially later. Scheduling court proceedings on Saturday or in the evening might help minimize the burdens of criminal justice not only for defendants but for victims and witnesses as well. Indeed, Feeley's analysis could prompt consideration of proposals for a radical simplification of the misdemeanor process in cases in which imprisonment is not at issue through the use of lawyerless tribunals, simplification or abandonment of the rules of evidence, and limitation of the right to jury trial. The goal of these reforms would not be so much to conserve public resources as to make trial a less burdensome proceeding for all participants (although the reforms would in fact conserve resources which might be used to make trials available to defendants who want them). Nevertheless, after a conscientious effort to minimize process costs, the dilemma would remain. When a defendant recognizes that the evidence against him is strong

(and frequently even when he does not), very little "process" can overbalance the nonincarcerative sanctions at issue in most misdemeanor prosecutions. With plea bargaining or without it, misdemeanor courts are unlikely to become the scene of frequent adversary battle.

Once this central reality of misdemeanor justice is recognized and its implications faced, the direction of reform seems plain. A simple, straightforward procedure should be made available to misdemeanor defendants to enable them to assess the wisdom of incurring the costs of trial and to facilitate the implementation of their choices. The penal order procedure of West Germany may provide a useful model for this reform.[107]

Under this West German procedure (comparable to the nontrial procedures employed by most other European nations in minor cases[108]), a prosecutor may propose a specific penal sanction not involving imprisonment in a draft judicial order that the courts routinely approve.[109] The draft order informs the defendant that if he files an objection to it within a specified period of time, the order will be set aside and he will be entitled to a full criminal trial. If, however, he fails to object, the order will become final. When a defendant accepts a proposed penal order, a parallel to the American guilty plea is of course obvious, and an analogy to plea bargaining may suggest itself as well. Nevertheless, as Professor John H. Langbein has observed, "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."[110]

As Langbein noted, German courts are not precluded from imposing more severe sentences after trials than prosecutors have proposed in rejected penal orders; they are, however, inhibited from doing so by a requirement that any increase in a defendant's sentence beyond that proposed in a penal order be accompanied by a clear statement of reasons for this increase--reasons that apparently must be based on evidence that was unavailable at the time that the penal order was proposed.[111] A recent study by William L. F. Felstiner concluded on the basis of interviews with German judges, prosecutors and academics that "German defendants who do not accept a penal order . . . are not treated more harshly than those who do."[112] Felstiner reported that prosecutors were strongly committed to the view that it would be unjust to penalize a defendant for rejecting a penal order (or for any other tactical mistake). This attitude was so pervasive that one prosecutor with eight years' experience told Felstiner incorrectly that a trial court simply lacked authority to impose a more severe sentence than had been proposed in a rejected penal order.[113]

An American "penal order" procedure might be similar to the German, but it should offer clearer assurances against an increase in sentence when a defendant exercises his right to trial. As in Germany, a prosecutor who does not seek a defendant's incarceration[114] should be able, if he chooses, to

prepare a written proposal specifying whatever lesser sanction he considers appropriate. Before delivering this proposal to the defendant (usually by registered mail), the prosecutor probably should be required to secure approval of its terms by a court.[115] Of course the form of the proposal should emphasize its tentative character,[116] yet it also should emphasize that if the defendant fails to object within a specified period of time, the proposed sanction will be imposed without further proceedings. If local law or practice extends the right to counsel to cases in which a defendant does not risk imprisonment, the proposal should advise the defendant of this right and of the procedure by which an indigent defendant may consult a public defender before accepting or rejecting the proposal. It also should contain a suitable admonition of the collateral consequences of a misdemeanor conviction.[117] Upon objection by the defendant, he should obtain a trial whose guilt-determination phase will be unaffected in any way by the prosecutor's proposal.

If the defendant is convicted at trial, however, the proposal drafted by the prosecutor and approved by the court should assume significance at sentencing. For the proposal should advise the defendant that his insistence on trial cannot lead to a more severe sentence than the sanction proposed. In West Germany, defendants may be aware without this express assurance that courts virtually never "up the ante" when a defendant rejects the proposed penal order and insists upon trial, but in light of the pervasive practice plea bargaining in

the United States, the matter should not be left to implication here.[118]

Assurance that the posttrial sentence will not exceed the sentence proposed would free defendants of the gratuitious leverage of current plea bargaining practices. At the same time, specification of the sanction actually at issue would permit each defendant to choose between acquiescence and contest on a knowledgeable basis. With the stakes made clear, many defendants, especially those with little chance of acquittal, undoubtedly would forego the burdens of trial. The procedure would in some ways be similar to plea bargaining, for prosecutors would continue to make sentence proposals on more or less the same basis that they do today.[119] Nevertheless, each defendant's choice would be made on a more appropriate basis than that provided by today's bargaining practices--practices that usually leave the trial stakes unknown apart from the fact that they probably will include a tariff for the invocation of procedural protections. The factors influencing a defendant's choice therefore would change significantly, but there is little reason to expect the reform to increase significantly the number of trials.

Indeed, one important virtue of the proposed procedure is its efficiency. Despite the praise that today's plea bargaining process has received from champions of economy in government, this process is not efficient at all. It imposes absurd, unnecessary process costs even on defendants who do not wish to contest the charges against them.

Today's misdemeanor defendants commmonly must take time from work to assemble in crowded courtrooms. There they are sometimes lectured by a judge. In one Denver courtroom, for example, the judge regularly tells defendants that there has been only one person in history who never made a mistake, the judge's Lord and Savior, Jesus Christ. The judge adds that if the defendants recognize that they have made mistakes, they will find the prosecutor understanding. With this lecture or without it, the defendants or their counsel then wait for rushed huddles with a prosecutor. Sometimes they jostle for positions in the queue. The prosecutor commonly manifests his suspicion of the defendants' stories, but he almost invariably offers some concession for a plea of guilty. When a defendant persists in seeking a trial, the prosecutor usually offers a greater concession. Then all defendants return to the courtroom for the delivery of some judicial admonitions and the formal acceptance of their pleas of guilty.

Certainly the admonitions that surround the acceptance of pleas of guilty would mean more if they were presented to each defendant in writing and if he could consider them at leisure before deciding whether to accept a prosecutor's proposal. Similarly, a penal order procedure would save both defendants and prosecutors the need to make and evaluate proposals under the pressures of a "hurry-up" conference. The crowds, the waiting time, the absences from work, the cajolery, the general bustle, and the play of personalities would all be eliminated. The misdemeanor process would become far more dignified and

deliberative. Moreover, although the detailed cost accounting necessary to document this proposition seems nearly impossible, a penal order procedure almost certainly would cost American taxpayers less than today's daily enactment of scenes from Kafka. The resulting savings could be used to provide trials in misdemeanor cases in which defendants did risk imprisonment and sensed a signficant chance of acquittal and in other atypical cases in which defendants found the inherent costs of trial worth bearing. Conceivably, some savings might even be "left over" and used to finance trials in felony courts where, from the defendants' perspective, process costs usually do not loom so large. In any event, it would seem desirable to introduce to the criminal justice system a remarkable technological innovation, the post office. With the adoption of a penal order procedure vastly more orderly than today's lower court plea bargaining, the elimination of plea bargaining in misdemeanor courts probably would impose no additional burden on American taxpayers.

C. The Problem of Enforcement

Although some plea bargaining proponents contend that an attempt to prohibit this practice would "drive [it] . . . back into the shadows from which it has so recently emerged,"[120] others apparently maintain only that far-reaching mechanisms for enforcing the prohibition would be necessary.[121] For example, when the Supreme Court upheld the constitutionality of plea bargaining in Brady v. United States,[122] it wrote:

> A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges.[123]

Someone who seeks a plan for abolishing plea bargaining that would preclude all revision of criminal charges, forbid all guilty pleas, or seek in other ways to foreclose every conceivable route of evasion that prosecutors, trial judges and defense attorneys might invent will not find it in this article.

In fact, plea bargaining cannot be abolished. Neither can murder, armed robbery, racial discrimination, police brutality, cruelty to animals, littering, the sexual mistreatment of four-year-olds, or (probably) any other activity known to humankind. If, despite a plea bargaining prohibition, prosecutors and defense attorneys wished to meet in dark alleys, enter plea agreements and lie about them, they probably could escape detection. Similarly, if prosecutors and defense attorneys wished to strangle elderly derelicts in dark alleys, they probably could avoid punishment for this more serious offense as well. So far as I am aware, there is no perfect enforcement mechanism for any legal obligation.

Of course the violation of a law can become so widespread that the law itself seems futile. Federal liquor prohibition offers the classic illustration. Nevertheless, some evasion is routinely tolerated--even substantial evasion on occasion. For

example, our legal restrictions on the sale of cigarettes to minors have not made it impossible for minors to obtain cigarettes. To some extent, these restrictions have invited subterfuge and have driven cigarette smoking by minors underground. Nevertheless, without these restrictions the number of minors who smoke probably would increase. Moreover, the fourteen-year-old who now smokes a few cigarettes each day in a junior high school restroom might escalate to a half-pack a day in the school cafeteria or student lounge. As Professor Franklin E. Zimring, whose study of the legal world of adolescence includes a penetrating analysis of the problem of teenage smoking, has suggested, this closet (or water closet) sophisticate might even learn to inhale.[124] Despite disturbing evasions, legal prohibitions that merely reduce the incidence of the prohibited behavior can be worthwhile. It is a matter of costs and benefits and a matter of degree.

It therefore is not enough for social scientists to proclaim that the opponents of plea bargaining are bound to fail if they wish to create a bargain-free world.[125] That criticism implicitly applies to one law a standard that no law can meet. Similarly, a triumphant empirical finding that some plea bargaining persists in a jurisdiction that has purported to ban it is worth little more as a guide to policy than a finding that some burglary persists in a jurisdiction that has attempted to end that activity.

Of course prosecutors and defense attorneys do sense personal advantages in plea bargaining. There are natural

temptations to engage in most of the activities that the law prohibits. Moreover, bargaining commonly occurs in private where no victim, member of the public, or other watchdog is likely to see it and howl. Undeniably, the impediments to enforcement of a plea bargaining prohibition are substantial; again, however, plea negotiation is not unique. Without suggesting that bribery is analogous to plea bargaining in more important ways, one can note a minor parallel. It is always in the interest of a person who offers a bribe to secure favorable governmental action and always in the interest of an official who accepts a bribe to become rich. Bribery, too, is a transaction between willing adults in private.[126] We apparently have not concluded that the only realistic choice is to legalize bribery or else drive it underground.

In a few respects, the enforcement of a plea bargaining prohibition might be easier than the enforcement of our laws against bribery, the sale of cigarettes to minors, and other consensual behavior. For one thing, the final product of successful plea bargaining--a plea of guilty--must surface in an inauspicious place for illegal behavior, a courtroom. This circumstance at least can trigger an inquiry. For another, this official inquiry can be directed to prosecutors and defense attorneys, people who have special obligations to the law.

A simple and straightforward plan for prohibiting plea bargaining might rely in part on these circumstances; it might consist of only a little more than Anglo-American courts did long ago, before they became so plea-hungry. When a defendant

submitted a plea of guilty, the trial judge might question him, his lawyer and the prosecutor individually, asking whether any reward, favor, concession or benefit of any description, express or implied, had been offered in exchange for or was anticipated in response to the plea.[127] Before accepting a guilty plea, the court might be required to find as of old that it was not motivated by "hope of reward" or by fear of official retaliation for exercise of the right to trial. Moreover, although some observers have argued that "implicit judicial bargaining" (the practice of sentencing defendants who have pleaded guilty less severely than those convicted at trial) would cause the speedy downfall of an attempted plea bargaining prohibition,[128] they have failed to consider the most apparent response to this evasion--the direct prohibition of "implicit bargaining" along with its more explicit counterparts. As was apparently the practice in England in the nineteenth century,[129] a trial judge might inform a defendant who submitted a plea of guilty that his plea would make no difference in the sentence that he would receive.[130]

Of course we have experienced empty guilt-plea ceremonies before, and this proposal might appear merely to invoke the failed historic safeguards that have let us slide to where we are. Before endorsing this objection, however, one should consider the dreadful things that the objection says about members of the legal profession. The proposal, after all, is not quite to turn back the clock. It is not to ask form questions of a defendant who has been persuaded that the court's acceptance of a guilty plea will save him from the harsh sentence likely after a trial. It is to ask--as part of a seriously intended plea bargaining prohibition--questions of two lawyers.

The theory that plea bargaining is inevitable because prosecutors and defense attorneys would find ways to bargain even if bargaining were illegal is as unattractive as the theory that plea bargaining is inevitable because our nation cannot afford implementation of the right to trial promised by the constitution. This theory obviously offers a very dark view of the legal profession. It sees America's men and women of the law as lawless, and it proclaims without evidence, without hesitation and even without blushing that large numbers of these people not only would break the law to achieve their goals but would lie about this law violation. Although my writings have not expressed a terribly exalted opinion of lawyers and judges, I do not share even remotely this dismal vision of our profession.

In many ways, to be sure, lawyers and judges could be expected to resist a plea bargaining prohibition. Many would cheerfully construe ambiguities, expand exceptions, seek loopholes, and bend imprecise language in order to continue their old, comfortable ways (or, if one prefers, to perpetuate a time-honored practice that they regard as worthwhile). Indeed, a defense attorney who believed a plea agreement to be in a client's interest might consider it his ethical duty to stretch a plea bargaining prohibition to its limit. Once the scope the prohibition had been made clear, however, his ethical obligation would be to comply. Our law imposes a great many limits on what

a lawyer may do to advance a client's interests, and most lawyers seem to respect these limits (especially when the restrictions are reasonably clear, as in "Thou shalt not bribe judges nor suborn perjury"). The key to an effective plea bargaining prohibition probably lies less in proliferating intricate enforcement mechanisms than in clarifying the scope of the substantive prohibition. As I have argued elsewhere at greater length, it is not always easier to regulate a practice than to forbid it; that modern truism simply is not true. The effective implementation of an unambiguous plea bargaining prohibition probably would prove less difficult than enforcement of the fuzzy regulatory schemes typically proposed by plea bargaining reformers who view themselves as moderates.[131]

The advocates of plea bargaining apparently take a different and, indeed, a schizophrenic view. While confidently asserting that prohibitions of plea bargaining would be unenforceable, most of them disregard all problems of enforcement in advancing their own proposals for reform.[132] For example, the Advisory Committee on the Federal Rules of Criminal Procedure declared in 1974, "We have previously recognized plea bargaining as an ineradicable fact. Failure to recognize it tends not to destroy it but to drive it underground."[133] At the same time, the Committee added to the federal rules a provision that trial judges "shall not participate in [plea] discussions."[134] The Committee offered no procedure for enforcing this prohibition and no discussion of the likelihood of evasion; presumably the Committee regarded it as unthinkable that judges would not simply comply. One is left to

infer that prohibiting judicial plea bargaining tends not to drive it underground but only to destroy it.[135] Other defenders of plea bargaining have offered such reform proposals as, "Similarly situated defendants should be afforded equal plea agreement opportunities."[136] These observers may believe that the general high-mindedness of prosecutors will be enough to implement reforms that they desire while no enforcement machinery can implement reforms that they oppose.

Of course some lawyers and judges might cheat. After telling a defendant that his choice of plea would not affect his sentence, a trial judge might disregard this pledge and, through actions that spoke louder than his words, demonstrate the extreme foolishness of the defendant's exercise of the right to trial. To a considerable extent, the plea-acceptance procedures proposed in this article do wager the future of the right to trial on the proposition that most trial judges have not attained the high level of malevolence that this turnabout would require,[137] but some check on the possibility that the procedures would turn to hypocritical rituals in the hands of dishonest lawyers and judges might be warranted.

This check could be provided by post-conviction proceedings at which allegations of noncompliance with a plea bargaining prohibition could be heard and adjudicated. When a defendant who had pleaded guilty demonstrated by a preponderance of the evidence that his plea was the product either of a sub rosa promise or of a pattern of implicit bargaining, his conviction might be set aside. Similarly, when a defendant convicted at

trial showed by a preponderance of the evidence (statistical or nonstatistical) that he had been sentenced more severely as the result of his exercise of the right to trial, he might be entitled to reformation of his sentence.

As federal and state rules have required ever-more-elaborate courtroom guilty plea colloquies, the Supreme Court has expressed the hope that sufficiently intricate plea-acceptance procedures can foreclose all avenues of post-conviction relief.[138] The Court apparently believes that guilty pleas can be packaged carefully enough at the outset that the prospect of post-conviction proceedings will disappear. This hope is misconceived. An attachment to finalty in guilty plea cases[139] is likely to prevent even moderate reform of the plea bargaining system.

Although this article has expressed considerable optimism about revised courtroom procedures that would include the interrogation of prosecutors and defense attorneys, the parties to an improper bargain have an undeniable interest in concealing it. The proposed plea-acceptance procedures might inhibit illicit bargaining by lawyers but would be unlikely to reveal whatever bargaining occured despite the ban. Moreover, today's courtroom procedures--procedures that seek answers only from defendants--are much less likely to succeed.

If the villain of a melodrama were to place a gun at the hero's head and require him to sign, first, a deed conveying his farm and, second, a paper declaring that there was no gun at his head, the second paper would be worth no more than the first. Moreover, the paper would

not gain value with the addition of more elaborate clauses and more emphatic denials. A defendant's affirmation of the voluntariness of his guilty plea at the time that he enters it is simply a second signature. This affirmation adds almost nothing to the plea itself.

Perhaps the ordinary pressures of prosecutorial bargaining should render a guilty plea involuntary; or perhaps, as the Supreme Court appears to believe,[140] only threats of illegal action should be sufficient. Wherever the threshold of involuntariness is established, coercive threats are unlikely to be revealed so long as the consequence of revealing them will be rejection of the plea--and the consequence of rejecting the plea, execution of the threats. A full presentation of coercive circumstances can be expected only after those circumstances have changed, and any effort to force "final" adjudication of the voluntariness of a defendant's guilty plea at the moment it escapes his lips is therefore misguided.[141]

A few other embellishments of a plea bargaining prohibition might merit consideration. It would be plainly inappropriate to forbid a prosecutor from reducing a charge that he had filed if new evidence made the initial charge appear unjustified, and it also might seem inappropriate to forbid charge reduction when further reflection convinced the prosecutor that his initial charge was inequitable. Moreover, it might seem inappropriate to forbid a defense attorney from urging the prosecutor to reconsider his charge. Of course the charge-revision process, especially when it included discussions between prosecutors and

defense attorneys, could lead to implicit understandings, to implicit misunderstandings, and to expectations of reciprocity. To clarify the situation, it might be desirable to require a prosecutor to file with any downward revision of a charge an express assurance that no expectation of reciprocity did exist and that the defendant might exercise freely his right to trial on the revised charge. It also might be desirable to provide that no guilty plea to the reduced charge could be entered for a period of perhaps thirty days.[142]

I repeat that none of the safeguards offered here would be foolproof and that some evasion undoubtedly would occur. Without attempting to treat this regrettable circumstance as a virtue, one can note that at least it would reduce the strain on existing resources that a plea bargaining prohibition might produce. One cannot logically contend both that a plea bargaining prohibition would be a dead letter and that it would swamp the courts. If the behavior of prosecutors, defense attorneys and trial judges will not change overnight, the morning will not see a sudden devouring of the courts by the caseload monster.

As I have indicated, I do not believe that most lawyers and judges would seek devious backdoor mechanisms to undercut a plea bargaining prohibition; but whatever the level of subterfuge and evasion at the outset, it probably would diminish with time. Law typically works less through specific enforcement mechanisms than through a gradual influence upon attitudes. For example, fifty years ago, police use of "the third degree" to secure confessions was apparently a widespread activity.[143] Plainly we have not, in the interim, devised an effective means of policing what occurs in the backroom of a stationhouse. Nevertheless, "the third degree" does not seem nearly as significant a problem today. Even if determined prosecutors and defense attorneys were to devise an elaborate system of secret handshakes to evade new legal restrictions on plea bargaining, the next generation of prosecutors and defense attorneys might adopt a different attitude.

I have argued elsewhere that critics of the fourth amendment exclusionary rule "have followed too closely Justice Holmes' advice to view the law from the perspective of a 'bad man' who wishes only to evade it."[144] From a "bad cop" perspective, it is not difficult to ridicule the fourth amendment exclusionary rule's supposed deterrent effect.[145] This perspective, however, has led critics of the exclusionary rule to overlook what is probably one of the law's success stories. Police behavior has changed for the better in the generation since Mapp v. Ohio[146] was decided, and it has changed dramatically for the better in the two generations since the Wickersham Commission reported on the third degree and the Supreme Court began excluding coerced confessions from evidence in state criminal proceedings.[147] The causes of this change obviously are complex, but the law probably has had an influence. The principal reason has not been that lawless and dishonest officers greatly feared the discovery of their abuses and the courtroom exclusion of coerced confessions and illegally seized evidence. It has been that essentially law-abiding officers have accepted (although slowly and reluctantly

on some occasions) the guidance that the law has provided. People who confidently assert that any prohibition of plea bargaining would drive it underground have fallen into the Holmesian trap and have been thinking about law observance and law enforcement in the wrong way. The "bad man of the law" does merit careful attention, but the "good person of the law" also merits notice.

Part II. Alternative Shortcuts

This article has suggested that full implementation of the right to jury trial would be costly only in felony cases and that, even in felony cases, the cost would be far from exhorbitant. Nevertheless, however bearable this cost might seem, Americans might prove unwilling to pay it.[148] Even this refusal to afford criminal defendants the kind of trials promised by the Constitution would not require the continuation of plea bargaining. For in providing elaborate trials to a minority of defendants while pressing all others to abandon their right to trial, our nation allocates existing resources about as sensibly as nation that attempted to solve its transportation problem by giving Cadillacs to ten percent of the population while requiring everyone else to go barefoot. The central argument of Part II of this article is simply that less would be more.

Part II will develop this theme partly by exploring the experience of other times and places. Much of today's talk about economic necessity, immutable principles of organizational

interaction, and the inevitability of plea bargaining seems strained when one glances beyond the boundaries of our own criminal justice system. Most of the world actually lives in what plea bargaining proponents regard as "fantasy land,"[149] and even the Anglo-American legal system survived without plea bargaining during most of its history. Indeed, two American jurisdictions, Philadelphia and Pittsburgh, have avoided the overwhelming dependency on plea bargaining of most American cities by implementing systems of expedited jury waived trials.

History, comparative legal study, and contemporary American experience support a thesis that I have advanced before and that this article will develop more fully:

> [T]he more formal and elaborate the trial process, the more likely it is that this process will be subverted through pressures for self-incrimination. The simpler and more straightforward the trial process, the more likely it is that the process will be used.[149]

Apart from offering empirical material in support of this thesis, Part II will consider a number of ways in which our trial processes might be simplified. The key to eliminating America's widespread subversion of the right to trial may lie in making trial a more workable, more affordable procedure.

A. Other Times, Other Places

1. Some Lessons of History

In 1979, I published a history of the guilty plea in Anglo-American Law,[150] and for present purposes, only a brief review of

some of my conclusions seems necessary. For many centuries, Anglo-American courts did not encourage guilty pleas but actively discouraged them.[151] Guilty pleas apparently accounted for a small minority of criminal convictions during the Middle Ages,[152] the Renaissance,[153] the American colonial period,[154] and even the first part of the nineteenth century.[155] As recently as the early twentieth century, moreover, our criminal justice system was not as dependent on the guilty plea as it has now become. For example, in 1908 and for several years thereafter only about 50 percent of all convictions in the federal courts were by guilty plea rather than trial.[156] Moreover, when plea bargaining first emerged in the period following the American Civil War, appellate courts emphatically condemned it, and they articulated some principles that had seemed implicit in earlier practices on both sides of the Atlantic: "No sort of pressure can be permitted to bring the party to forego any right or advantage however slight. The law will not suffer the least weight to be put in the scale against him."[157] "[L]itigation is . . . the safest test of justice."[158] "The law . . . does not encourage confessions of guilt, either in or out of court."[159] "All courts should so administer the law . . . as to secure a hearing upon the merits if possible."[160] "A man may not barter away his life or his freedom, or his substantial rights."[161]

In the "golden age of trials" that Anglo-American legal systems now have abandoned, the trials themselves were not golden.[162] When defendants offered to plead guilty, judges strongly urged them to reconsider; but this practice developed at

a time when the trial process was not notably burdensome. Professor John H. Langbein discovered that an English jury could resolve between twelve and twenty cases during a single day in the 1730's. At this time, neither party was usually represented by counsel; there was ordinarily no voir dire of prospective jurors; a single jury might hear several cases before retiring; the accused participated actively and informally in the trial process; and the law of evidence was almost entirely undeveloped.[163] Moreover, Professor Lawrence M. Friedman discovered that one American felony court could conduct a half dozen jury trials in a single day as recently as the 1890's.[164]

The speed and informality that characterized the trials of past centuries undoubtedly harbored grave potential for abuse, but the American jury trial now has become so complex that our society refuses to provide it. Apparently reluctant to reconsider our too expensive trial procedures, we press most defendants to forego even the more expeditious form of trial that defendants once were freely afforded as a matter of right.[165]

As Professor Langbein has demonstrated,[166] the paradox of our criminal justice system has a parallel in history. On the European continent during the late Middle Ages and the Renaissance, a formalistic, rule-bound trial process designed to protect defendants had proven unworkable in practice. Rather than revise their unrealistic standards of proof, officials adopted expedient shortcuts to induce defendants to incriminate themselves. These shortcuts included a judicially sanctioned system of torture surrounded by supposed safeguards that were

strikingly similar to those that surround the plea bargaining process today.[167] Both continental and Anglo-American history support the view that pressures for self-incrimination increase as trial procedures grow complex.

2. A Rapid International Tour

In 1961 in Rogers v. Richmond,[168] the Supreme Court declared, "[O]urs is an accusatorial and not an inquisitorial system--a system in which the state must establish guilt by evidence independently and freely secured and may not by coercion prove its charges against an accused out of his own mouth."[169] In this statement, the Court revealed some narrowness of vision. Professor Lloyd L. Weinreb has noted that "no country relies so much as we on the defendant's formal acknowledgement of guilt."[170] Plea bargaining is not only a relatively recent phenomenon; it is also a distinctive feature of Anglo-American legal systems. Still, as Professor Rudolph B. Schlesinger has observed with perhaps a touch of provocative exaggeration, "When it comes to problems of criminal procedure, [Americans] are possessed by a feeling of superiority that seems to grow in direct proportion to the ever-increasing weight of the accumulating evidence demonstrating the total failure of our system of criminal justice."[171]

That the extent of a jurisdiction's reliance on plea bargaining is likely to turn largely on the complexity of its trial procedures is illustrated, not only by America's unhappy experience and the less distressing experience of nations that have avoided plea bargaining, but by the experience of some "intermediate" jurisdictions. Most notably, England's trial procedures have been used more

frequently than our more elaborate alternatives but less frequently than the simpler procedures of the many nations that do not engage in plea bargaining. Moreover, the practices of other nations of the British Commonwealth and of countries like Israel that have derived their legal systems partly from English or American institutions seem to fit the same "in-between" pattern.

The frequent denial that plea bargaining occurs in England[172] is apparently based largely on semantics[173]; there is ample evidence that what Americans would call plea bargaining does occur, not only in England,[174] but in most of these other nations as well.[175] Nevertheless, these nations do not seem as dependent on plea bargaining as we are.[176] The nation that comes closest is probably Canada, where "of the cases adjudicated approximately 70 percent are disposed of by guilty pleas and approximately 30 percent . . . by trial."[177] Empirical studies of Canadian practices have concluded that a defendant's choice of plea has only a minor effect on the sentence that he receives--less effect than this tactical decision usually has in the United States.[178] Moreover, although plea bargaining may be reasonably widespread in Canada, most Canadian authorites seem far from reconciled to it. As two Canadian scholars observed,

> Evidently the plea agreement has now been enshrined as a cornerstone of the federal criminal justice system within the United States. In Canada, the main drift in policy making has been in exactly the opposite direction. Canadian courts are beginning to express strong disapproval of plea bargaining while the Law Reform Commissions both of Canada and Ontario have strongly advocated rigorous suppression of the practice.[179]

In England, approximately 40 percent of the defendants charged in Crown Courts have received jury trials in recent

years.[180] The plea bargaining that does occur seems relatively genteel by American standards. Until 1970, counsel for the defendant sometimes could obtain an advance indication from the trial judge of the sentence that his client was likely to receive on a plea of guilty,[181] but a judicial decision of that year apparently put an effective end to the practice.[182] Counsel for the Crown is never permitted to make sentence recommendations,[183] and bargaining focuses exclusively on possible reductions in the charge. Moreover, the Court of Criminal Appeal has ruled that it is improper to reduce a charge "where nothing appears on the depositions which can be said to reduce the crime from the more serious offense" and that trial judges should refuse to permit charge reductions unless this standard is satisfied.[184] One barrister who is familiar with both English and American practice has maintained that concessions to defendants who plead guilty are far less automatic in England, that judicial review of prosecutorial decisions is far more vigorous, and that American prosecutors "have assumed unto themselves certain discretions which in England are still carefully guarded by the judges."[185]

Although English trial and pretrial procedures are substantially more burdensome than those of many nations that sense no need to engage in plea bargaining, these procedures at the same time are less elaborate than our own. The grand jury in England has been discarded, and nonunanimous, ten-to-two jury verdicts are permitted.[186] As is the case almost everywhere except in the United States, the products of unlawful searches and seizures are admitted in most cases into evidence.[187]

Although the law provides for the peremptory challenge of prospective jurors, this perogative is rarely exercised, and a jury is usually empaneled in minutes.[188] Of course English procedure recognizes a privilege against self-incrimination, but it also encourages defendants to testify by forbidding impeachment on the basis of prior convictions in most situations and by permitting juries to draw adverse inferences from silence.[189] These rules promote use of the evidence of defendants themselves--evidence that, as Professor Langbein has observed, is "almost always the most efficient testimonial resource."[190] In addition, "lawyers almost never object to a question, . . . the hearsay rule has been abolished, . . . [and] leading questions are permitted on direct as well as cross-examination."[191] The "intermediate" complexity of English trial procedure may explain both why plea bargaining has become part of the English criminal justice system and why it has not become as important part of that system as of ours.

The criminal procedures of continental Europe have provided the principal model for most of the rest of the world, and although some Americans do maintain that there are near equivalents of the negotiated plea in European practice, these continental procedures also seem to provide the principal illustration of the ability of advanced legal systems to avoid reliance on plea bargaining.[192] The experience of the Scandinavian nations may be especially instructive, for in some ways the procedures of these nations differ from those on the rest of the continent and are parallel to our own. Although

writings in English about Scandinavian criminal procedure are unfortunately scanty,[193] an article by Jonas A. Myhre, an attorney in Oslo, Norway, has provided a thoughtful description of the workings of criminal justice in one of these jurisdictions.[194]

In continental Europe outside of Scandinavia, even the institution of the guilty plea is unknown except in minor cases so that essentially the same trial procedures are employed when a defendant confesses as when he does not.[195] In Norway, however, for all offenses except those punishable by more than ten years' imprisonment, the code of criminal procedure provides that a defendant may make "an unreserved confession" in open court. If the accuracy of this confession is "corroborated by other existing evidence," the Code declares that "the case may, upon the consent of the accused, at once be adjudicated and tried without a formal charge and without lay judges being summoned."[196] The resulting "trial" is probably somewhat more elaborate than the "providency hearings" that precede the acceptance of guilty pleas in the United States, but not greatly so.[197] Moreover, Norwegian prosecutors are not restricted by a rule of "compulsory prosecution" like the ones applicable in Germany and Italy; they may properly decline to prosecute even when abundant evidence establishes a defendant's guilt.[198] Norway also goes farther than most other European nations in promoting popular participation in the administration of justice. Although this nation, like many others, employs "mixed" tribunals of professional and lay judges in less serious criminal

cases, it retains ten-person criminal juries for the most serious cases.[199] In addition, trial procedures are accusatorial in character, and the state bears the burden of proving the defendant guilty beyond a reasonable doubt.[200] Finally, Norway, like most other European nations, has experienced a "growing tide of criminal cases" in recent years.[201]

Despite the existence of broad prosecutorial discretion, of a legal procedure very much like the guilty plea, of a jury system in serious cases and of other conditions that are thought to make the widespread use of plea bargaining inevitable in the United States, Myhre reported that the Norwegian prosecutor "is not allowed to bargain with the defendant in order to secure a conviction," that "he is liable to criminal prosecution if he does so," that "bargains are almost nonexistant," and that "the system functions very well without them."[202] Of course, when prosecutors do not bargain, judges may reward the entry of guilty pleas by sentencing defendants who plead guilty less severely than those who are convicted at trial.[203] This "implicit bargaining" can prove as intimidating as the more "explicit" kind,[204] and a system that merely substituted one form of bargaining for another might not seem a promising model for reform. Myhre, however, addressed this issue:

> The punishment [of the defendant who confesses] will, neither as a matter of law, nor of practice, be more lenient than in judgments entered after a trial. The only concession thus given the accused is a procedural one, being saved the inconvenience and publicity of an ordinary trial. In spite of this, there are a great number of accused persons who prefer the summary adjudication, a fact which may sound rather incredible to those familiar with the system in the United States.[205]

Although the ability of European legal systems to function effectively without plea bargaining is sometimes disputed, the controversy is apparently confined to the United States and focuses almost exclusively on the possibility of "implicit" bargains. European law forbids the exchange of prosecutorial or other official concessions for confessions, and despite the claim that those who find merit in European systems may have compared the "law on the books" of continental nations with the "law in action" here,[206] European prosecutors, judges and defense attorneys insist with a uniformity rarely encountered in field research that this legal requirement is observed and that talk of trading a defendant's confession for some benefit that a prosecutor or trial judge might provide simply does not occur.[207]

The legal constraints under which many European prosecutors operate tend to add credibility to these assertions about prosecutorial practice. In West Germany, for example, a "rule of compulsory prosecution" applicable to serious offenses requires the prosecution of "all prosecutable offenses, to the extent that there is a sufficient factual basis."[208] Violation of this rule can lead to citizen complaints and to administrative and judicial remedies, and in a meritocratic corps of career prosecutors in which even unsuccessful complaints may hinder career advancement, these are apparently powerful incentives for obeying the rule.[209] Moreover, if a prosecutor were to defy the rule by charging a lesser offense than the evidence would support, his concession might prove ineffective; a German court is not bound by a prosecutor's formulation of the charge and,

after giving the defendant appropriate notice and an opportunity to be heard, may convict of any offense that the evidence establishes.[210] Although German prosecutors invariably make sentence recommendations, these recommendations are followed far less often than prosecutorial sentence recommendations in the United States.[211] In the many legal systems like the West German in which the guilty plea as such does not exist in serious cases, in which trials are so uncomplicated that there is little administrative reason to avoid them, and in which legal ideology strongly opposes any form of bargaining for confessions, even the most skeptical observers apparently concede that plea bargaining American style is essentially unknown.[212]

As Professor Langbein has contended, however, American practitioners and scholars "feel a deep need for reassurance that what they are doing is not so bad as it looks. . . . As a corollary to the proposition that plea bargaining is not really so bad, the claim is advanced that everybody else does it too."[213] Professor William M. Landes once wrote:

> Although American and Continental procedures for disposing of criminal cases appear to be different . . . , one can argue that in actuality they are nearly equivalent. . . . There does not have to be an explicit bargain between the prosecutor and the defendant. It is sufficient that the courts operate in a manner to reward defendants who have confessed with lighter sentences, and that this fact be known to defendants. We would predict that European trials in which a confession has been made . . . would be similar to the formal proceedings before a judge in the United States for defendants who plead guilty. If my hypothesis is correct, then confessions in European criminal procedure serve the same purpose as guilty pleas in American procedure. . . . This is not surprising since the forces I cited as producing guilty pleas . . . would operate on the Continent

to produce confessions.[214]

Professor Landes, conceding a lack of empirical support for his analysis, recognized that it ought to be tested.[215] Two American legal scholars, however, Abraham S. Goldstein and Martin Marcus, have reported on the basis of interviews in Germany, Italy and France that covert European practices may provide "functional analogues of the guilty plea and 'plea bargaining.'"[216] Relatively little of the article in which Goldstein and Marcus presented their findings was devoted to the plea bargaining issue, but a casual reader might have overlooked this fact. For Goldstein and Marcus seemed to emphasize the plea bargaining issue in their introduction and in two of the three headings that introduced their conclusions: "The Analogue of the Guilty Plea: The Uncontested Trial" and "Analogues of Plea Bargaining: Discretion and Acquiescence."

In suggesting that uncontested trials in Europe might be similar to guilty pleas in the United States, Goldstein and Marcus noted that European trials are likely to be relatively short when defendants do not contest their guilt. A somewhat more surprising fact, however, is the limited extent to which confession does shorten European judicial proceedings. The two scholars cited what was then the only empirical study of this question, a work by Gerhard Casper and Hans Zeisel which found that in West Germany a full confession normally cut the time devoted to trial in half and the time devoted to deliberation hardly at all.[217] In a jurisdiction in which "the average . . . duration of a [lesser court] trial is one-third of a day . . . [and] of a [major court] trial one day,"[218] the time savings effected by a defendant's confession were not especially great.[219] Moreover, a recent study of lower court trials in Germany reported that a defendant's confession merely reduced the average time of trial from 70 to 50 minutes.[220] Although Goldstein and Marcus did present some evidence of mass processing in lower criminal courts in France,[221] their conclusion that the uncontested trial in Europe is analogous to the American guilty plea seemed somewhat strained; and of course an even closer analogy would not have suggested that uncontested trials in Europe are commonly the product of a bargaining process.[222]

When Goldstein and Marcus turned from "analogues of the guilty plea" to "analogues of plea bargaining," they focused primarily on whether the rules of compulsory prosecution applicable in Italy and Germany and the assertedly comparable practice in France truly preclude the exercise of discretion by prosecutors and police officers. They found to no one's surprise that discretion had not been wholly suppressed. Thus in Italy:

> Prosecutors admit that they avoid the requirement of mandatory prosecution by the manner in which they appraise the credibility of witnesses, weigh the evidence, and assign burdens of proof. For example, when a woman of "tarnished" reputation alleges that she was raped by an established person who has no previous record, the prosecutor may make comparative assessments of credibility and decline to proceed on the basis of insufficient evidence, even though he could easily send the case to trial.[223]

Fortunately the rule of compulsory prosecution does permit prosecutors to assess questions of credibility in deciding whether there is an adequate evidentiary basis for prosecution,

and it is not clear that the case suggested by Goldstein and Marcus involved a departure from the rule. Certainly a judgment concerning the strength of the evidence cannot be wholly mechanical, and one may readily accept the suggestion of Goldstein and Marcus that, in close cases, "[c]ompassion intrudes now and then . . . ."[224] To say that the rule of compulsory prosecution is subject to interpretation or even that it may be bent is not to say, however, that the rule means nothing or that the discretion exercised by European prosecutors is even remotely comparable to the essentially unfettered charging discretion of prosecutors in the United States. More importantly, the exercise of a unilateral charging discretion that, far from inducing a defendant to convict himself, may save him from prosecution is plainly no analogue of plea bargaining. As I have remarked elsewhere, "To say that mercy may be given is not to say that mercy should be sold."225

Goldstein and Marcus ultimately did address the plea bargaining issue that they had promised to address, and they briefly suggested two European practices that, they thought, bore a resemblance to American bargaining. In France, where compulsory prosecution is not a legal requirement, this principle seems to mean less than it does in other European jurisdictions. Even when the available evidence strongly suggests that a defendant has committed a serious offense within the jurisdiction of the Court of Assize, a prosecutor may charge a "lesser included" offense triable in the Correctional Court whose procedures are less elaborate. The defendant, however, may object to this "correctionalization" and may insist upon standing trial on the more serious charge in the higher court. Goldstein and Marcus maintained that when a French prosecutor uses the process of "correctionalization," he "is, in effect, offering an accused a lesser sentence . . . in exchange for a waiver by the accused of the full process that he would have if he were charged with a [more serious crime]."[226] This argument may be literally accurate, especially if one wishes to view a defendant's failure to insist that he should be prosecuted for a more serious offense as a "waiver" of procedural protections.[227] Nevertheless, a defendant whose case is "correctionalized" does not concede his guilt of any crime. He retains his right to trial and to the full range of legal protections considered appropriate for the only offense with which he has been charged. A similar situation might arise if an American defendant charged only with a fineable offense in a nonjury court were permitted to insist (as he is not) that he should be charged with a more serious crime in a court where he could receive a jury trial. Although most defendants would be likely to decline the honor, they probably would not think that they had engaged in a form of plea bargaining. The analogy between plea bargaining and "correctionalization" may simply indicate that some Americans tend to go to extremes in the attempt to prove that everyone else subverts procedure protections in more or less the same way that we do.[228]

Finally, Goldstein and Marcus maintained that "[in] return for an admission of guilt . . . prosecutors may recommend suspended sentences or lenient ones, and judges may impose them."[229] In contrast to the authors' descriptions of other European practices, this seemingly central assertion received little attention and was unsupported by reference to any specific interview, to any illustrative incident, or to any European literature.[230] Professor Langbein has advanced a substantially different view:

> In the West German system, 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 . . . 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 anyway. . . .
>
> [T]here is nothing unreasonable about the proposition that 41% of the cases [in West Germany] are so open-and-shut that the defendants admit the charges for no better reason than that contest is hopeless.[231]

Langbein's analysis may offer at least as plausible an explanation of the 41 percent confession rate in Germany as the explanation advanced by Goldstein and Marcus, but of course neither analysis was based on a direct examination of European sentencing practices.

During the years that I have been studying plea bargaining, I have encountered a number of lawyers, academics and judges with backgrounds in continental-type legal systems. They have included a delegation of criminal law teachers from Mexican law schools; most members of the Penal Committee of the French National Assembly with whom I spent a day during their 1974 tour

of the United States; a group of officials from the Afghanistan Ministry of Justice whom I escorted on a visit to the Cook County criminal courts (where they claimed to be appalled by the barbarity of American criminal laws, sentences and procedures); and Johannes Andenaes of Norway; Jørn Vestergaard of Denmark; Hans G. Rupp and Klaus Rolinski of West Germany; Dusan Cotic and Bostjan M. Zupancic of Yugoslavia; and Zdenek Krystufek, an American professor who had taught law for twenty years in Czechoslovakia. Conversations with these sources obviously have provided only a tentative basis for judgments about legal practices outside the United States, but in the absence of more systematic empirical study, these conversation may be worth something.

All of these sources confirmed the absence of explicit bargaining for confessions in their countries, and they noted that if any form of prosecutorial or judicial bargaining came to light, it would render the resulting confessions inadmissible. When I asked whether confession might be viewed on occasion as evidence of remorse, all of the sources agreed that it might. To my surprise, a few suggested that it would be illegal to consider a defendant's confession even when it plainly evidenced remorse, but they admitted that this legal stricture might not be observed perfectly and that "judges are human too."[237] With only a single exception, however,[238] the sources denied that a defendant's confession was likely to be rewarded in a systematic way.

A typical statement was that of Professor Andenaes: "If a defendant were to confess before any significant evidence against

him had come to light, his confession might seem relevant, but a judge ordinarily would not regard a confession as relevant to sentencing if it had been made when there was no way out." Dusan Cotic observed that, at one time, a code provision in Yugoslavia had indeed declared that an admission should be treated as evidence of repentance.[239] He noted, however, that this provision had been repealed because it seemed to threaten a penalty for a defendant's denial of his alleged crime.[240] In addition, the first question asked of the defendant at a Yugoslavian trial was once whether he considered himself guilty of the crime charged. Again, however, the code provision requiring this question had been repealed in 1954 because even this question seemed unfairly to seek a confession. Today, after the defendant is asked about his education, family, and the like, he is usually asked only, "What have you to say in your defense?" Cotic noted some irony in the fact that no more than 30 percent of Yugoslavian defendants do admit their guilt. "Your legal ideology seems to be much more opposed to self-incrimination than ours. You do not ask a defendant even to give an account of himself. Nevertheless, you have lots of confessions and we don't."

Because these authorities agreed that a defendant's confession might affect his sentence on some occasions, I asked whether defense attorneys might advise their clients of this possibility and whether some defendants might then confess in the belief that this act could lead to some reward. Again with only one exception, my sources insisted that judicial rewards for

self-incrimination were so small and sporadic that a defense attorney could not properly encourage a client to confess on this basis. When I observed that even an outside chance of a minor reward might lead a defendant to confess if he had very little chance of acquittal, they replied that in any event defense attorneys do not give this advice and that defendants are not encouraged to confess. Moreover, these sources generally bridled at any suggestion that European sentencing practices might serve the same function as American plea bargaining; they used words like "ridiculous" and "unthinkable." Of course subjective perceptions of sentencing practices may be more important in assessing the extent to which legal systems encourage confession than the sentencing practices themselves; and one may hope that when European sentencing practices are studied in a systematic way, scholars will devote some attention, not merely to what the courts do in fact, but to the advice that defense attorneys give their clients and to the perceptions that defendants themselves develop.

One also may hope that empirically minded scholars will distinguish as best they can between a simple failure to confess and the presentation of a contrived defense--a task that would seem more difficult in European than in American systems because very few European defendants do remain silent. Certainly one who opposes the imposition of a penalty for the exercise of a right as basic as the right to trial need not also oppose the imposition of a penalty for false testimony.[241] Nevertheless, most of the continental sources with whom I spoke insisted that

even a defendant who advanced an obviously fabricated defense at trial probably would not receive a more severe sentence as a result. Most judges would regard this attempted deception as "a natural thing to do." The same tolerant attitude may be indicated by the fact that, although European defendants are questioned at their trials, they are not placed on oath, and their false answers are not punishable as perjury.[242] Both an ideological opposition to penalizing defendants for tactical decisions and a matter-of-fact recognition that courts rarely can distinguish accurately among defendants on the basis of their attitudes may account for the apparent reluctance of Europeans to reward confessions even informally.

Of course European legal systems should not be regarded as immobile alabaster masterpieces in which no deviations from legal norms have ever occurred, and much more extensive research on whether European practices serve in even a small degree as "functional equivalents" of plea bargaining plainly would be desirable. Even without further research, however, and even if one brings a healthy dose of American skepticism to the inquiry, it seems undeniable that European practices are very different from our own. Whether or not a French defendant who accepts the "correctionalization" of his case should be regarded as waiving procedural protections and whether or not the minority of continental defendants who confess sometimes are rewarded for this act, it is idle to pretend that all legal systems are just the same under the skin. At a time when many thoughtful observers are deeply disillusioned by American criminal procedure

and when European systems are regarded with apparent equanimity, it is appropriate to ask how these systems have avoided, if perhaps imperfectly, our disturbing subversion of the right to trial.

The most important reason for the lack of plea bargaining on the continent is of course the relative simplicity of the European trial. The West German system offers an especially suitable illustration of how an essentially plea-bargaining-free system can operate, for the literature in English about German criminal justice is especially rich[244]; this nation may avoid the rapid case processing that Goldstein and Marcus discovered in France[245]; and German criminal procedure is in some ways closer to ours than that of other European nations.[246]

Americans often harbor serious misconceptions about continental trial procedures.[248] One persistent myth is that continental defendants are "presumed guilty." In Germany,[249] however, as in France,[250] the standard of persuasion is not significantly different from our standard, beyond a reasonable doubt. Moreover, the word "inquisitorial" as applied to continental procedure probably conveys a false impression. European procedures incorporate significant adversary safeguards, and Europeans themselves often describe their systems as "mixed."[251] Although a European presiding judge almost invariably has the primary responsibility for questioning the

witnesses at trial, the prosecutor and defense attorney may pose additional questions and, at least in Germany, submit closing arguments.[252] In addition, continental procedure recognizes a privilege against self-incrimination. The continental trial begins with a judicial examination of the defendant, but the defendant is instructed that he need not answer. In Germany, morever, the court is forbidden to draw an adverse inference from the exercise of this legal privilege.[253] There is, however, no privilege analogous to the Anglo-American privilege not to take a stand, and perhaps because silence in the face of detailed questions concerning a criminal accusation is unnatural and is likely to seem incriminating whatever the legal rules, nearly all German defendants do tell their stories.[254] German trial procedure is therefore more "inquisitorial" than ours, although one should not overlook the fact that our accusatorial ideals have been so perverted by plea bargaining that American officials commonly expect, not merely an answer from the defendant, but what they regard as the right answer--an unqualified affirmation of guilt.

German procedure promotes popular participation in the administration of criminal justice but does not employ what, despite its democratic virtues, has become the most cumbersome fact-finding mechanism that humankind has devised, the twelve-person jury. All except the most trivial cases are heard by mixed tribunals of lay and professional judges, and although the size and composition of these tribunals varies with the seriousness of the offense charged, the lay judges always have

sufficient voting power to force an acquittal.[255] Because German lay judges are subject to disqualification only on the narrow grounds that can justify the disqualification of professional judges, German procedure is not burdened by the voir dire examinations of prospective jurors that prolong American jury trials.[256] Also absent are our elaborate jury instructions ("If you find A, you must consider B, and if you find B . . ."))--instructions that also lengthen the trial and that, most studies indicate, jurors do not understand.[257] Because the lay and professional judges deliberate together, the professionals can explain points of law as they become relevant. An adversary check on the accuracy of the legal positions that they adopt is provided by the preparation of a detailed written judgment that sets forth both these legal positions and the tribunal's factual conclusions and that can (and often does) lead to wide-ranging appellate review at the behest of either the prosecution or the defense.[258]

Many American evidentiary rules seem difficult to defend even in our jury system (for example, the rule that forbids leading questions on direct examination even after a lawyer has spent hours discussing a witness's testimony with him before trial). Nevertheless, it may be the lack of a jury system rather than greater common sense that accounts for the absence of these complicating rules in Germany.[259] Witnesses usually are permitted to present their testimony in narrative form. The principles of "orality" and "immediacy," designed primarily to preclude the use of statements contained in a pretrial dossier

that have not been presented orally by the witnesses at trial, do provide a weak German analogue to the hearsay rule; but many forms of documentary evidence that would be inadmissible in the United States--including the recorded but unsworn statements of witnesses who have become unavailable--can be considered.[260] With a very few exceptions like the limited hearsay rule and the rule against receiving involuntary confessions, German procedure does not exclude evidence on the ground that its prejudicial impact may exceed its probative value; this kind of exclusion seems to occur primarily in systems that value the common sense of juries but that trust only the less common sense of judges and rulemakers to determine the worth of various sorts of evidence. West Germans have enough confidence in the disciplinary mechanisms aplicable to their statewide, hierarchically controlled police forces that they have little interest in adopting exclusionary rules to deter police misconduct,[261] and because "virtually all relevant evidence is admissible, . . . time is not spent arguing about exclusion and otherwise manipulating evidence in the familiar Anglo-American ways."[262] In addition, a pretrial procedure that provides virtually complete discovery to the defense (and that permits the defense to seek the investigation at public expense of material that the police and prosecutor may have overlooked) limits the importance of surprise and forensic strategy at the trial, and the practice of beginning the trial with an examination of the accused also tends to establish which matters are contested and thus to focus the issues.[263] Because "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 the trial by comparison with our own arrangements,"[264] Professor Langbein has concluded, "German trial procedure, unlike American, has retained an efficiency that makes trial practical for every case of imprisonable crime."[265]

It is not only the relative simplicity of the European trial that has made plea bargaining in Germany unnecessary. Criminal caseloads are less burdensome in Europe than in the United States largely because crime rates are much lower.[266] In addition, West Germany has legalized some formerly criminal conduct[267]; and in an effort both to reduce judicial workloads and to eliminate the criminal stigma from regulatory and other minor violations, it has substituted administrative for criminal proceedings in many cases involving traffic, health and environmental regulations and in cases involving more traditional criminal prohibitions as well.[268]

Finally, West Germany, like most other European countries, devotes far greater resources to its courts than do American jurisdictions. A study by Earl Johnson, Jr., and Ann Barthelmes Drew concluded that the United States does have a substantial edge in the number of lawyers. "The number of practicing lawyers for each judge in California is more than ten times West Germany's."[269] Nevertheless, the public resources devoted to the administration of justice in the United States are smaller. There are only one-third as many professional judges per capita in the United States as in Germany.[270] Moreover, this

discrepancy does not seem the product of our poverty. While the United States employs 42.7 professional judges per billion dollars of national income, West Germany employs 90.[271] Even with traffic case set aside, the average California judge disposes of six times as many cases as the average West German judge. (With traffic cases included, the ratio of cases per judge becomes twenty times greater in California than in Germany.)[272] Of course, in view of the very different allocation of responsibilities between lawyers and judges in European and American jurisdictions, even an adequately funded American legal system might require fewer judges than the German, just as an adequately funded German system might require fewer lawyers than the American.[273] Nevertheless, the experience of West Germany and other European nations[274] should cause Americans to blush when they consider the claim that plea bargaining is an economic necessity. If the resources devoted to our criminal courts are inadequate to implement our constitutional ideals, that circumstance does not seem the product of necessity but of choice.

B. The Process That Is Due: The Constitution and the Continent, the Criminal and the Courts

Until 1968, the very end of the Warren Court era, the Supreme Court had said repeatedly, "Consistently with the [due process clause of the Fourteenth Amendment] trial by jury may be abolished."[275] That year, however, the Court decided Duncan v.

Louisiana and declared, "[W]e hold that the Fourteenth Amendment guarantees a right to jury trial in all [state] cases which--were they to be tried in a federal court--would come within the Sixth Amendment's guarantee."[276] In light of Duncan and other decisions "incorporating" provisions of the Bill of Rights within the Fourteenth Amendment's due process clause, it commonly is assumed that a revision of American trial procedures to embody the dominant features of continental justice would require "either constitutional amendment or radical reinterpretation of the Bill of Rights by the Supreme Court."[277] In fact, neither constitutional amendment nor a judicial reinterpretation of the federal constitution would be necessary.

Duncan's "incorporation" of the right to jury trial within the Fourteenth Amendment was qualified by a critical assumption that many criminal justice scholars have tended to overlook. Footnote 14 of this opinion merits quotation at length:

> [R]ecent cases applying provisions of the first eight Amendments to the States represent a new approach to the "incorporation" debate. Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection . . . The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental--whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. It is this sort of inquiry that can justify the conclusions that state courts must

> exclude evidence seized in violation of the Fourth Amendment . . . [and] that state prosecutors may not comment on a defendant's failure to testify . . . Of each of these determinations that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.
>
> When the inquiry is approached in this way the question whether the States can impose criminal punishment without granting a jury trial appears quite different from the way it appeared in the older cases opining that States might abolish jury trial . . . A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system.[278]

It would be strange and unfortunate if the federal constitution were read to preclude states from seeking workable alternatives to a regime of criminal justice so far beyond their perceived capacities that the everyday avoidance of this regime's procedures through plea bargaining is seen as a necessity. Duncan was the high-water mark of selective incorporation, and it is extremely doubtful that today's Supreme Court would carry an incorporationist view of the fourteenth amendment beyond the limits of that decision. Of course this Court and others would scrutinize carefully any departure from a traditional model of American criminal justice to insure that it reflected a fair and balanced effort to promote effective law enforcement and the dignity of defendants. No procedure that served merely as a "cover" for limiting the rights of defendants

would be likely to receive judicial approval or ought to.[278] a extremely Nevertheless, the current Supreme Court would be unlikely to condemn a simplification of American trial procedures, including a major restriction of the use of criminal juries, simply on the theory that the sixth amendment and other provisions of the Bill of Rights automatically apply to the states by virtue of the fourteenth amendment. Instead, as Duncan revealed, the issue would be whether a state had constructed a procedural system that the Supreme Court said could be easily imagined but that no state had adopted--one that "was fair and equitable but used no juries."

Liberated from the incorporationist assumptions that often infect discussions of state criminal procedure, the states might consider a variety of options. For example, a state might retain the traditional Anglo-American jury for homicide cases, obscenity prosecutions and other proceedings in which the play of community sentiment is invited by vague legal standards.[279] In a substantial majority of cases, however, a state might prefer mixed tribunals of lay and professional judges.[280] As in Europe, the lay judges probably ought to have at least the collective voting power needed to force an acquittal, but to satisfy our traditional concern for a very high degree of certainty of guilt, a state might go beyond the European model and require the unanimous concurrence of the lay and professional judges as a prerequisite to conviction. If, as the Duncan opinion argued, the principal reason for entrusting the administration of justice to non-professionals is to check official arbitrariness, it may

be more appropriate to use nonprofessionals as a check than to yield them the entire field. In a system of mixed tribunals, lay judges might have less practical power over the administration of criminal justice than they currently have in the American jury system,[281] but the greater influence of professional judges need not automatically be regretted and often might work to the benefit of defendants.[282] As a group, law-trained judges may be alert to governmental abuses in ways that nonprofessionals often are not, and perhaps a system of mixed tribunals could best utilize the distinctive virtues of both groups in determining issues of guilt and punishment.[283]

The use of mixed tribunals might facilitate other reforms that would limit the complexity of trial procedures. Of course a thorough-going examination of the merits and substantially demerits of revised trial procedures might require a number of articles as long as this one; and it certainly would carry a study of plea bargaining far from its central focus. The discussion that follows therefore does not pretend to be exhaustive or even to present both sides. It indicates very briefly some paradoxes of American trial and pretrial procedures and how they might be remedied in a system of mixed tribunals. Although the positions this discussion that advances are not intended as devil's advocacy and are no more tentative than the other positions asserted in this article, the purpose of presenting them in an abbrieviated form is mostly to demonstrate that the paradoxes are serious and the proposed remedies worthy of serious consideration quite apart from their facilitation of a plea bargaining prohibition. The

reforms that this discussion advocates

_ are not offered as an indivisible package but more-or-less in an order that would permit someone logically to accept the earlier proposals while rejecting the later ones. The following section of this article will consider whether some of the paradoxes described in this section might be remedied to some extent even within the context of a traditional Anglo-American jury system.

Like other aspects of our current system of jury controls, today's jury selection procedures present significant paradoxes. The selection of a jury typically requires more time in the United States than a trial requires from beginning to end elsewhere in the world. Our procedures effectively insure the absence of invidious discrimination at the early stages of selection, but they ultimately permit prosecutors and defense attorneys to challenge prospective jurors on the basis of race and other stereotypical characteristics.[285] In effect, our system guarantees minorities an opportunity to reach the finals before it discriminates against them, and trial manuals typically advise lawyers to seek or avoid blacks, hispanics, women, people with physical afflictions, teachers, free thinkers, hunters, master sergeants, Jews, Lutherans and flower children.[286] Partly to facilitate this use of peremptory challenges, lawyers freely probe the private attitudes and practices of prospective jurors in questions that undoubtedly would provoke an outraged reaction if asked of citizens in other governmental contexts.[287] Nevertheless, the available evidence strongly suggests that,

after our extended jury selection proceedings are concluded, a lawyer seeking only his client's tactical advantage is almost as likely to guess incorrectly as to guess correctly in deciding which prospective jurors to challenge.[288] In the end, the selection of people to perform an important governmental function on the basis of racial, ethnic, religious and sexual characteristics serves no substantial purpose other than to mock our constitutional ideals.

Lawyers commonly value the jury selection process not so much because it yields a better jury as because it gives them an opportunity to try their cases before they try them.[289] The devotion of substantial resources to voir dire examinations, to the investigation of prospective jurors outside the courtroom, and also to the typically substantial waiting time of prospective jurors themselves seems difficult to justify in a system supposedly so impoverished that it is unable to afford trials to more than a minority of defendants. In a system of mixed tribunals, by contrast, lay judges might be assigned to cases on the same basis as professional judges and might be subject to disqualification only on the grounds that could support the disqualification of the professional judges themselves.

American procedures are almost as paradoxical at trial as at the earlier stage of jury selection. Despite our professed faith in jurors, we regard them as incapable of understanding the worth of hearsay and other evidence that they routinely evaluate in everyday activities. Or at least we say that we do not trust them; our practice may be somewhat different. The enforcement of

America's rules of evidence frequently depends on what Justice Jackson called "the naive assumption that prejudicial effects can be overcome by instructions to the jury, [an assumption that] all practicing lawyers know to be unmitigated fiction."[290] Sometimes, to be sure, our procedure does reject this fiction and seeks a more effective control. Jurors are ushered in and out of the courtroom as lawyers conduct hearings on evidentiary issues and then debate them--arguing, for example, about whether a witness's half-hour description of how a business record was prepared sufficiently authenticated the record to warrant its admission in evidence.[291]

Despite the time and energy devoted to jury selection, the enforcement of evidentiary restrictions, the frequently belabored probing of factual issues, the lengthy arguments of counsel, and the delivery of complex jury instructions, our system of jury controls often does not work. Indeed, jurors themselves may reveal that they have based their verdict on improper considerations (or even that they have returned a verdict other than the one that they meant to return, in one recent instance by convicting a defendant whom they meant to acquit[292]). In this situation, judges invoke the established rule that jurors may not impeach their own verdicts.[293] The refusal to know embodied in this rule reflects what we surely know already--that our system of jury controls frequently fails. If verdicts could be set aside whenever juries had seriously misconstrued the judge's charge, rendered compromise verdicts in defiance of the court's instructions, considered for one purpose evidence admitted only

for another, given substantial weight to evidence not admitted at all, treated a defendant's failure to testify as evidence of his guilt, or acted on the basis of some manifest prejudice, substantial numbers of jury verdicts probably could not stand.[294]

A system of mixed tribunals could check the possible misconduct of lay judges more efficiently and more effectively than the elaborate courtroom procedures currently used for this purpose. Of course this system would require its own rules of evidence--rules of relevancy and privilege and even, perhaps, a rule excluding the products of illegal searches and seizures from evidence. Most rules based on the perception that the prejudicial impact of some evidence outweights its probative value, however, could be abandoned. These patronizing rules are of dubious merit even in our jury system.[295] If law trained judges could caution lay judges against the misuse of evidence and other abuses and also could use their own voting power to prevent abuse, the most burdensome aspects of our current system of jury controls would become superfluous.

A state thus could go far toward simplifying its trial procedures without reassessing two basic tenets that have differentiated American and European systems--adversariness and a reluctance to use the accused as a source of evidence. With some reassessment of these tenets, the simplification of American trial procedures could be taken farther.

Our adversary system rests on a sound perception that the prejudices and limitations of a single fact-gatherer may lead him to overlook important considerations and important data. To

overcome this defect, the adversary system effectively preordains the prejudices of two advocates and directs them to find whatever evidence they can to support their assigned positions. In the main, this system does reflect an intelligent division of labor in marshaling evidence and argument.

Nevertheless, the writings of Marvin E. Frankel have documented the excesses and failures of our lawyer-dominated approach to truth seeking.[296] Although Judge Frankel has proposed remedying these defects primarily by modifying the ethical responsibilities of advocates, a number of critics have suggested that his proposals would be unworkable in practice and unsound in principle.[297] The courtroom procedures of continental Europe suggest a more appropriate approach. A "mixed" system of adversarial and nonadversarial procedures could permit partisan advocates to counteract the prejudices and limitations of judicial fact-gatherers while it encouraged the emergence of truth, not simply from the clash of two distinct perspectives, but from the interplay of three.

As our adversarial procedures have traditionally operated, witnesses have been divided into two camps. After hearing those who testify "for" the state, a jury hears those who testify "for" the defendant. Moreover, each witness's testimony is divided into two parts--first the part that favors the party who called him and then, on cross examination, the part that may favor his opponent. These two parts do not always make a whole, and no one bears responsibility for calling the witnesses whom the advocates were afraid (or forgot) to call or for asking the questions that

they were afraid (or forgot) to ask.[298]

A relatively minor modification of our adversarial procedures would give judicial officers greater responsibility for supplementing the evidentiary presentations of counsel.[299] A more substantial modification would require these officers to control the order of proof at trial and to conduct the initial examination of witnesses.[300] With this more substantial revision, the efficiency and the coherency of the trial process might be enhanced. Separate issues could be treated separately--for example, by placing opposing expert witnesses on the stand after one another--and each witness might be permitted to give his version of the "whole truth" before opposing advocates tested what he said. Even within a legal format similar to that employed on the continent, our strong adversarial traditions might make our "mix" of adversarial and nonadversarial approaches to the truth different from the "mix" exhibited by European systems.[301] Nevertheless, some movement in the European direction could promote both a more dignified treatment of witnesses and a more complete, coherent and accurate process of fact determination in the courtroom.

In addition to its other virtues, this reform would promote equality in the administration of criminal justice. Despite our claim that the kind of trial a person gets should not depend on the money he has[302] (and despite substantial progress toward the achievement of his goal), the American legal system probably makes the kind of justice that a defendant receives more dependent on the lawyer whom he is able to hire than any other

legal system in the world.

The defendant most disadvantaged in our system almost certainly is not the indigent defendant represented by a public defender but the defendant who, because he does not have much money or because he does not know better, is represented by one of the hangers-on of the private bar who frequently appear in criminal cases. This lawyer's primary goal usually is to pocket a quick fee by entering a plea of guilty,[303] but even on the infrequent occasions when this lawyer takes a case to trial, the trial judge will do little to protect the defendant from his attorney's apparent inadequacies. The greater the trial court's responsibility for development of the facts, the less the defendant with an inadequate lawyer is likely to suffer.

Of course affording a more active role to the presiding judge at trial might reduce an outstanding attorney's ability to work his magic. Still, this lawyer would be able to submit any argument that he could have submitted in a fully adversarial system, to call any witnesses whom he thought the tribunal should hear, and to ask any questions that he thought should be asked. If the presiding judge had overlooked a line of inquiry that seemed potentially helpful to the defendant, this lawyer could pursue it. For these reasons, the defendant with an able lawyer probably would not be greatly disadvantaged by the nonadversarial aspects of a "mixed" procedure while the disadvantage of the defendant with an inadequate or marginally competent lawyer might be lessened.

No issue better captures the differing philosophies of

American and European legal systems than the role of the defendant at his trial. American criminal procedure seems to view the defendant primarily as an object--a target of the coercive forces of the state. His dignity consists of his passivity, his ability to proclaim, "Thou sayest," and his constitutional right to force the state to "shoulder the entire load." The Supreme Court has described the privilege against self-incrimination--including the defendant's right to remain silent at his trial--as the essential mainstay of our accusatory system.[304] In a European trial, by contrast, the defendant is treated less as an object. He rarely remains silent. He is given both the first word at his trial and the last; he ordinarily may present his testimony as he likes rather than simply in response to the inquiries of counsel; he may question other witnesses himself; and if the unexpected develops, he is asked immediately for his comment.[305]

Certainly Americans bring to the criminal trial a view of human dignity different from the view that they adopt in other contexts. As Justice Walter V. Schaefer has suggested, no parent or schoolteacher feels guilty about asking questions of a child suspected of misconduct.[306] Similarly, no employer considers it improper to ask an employee accused of wrongdoing to give his side of the story. Indeed, criminal cases aside, there are apparently no investigative or factfinding proceedings in which asking questions and expecting answers is regarded as dirty business.[307]

Our accusatorial rhetoric has been one thing, however, and

our inquisitorial practices another. Short of restoration of the rack and the thumbscrew, a more blatant mockery of accusatorial ideals than today's practice of plea bargaining is difficult to conceive. Americans also actively seek the self-incrimination of defendants through police interrogation. Miranda v. Arizona[308] held that the products of custodial interrogation could be used at trial only when a suspect had made a knowing waiver of his right to remain silent. As Judge Frankel has commented, however, and as any lawyer will advise any suspect, "rational people do not condemn themselves advisedly in the stationhouse."[309] Frankel has noted that the target of a door-to-door vendor currently is allowed a few days of tranquil reflection before the law holds him to the purchase of a vacuum cleaner. If criminal suspects were afforded a similar opportunity to reconsider their more momentous choices made in a more coercive atmosphere, few of their supposedly intelligent waivers would be likely to survive.[310] Apart from a handful of remorseful suspects, another handful who may seek conviction for political or other reasons, and a third handful who are innocent and able to clear themselves by talking, virtually no one under arrest makes a truly knowing and voluntary waiver of Miranda rights.

Miranda, designed in part to promote equality between the knowledgeable and the naive in the administration of justice, may have accentuated the disparity between suspects who are smooth and sophisticated and those who are slow and easily imposed upon. Each year, courts find multitudes of intelligent waivers by suspects who, had they understood their situations in even the

slightest degree, surely would have remained silent.

The reasons for rejecting in practice the accusatorial rhetoric that we proclaim in theory are powerful; the manner in which we have done so is absurd. Criminal defendants are close to the best source of evidence for resolving criminal disputes, and they should be expected to provide it--the dons of organized crime no less than the hapless people who yield today to police interrogation. A fair and balanced resolution of the problem is apparent, and it has been proposed repeatedly by judges and scholars whose names "read like an honor roll of the legal profession."[311]

Following a judicial determination of probable cause,[312] a suspect should be questioned in the presence of his counsel before a magistrate. His answers in this safeguarded environment should be admissible at trial. Of course these answers might tend to prove the suspect's guilt either because they were incriminating or because they seemed internally contradictory, untrue in certain details, or inconsistent with the suspect's defense at trial. Equally, however, the answers might tend to prove the suspect's innocence by showing that he had denied his guilt promptly in a manner consistent with his trial defense and in apparently forthcoming answers to specific questions.[313] If the suspect refused to answer, this refusal also should be admissible at trial both because it would have a rational bearing on his guilt and because its admission would express society's judgment that defendants, like other witnesses, should respond to orderly inquiry.

This interrogation, somewhat comparable to the taking of a party's deposition in a civil case, would be likely to promote accurate factfinding both when this accurate factfinding would help the defendant and when it would hurt him. Moreover, the defendant's counsel should have a reciprocal opportunity promptly to depose witnesses who might testify against his client.[314] To make the safeguards of this procedure effective, no statements made in response to custodial police interrogation should be received in evidence.

A defendant also should be expected to testify at trial, and a trier of fact should be permitted to draw an adverse inference from his failure to do so. At the same time, the process of impeachment by prior convictions--itself a substantial impediment to the use of that "most efficient testimonial resource," the evidence of defendants themselves--ought to be eliminated.[315] In accepting Duncan's apparent invitation to devise a more balanced, more rational (and more affordable) system of procedure, a state might resolve the contradictions of America's use of defendants as a source of evidenc just as it might end the paradoxes of many other aspects of American trial procedure.

Some Americans favor subversion of the right to trial, not primarily for economic reasons, but because they regard current trial procedures as defective. Scholars proclaim, "Plea bargaining is best understood as an adaptive process in which the prosecutor, defense attorney and judge attempt to . . . infuse a sense of realism in the implementation of absurdly excessive rules and procedures."[316] When trial processes appear so

hopeless that even a lawless system seems better, the time may have come for their revision.

This article's review of the defects of the American trial and of ways in which trial procedures might be simplified has admittedly been cursory. It should be apparent, however, that substantially simplified procedures derived in part from European models might be preferred even to the procedures that our system promises but does not deliver. When these simplified procedures are compared not to what we say but to what we do, the issues become far less balanced and debatable.

The foregoing discussion of particular reforms neglected the most obvious advantage that a substantially revised system of criminal procedure would yield--one that would not lie in this system's selection of factfinding tribunals, its simplified rules of evidence, its blend of adversarial and nonadversarial procedures, or its use of the accused as a source of evidence. The most significant change that this system would effect would lie in its treatment of the right to trial. Like its European progenitors, this system would permit the abolition of plea bargaining and make a trial available to every defendant who sought one.

If Americans were to back their professed ideals of criminal justice with the resources necessary to implement them, they might conceivably assert the advantages of American procedure over this more straightforward alternative. On the assumption that the subversion of trial procedures through plea bargaining has become a necessity, however, there is little doubt that this

alternative would better provide the process that is due.

For the moment, this particular alternative to plea bargaining is probably a pipe dream. Although, as this article has argued, the federal constitution would pose no significant obstacle to its implementation, state constitutional guarantees of the right to jury trial and of other traditional features of American criminal procedure undoubtedly would. The processes of amending state constitutions, although less burdensome than those of amending the federal constitution, are burdensome enough. Moreover, a proposal for altering the traditional incidents of the American trial is likely to sound shockingly subversive to those whose views of criminal justice are derived from Law Day rhetoric rather than what happens in our courts. Paradoxically, those who view themselves as civil libertarians might be the first to resist indignantly a proposal actually to afford American defendants some rights for a change.

Nevertheless, the day may come when Americans will seek alternatives to a criminal justice system that sometimes seems more a ravaged ideological battleground than a functioning social institution. In place of today's curious blend of repressiveness and libertarian sentiment, they may seek a system that works. Certainly that day may come if the schizophrenia of our present system remains unresolved while its promises are ever more clearly abandoned. If the thesis suggested by our ideals and the antithesis suggested by our practices are to find their synthesis in a more balanced, more attainable procedure, responsible students of criminal justice ought to begin the process now by

considering proposals for reform that are unlikely to be implemented tomorrow.

C. Less Sweeping Reforms

Without reshaping trial procedures in a European mold--and also without any influx of resources--Americans could make trials much more available. This section will review very briefly (and again in a far from definitive fashion) seven proposals for conserving current criminal justice resources. These proposals, each of which has become the subject of its own scholarly literature, are (1) to prosecute less, (2) to use existing court capacity more effectively, (3) to limit the availability of post-conviction remedies, (4) to reduce the size of criminal juries, (5) to simplify jury selection procedures, (6) to simplify evidentiary rules and (7) to use videotape technology in assembling and presenting trial testimony.

1. Prosecute Less

A plea bargaining prohibition might strain existing resources, but probably not to the point that it would imperil the justice system's capacity to prosecute murderers, rapists and armed robbers. It seems substantially more likely that prosecutors would screen their cases thoroughly and insist on stronger evidence as a prerequisite to prosecution, and also that they would forego more often the prosecution of drug users, nude swimmers and dirty book sellers.[317] Many observers of American criminal justice would regard this intensified prosecutorial

screening as a virtue rather than a defect.[318]

Legislatures also could liberate existing resources by decriminalizing some "victimless" conduct. Although this article is not the place to explore in a very serious way our law's embroilment in the morals business, the emergence of plea bargaining certainly was associated historically with an expansion of the substantive criminal law in the late nineteenth and early twentieth centuries (especially with the enactment of liquor prohibition statues by local, state and national governments).[319] In the 1960's, moreover, felony caseloads more than doubled as the result in part of an explosion in the number of marihuana prosecutions,[320] at the end of this period, plea bargaining suddenly became respectable, gaining the endorsements of the American Bar Association,[321] the President's Commission on Law Enforcement and Administration of Justice,[322] and the Supreme Court.[323] Certainly the contribution of "victimless crime" to the perceived pressure for plea bargaining has not been trivial. As recently as 1971, "every second case on the Los Angeles criminal court docket [was] a pot offense [and] every fourth arrest across the nation a drunk case."[324] Although there may be more important reasons for limiting the reach of the criminal law, the contribution of morals offenses to our regime of bargained cop-outs suggests one reason for prosecuting consensual behavior less.

2. Use Existing Court Capacity More Effectively

Politicians are not always persuasive when they argue that potentially costly innovations can be financed by "trimming fat

elsewhere" or by using existing resources more efficiently. With today's criminal justice system, however, the more effective use of current resources is not just a rhetorical possibility.

Anyone can test this proposition by walking through a criminal courthouse on a weekday afternoon and seeing how many courts are in operation. If this person's experience is like mine, he will find most courtrooms vacant, and on a Friday afternoon he will be very lucky to find a single court in session.[325] The Chicago Sun Times reported in 1974:

> Even though the Circuit Court of Cook County faces a staggering backlog of nearly 150,000 cases, the average judge spends only about 2 3/4 hours a day on the bench.
>
> While judges argue that they spend essential work time off the bench in their chambers, spot checks of court clerks and other court personnel indicate that on the average this chambers time amounts to only 1 1/2 hours a day.
>
> Along with the 3-month court watching study, more than a score of interviews were conducted with leading trial lawyers and assistant state's attorneys--those men who actually spend time in court and in chambers with judges. Opinion was nearly unanimous that while some judges work hard, most come to court late, leave early and do little if any useful work in chambers.
>
> Courtrooms stand empty, unused and often locked on the average of more than five hours on the average working day.[326]

One cannot estimate with precision the unused capacity of our courts, but a report written principally by former United States Attorney Whitney North Seymour, Jr., for a New York citizens group concluded that more than 64 percent of the money spent each year by the Criminal Court of New York City was "wasted."[327] Moreover, the experience of the one state that has attempted to

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manage its caseloads without plea negotiation indicates that the sky might not fall if this bargaining were prohibited.[328]

Finally, to mention only briefly a development of importance, judicial administration has burgeoned as a distinct field of study within the past decade. It has produced an extensive literature on subjects like effective calendar management, the uses of pretrial conferences, the better training of court employees, the virtues of computerized technology, and the more efficient utilization of jurors.[329] Indeed, publications have addressed such previously unexplored topics as how to convert unused supermarkets into courthouses at one-half the cost of building new facilities.[330] To the extent that the considerable knowledge thus generated has not been put to use, it suggests a variety of ways in which current resources might go farther.

3. Limit the Availability of Post-Conviction Remedies

The review of a criminal conviction in the United States can be disjointed and prolonged.

> Potential steps are these: (1) new trial motion in trial court; (2) direct appeal to state intermediate appellate court; (3) discretionary review in state supreme court; (4) discretionary review in Supreme Court of the United States; (5) petition for collateral review in state trial court; (6) appeal of the collateral proceedings to state intermediate appellate court; (7) discretionary review in state supreme court; (8) discretionary review in Supreme Court of the United States; (9) habeas corpus petition in federal district court; (10) appeal to U.S. Court of Appeals; (11) discretionary review in Supreme Court of the United States.[331]

In England, by contrast, partly because the complexities of our federal system are absent, a criminal conviction ordinarily is

subject only to a single review on direct appeal.[332]

In 1976, a study by Paul D. Carrington, Daniel J. Meador and Maurice Rosenberg recommended both a unified state appellate procedure patterned after England's and a simplified federal habeas corpus procedure under which cases would enter the federal judicial system at the Court of Appeals level.[333] In 1981, a federal task force headed by Illinois Governor James R. Thompson and former United States Attorney General Griffin B. Bell proposed a statue of limitations for federal habeas corpus actions and a number of other restrictions on use of the habeas corpus writ.[334]

I do not endorse these proposals.[335] Indeed, this article has suggested making post-conviction remedies more available to defendants who have pleaded guilty than they are today.[336] Nevertheless, if one assumes that criminal justice resources are as limited as the advocates of plea bargaining commonly contend, both the Carrington-Meador-Rosenberg and the Thompson-Bell proposals seem far too timid.

Perhaps the costs of post-conviction proceedings are worth paying, but not in a system as reluctant to pay the costs of trials as ours. It is bizarre to afford some defendants unrestricted access to trial and appellate courts for repeated post-conviction proceedings while pressing most defendants to sacrifice their initial and primary opportunity for a hearing.[337] A much better course would be to grant all defendants an unfettered right to trial (and perhaps to one appeal) and then to call a halt. If the issue is merely one of first things first, today's broad

access to post-conviction relief ought to be restricted in the interest of making trials more available.

4. Reduce the Size of Criminal Juries

The Supreme Court's decision in Williams v. Florida[338] upholding the use of six-person juries in felony cases led to a flood of scholarly criticism. This criticism, based largely on sophisticated social science research, suggested both that six-person juries are less able than twelve-person juries to serve some traditional functions of the jury and that they are less advantageous to defendants.[339] Although these conclusions occasionally have been questioned,[340] the critics were certainly correct on both points; they also were whistling in a wind tunnel.

One early, forceful criticism of Williams said much in its title, "And Then There Were None."[341] For the overwhelming majority of criminal defendants, however--those induced to plead guilty because American jurisdictions view themselves as too impoverished to implement the right to trial--there currently are none. To debate the niceties of jury dynamics amidst the ruins of a system that strains mightily to avoid using juries of any size is myopic. On the assumption that criminal justice resources will remain inadequate, the issue plainly is not twelve versus six. It is twelve for a small number of defendants versus six for a larger number.[342] Moreover, this issue of resource allocation does not seem extraordinarily difficult; although six jurors may not be as good as twelve, they are far, far better than none.

Despite Williams, the use of six-person juries in serious criminal cases remains abberational.[343] Our nation's insistence on the historic number twelve ilustrates once more the taste for champagne and caviar that has brought our system of courtroom justice to the verge of starvation.[344]

5. Simplify Jury Selection Procedures

When viewed against the protestations of poverty offered to rationalize American guilty plea rates, the waste caused by current jury selection procedures sometimes seems scandalous.[345] For example, in the New Haven murder prosecution of Bobby Seale and Ericka Huggins, the selection of a jury required the examination of more than 1000 prospective jurors over a four-month period.[346]

Half a century ago, the Wickersham Commission called for an end to attorney-conducted voir dire,[347] and largely within the past fifteen years, a number of courts have instituted this reform.[348] Apart from questioning by the court rather than by counsel, some of these courts have employed written questionnaires to elicit information from prospective jurors, and some have used a single voir dire proceeding to select juries for more than one case.[349]

These reforms conserve significant resources[350] but do not go far enough. The usual English practice of seating without inquiry the first twelve prospective jurors to enter the jury box may not merit duplication here,[351] but we probably ought to come close. First, our use of peremptory challenges should be ended. The asserted justification for these challenges is that

they promote impartial juries; but of course, whenever there is good reason to believe a prospective juror biased, he is not challenged peremptorily but instead is disqualified for cause. In exercising a peremptory challenge, a lawyer is invited to give rein to his whim or hunch--not usually a whim or hunch that a prospective juror is partisan or incompetent but merely that he is likely to prove less favorable to the lawyer's position than his replacement. Almost inevitably, challenges are exercised partly on the basis of race or things like race, and opposing advocates attack the panel of prospective jurors from both ends. The thin German Lutheran who rarely smiles disappears from this panel along with the black who wears his hair in an Afro. The tendency is to provide juries of clerks and to diminish our vision of the jury as a cross-section of the community.[352]

Second, whether or not peremptory challenges are abolished, the initial voir dire of prospective jurors should consist of only three questions:

> Are you acquainted with any of the parties, witnesses, or lawyers in this case?
>
> Do you currently know anything about the facts of this case?
>
> Do you know any reason at all why it might be difficult for you to render a verdict on the basis of the evidence presented in court in accordance with the court's instructions?

An affirmative answer to any of these questions would require further questioning, but a prospective juror who answered all three questions no ought to be seated without further inquiry (unless of course independent evidence established grounds for his dismissal of the sort that would merit the disqualification

of a judge).[353]

This simplification of jury selection procedures might save more time and money than any of the other reforms suggested here. Unlike some of the other reforms, however, economy would not be the principal virtue of this change. Instead, the primary reasons for abolishing peremptory challenges and for <u>almost</u> abolishing voir dire would be to promote the dignity and privacy of prospective jurors, to further their equal treatment, and to achieve more fully the asserted purposes of our jury system.

6. <u>Simplify Evidentiary Rules</u>

In the early nineteenth century, Jeremy Bentham decried "almost every rule that has ever been laid down on the subject of evidence" as "repugnant to the ends of justice."[354] Bentham argued that evidence never should be excluded on the ground that exclusion promotes accurate factfinding.[355]

Some of the common law rules that Bentham criticized--most notably, the rule disqualifying criminal defendants from testifying under oath at trial--now have been abandoned, and most other common law exclusionary rules have been liberalized a bit. Nevertheless, the common law's system of proof remains essentially intact--a circumstance that may reflect the self-interest of lawyers and their deep attachment to the familiar, for the system makes little more sense today than in 1800.

Now that common law pleading with its specialized forms of action has been abandoned, our law's grandest living memorial to common law refinement is the hearsay rule with its exceptions. In 1980, the Supreme Court noted that the Federal Rules of

Evidence list over twenty hearsay exceptions while the number and nature of these exceptions vary sigificantly among the states. The Court observed that "every set of exceptions seems to fit an apt description offered more than 40 years ago: 'an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and realists.'"[356] Despite this declaration, the Supreme Court reiterated that the sixth amendment confrontation clause in large measure "constitutionalizes" this common law work of art in criminal prosecutions.[357]

Jeremy Bentham favored the exclusion of hearsay evidence when more direct proof was available; when hearsay was the best proof to be had, however, he thought it worth hearing.[358] Bentham's proposed liberalization of the hearsay rule has been endorsed by modern scholars[359] and incorporated in the Model Code of Evidence.[360] This revision apparently would be consistent with the results (although certainly not with the language) of the Supreme Court's confrontation clause decisions.[361] Moreover, a reinterpretation of the sixth amendment to incorporate Benthamite principles has significant scholarly support,[362] and of course the confrontation clause restricts only the presentation of evidence by the state. Despite the lack of symmetry, a state might permit defendants to offer hearsay evidence whenever better evidence could not be presented. Nevertheless, Bentham's proposal for simplifying and liberalizing the hearsay rule has nowhere been adopted.

To a somewhat lesser extent than the hearsay rule, our rules

concerning evidence of a defendant's prior conduct, documentary evidence, and the format of testimony at trial fit the historical pattern of unnecessary common law complexity. Paradoxically, the exclusion of evidence pursuant to these rules generally makes trials longer, not shorter. The substantial revision of all of these rules would both expedite the administration of justice and further the ascertainment of truth.

7. Use Videotape Technology in Assembling and Presenting Trial Testimony

The hero of this last segment on trial reform is not Jeremy Bentham but James L. McCrystal of Sandusky, Ohio, a state-court judge who has pioneered use of the "prerecorded videotape trial." As Judge McCrystal has described it, the process begins when lawyers assemble at their convenience and that of one or more trial witnesses, start a video recorder, and swear one of the witnesses. The lawyers examine this witness as though before a jury, noting and perhaps arguing evidentiary objections on the videotape. A judge later reviews the tape, passes on the evidentiary objections, and edits from the tape whatever material he holds inadmissible. Finally, the edited tape is presented to a jury.

Judge McCrystal and a co-author have listed some advantages of this procedure:

> (1) the trial flows without interruptions from objections, bench conference, delays for witnesses, counsel's pauses, client conferences and chamber retreats; (2) maximum utilization of juror time is achieved; (3) the time required for a given trial is shortened considerably; (4) the trial can be scheduled, with certainty, for a specific day; (5) the witnesses can be presented

in the desired order, obviating the need for adjustment to availability at the last moment; (6) the chance of mistrial is greatly reduced; (7) there is no need to recess for the preparation of instructions; (8) directed verdict motions are decided when the tapes are previewed and do not infringe on courtroom time; (9) opening statements should be more effective with knowledge of precisely what the evidence will show; (10) the judge need not be present during the viewing of the tape; (11) the presence of the lawyers is not required during the viewing of the tape; (12) it is possible for judge and counsel to conduct simultaneous trials; (13) trial preparation can be more effectively scheduled and the taping may be in the most convenient order of witness availability; (14) last-minute preparation is eliminated; (15) time is afforded for study of evidentiary questions; (16) testimony on location is facilitated; (17) elimination of live trial impediments give the jury a comprehensive related view of the entirety of the case; (18) the tape can serve as the transcript of proceedings on appeal; (19) retrial is facilitated; (20) extrajudicial judge influence through reaction to witnesses and comments to counsel is reduced; (21) the court need no longer resort to the fiction that a juror can disregard what he has heard in accordance with the judge's instructions.[363]

Of course one might fear that this form of trial would prove insufficiently awesome to witnesses and jurors and would fail to impress upon them the human significance of their responsibilities. Nevertheless, the available evidence offers no support for this concern and suggests in fact that the prerecorded trial probably yields some gain in juror attention, comprehension and retention.[364] Plainly the time-saving potential of this trial format is enormous, and the dangers of this technological innovation seem minimal when compared to the pitfalls of today's more widely employed expedient, plea bargaining. Like most of the other reforms suggested in this section, the "prerecorded videotape trial" would not raise

substantial constitutional issues,[365] would offer important advantages apart from its economizing effect, and would permit a significant reallocation of existing resources if Americans wished to end our regime of bargained justice.

D. The Pittsburgh and Philadelphia Stories: Simplication of the Trial Process Through "Waiver Bargaining"

In suggesting a final alternative to plea bargaining--bargaining for a waiver of the right to jury trial rather than for a plea of guilty--this article once again begins with description and moves to prescription. The thesis that simpler trial procedures lead to increased trial use and to reduced pressure for self-incrimination is supported not only by our history and by European experience but by the contemporary experience of American jurisdictions.

In Pennsylvania's two largest cities, criminal trials commonly have been conducted in an even simpler and more rapid fashion than on the European continent. Although neither jurisdiction has attempted to abolish plea bargaining, guilty plea rates have been low. In Philadelphia in 1965, only 27 percent of all criminal convictions were by plea of guilty[366]; guilty pleas accounted for 35 percent of Pittsburgh's criminal convictions two years later.[367] These guilty plea rates were far lower than those of Chicago (87 percent),[368] Cleveland (95 percent),[369] Houston (92 percent),[370] Manhattan (97 percent),[371] Oakland (88 percent),[372] San Francisco (87 percent),[373] and indeed almost every other urban jurisdiction in America.[374]

These unusual guilty plea rates were also far lower than those of the less populous areas of Pennsylvania. In 1965, despite the very large number of criminal trials conducted in Philadelphia and Pittsburgh, 63 percent of the state's convictions were by guilty plea.[375] Indeed, the guilty plea rates of Philadephia and Pittsburgh were lower than those that the two cities themselves had experienced during the 1920's. At that time, guilty pleas accounted for 58 percent of Philadelphia's convictions[376] and for 74 percent of the convictions in Pittsburgh.[377]

Although today's guilty plea rates in Philadelphia and Pittsburgh do not approach those of most other jurisdictions, these rates have increased since the mid-1960's. In Philadelphia, the number of trials still greatly exceeds the number of guilty pleas, but guilty pleas now account for 48 percent of the cases that end in conviction.[378] In Pittsburgh, the change has been even more pronounced. By 1975, 62 percent of that city's convictions were by guilty plea,[379] and by 1979, 77 percent.[380] In short, Pittsburgh's low guilty plea rates of the mid-1960's more than doubled within a dozen years.

On two occasions approximately nine years apart--in 1968 and in 1977--I interviewed prosecutors, defense attorneys, trial judges and other officials in Philadelphia and Pittsburgh. On both occasions, I also attended trials and plea negotiation sessions. Changes in the criminal justice systems of the two jurisdictions could be discerned in more than the official statistics, but before exploring these changes, the systems' operations at the time of my initial investigation should be

described in greater detail.

The relative lack of plea bargaining in Philadelphia and Pittsburgh plainly was not the product of an unusual commitment of resources to their criminal justice systems. A study by Professor Martin Levin reported that the Court of Common Pleas in Pittsburgh not only had the lowest guilty-plea rate of the four felony courts studied; it also had the heaviest caseload per judge. The caseload per judge in Pittsburgh was, in fact, almost five times greater than in the District of Columbia and almost three times greater than in Chicago.[381] Although the caseload per judge was lighter in Philadelphia than in Pittsburgh, my very rough calculations suggest that it remained about twice as great as the criminal caseload in Chicago.[382]

Similarly, the low guilty plea rates of these distinctive jurisdictions did not reflect any unusual devotion of their lawyers and court officials to jury trials. Not only were guilty plea rates unusually low; jury trial rates were low as well. In Philadelphia, only 1.7 percent of all criminal cases were tried to a jury,[383] and in Pittsburgh the figure was 3.3 percent.[384] Professor Levin reported that the rate of what he called full length trials was substantially lower in Pittsburgh than in any other felony court that he studied.[385] Moreover, in the United States as a whole, a significant majority of the felony cases resolved by trial in recent years have been resolved by juries; as a result, jury trials probably have occurred in something close to eight percent of all cases filed in America's felony trial courts.[386]

In both Pittsburgh and Philadelphia, by far the most common procedure for resolving a felony case in the mid-1960's was a jury waived trial. In Pittsburgh in 1967, the cases of 3005 defendants were resolved at these trials (while 180 defendants were tried before juries, 1144 pleaded guilty, and the cases of 1174 were dismissed).[387] In Philadephia in 1966, 13,750 criminal charges (a number probably about twice as great as the number of defendants) were resolved at jury waived trials (while 358 charges were resolved by jury verdicts, 4414 by guilty pleas, and 3094 by dismissal, abatement or transfer).[388] An obviously critical question is why prosecutors, defendants and defense attorneys in these jurisdictions usually preferred jury waived trials to jury trials on the one hand and to bargained pleas of guilty on the other.

Defense attorneys in other jurisdictions often explain their preference for jury trials by emphasizing the supposed willingness of jurors to consider legally irrelevant equities and by noting that, in most states, the vote of one juror out of twelve is sufficient to prevent conviction.[389] Some Pittsburgh defense attorneys agreed with the general perception that juries are less likely to convict than judges, but most did not. In Philadelphia, moreover, defense attorneys invariably maintained that judges were as likely and perhaps more likely to acquit than juries.[390]

The somewhat divergent views of defense attorneys in the two jurisdictions seemed to reflect somewhat divergent practices. Thomas M. Uhlman and N. Darlene Walker recently published two

studies of felony prosecutions in a major eastern city,[391] and although the jurisdiction that they studied was not specifically identified, the distinctive features of Philadelphia's judicial system could be recognized as easily as the outline of Independence Hall.[392] The authors reported that 40.2 percent of the defendants tried at jury waived proceedings between mid-1968 and mid-1974 in this jurisdiction were acquitted[393]--a figure much higher than the 25 percent acquittal rate at American felony trials generally[394] and significantly higher than the 34.2 percent acquittal rate at jury trials in the city.[395] In Pittsburgh, by contrast, 33.7 percent of the defendants tried without juries in 1967 were acquitted--again an unusually high figure but less high than the remarkable 48.9 percent acquittal rate at Pittsburgh jury trials.[396]

Far more important than acquittal rates in explaining the predominance of jury waived trials in Philadelphia and Pittsburgh were the sentencing patterns that characterized both cities. Judges, prosecutors and defense attorneys uniformly agreed that a defendant convicted at a jury trial was likely to receive a substantially more severe sentence than a comparable defendant convicted at what they called a "waiver trial." This phenomenon was partly the product of the sentencing philosophies of individual judges,[397] but it also grew out of the practice of assigning judges with relatively "tough" reputations to the courtrooms in which jury trials were heard. Pittsburgh made extensive use of visiting judges from outside Allegheny County; and these judges, generally assumed to have the sterner attitudes

associated with rural and small-city areas, were assigned regularly to "jury rooms."[398] Although Philadelphia made much less use of visiting judges, its assignment of local judges also strongly encouraged waivers of the right to jury trial.[399]

Indeed, agreement to a jury waived trial was sometimes the product of express bargaining. I observed a number of "major case" bargaining sessions in Philadephia in which defense attorneys proposed waivers of the right to jury trial in exchange for a reduction of the charges against their clients.[400] Moreover, when a defense attorney announced, "This case will be a waiver if it can be assigned to Judge Sweet," presiding judges and court administrators often were accomodating. "Expediting the business of the court is what we're here for," one of Philadelphia's Deputy Administrators for Criminal Listings observed.[401] In short, Philadelphia and Pittsburgh discouraged exercise of the right to jury trial in more or less the same fashion as other cities, by rewarding defendants who waived this right and by threatening defendants who exercised it with unusually severe sentences. What was distinctive about these jurisdictions was simply that no one regarded guilty pleas as the principal alternative to jury trials.

Just as sentencing patterns provided the principal explanation for the lack of jury trials in Philadelphia and Pittsburgh, they also provided the most obvious explanation for the lack of guilty pleas.[402] Without exception, judges, prosecutors and defense attorneys reported that a defendant ordinarily could not anticipate a notably lighter sentence

following a guilty plea than he would have received following conviction at a jury waived trial. The only disagreement concerned whether there might be a slight "sentence differential" between defendants convicted by plea and those convicted at jury waived trials, or whether the two procedures usually led to identical sentencing outcomes. Indeed, most observers, including most defense attorneys, adhered to the latter view. In most American jurisdictions, a defendant apparently can anticipate both a more severe sentence if convicted by a jury than if convicted by the court and a more severe sentence if convicted by the court than if convicted on a plea of guilty.[403] In Philadelphia and Pittsburgh, however, the usual three tiers of the sentence differential had been collapsed to two, and only defendants convicted at jury trials were penalized routinely for their tactical decisions.

The Uhlman-Walker studies revealed that, at least in Philadephia, the practitioners' perceptions of sentencing patterns were accurate. Using a concept of sentence weights that enabled them to compare prison and probated sentences in terms of severity, the authors reported that the mean sentences imposed following guilty pleas and following convictions at jury waived trials were essentially the same--24.9 for guilty plea convictions and 25.1 for convictions at jury waived trials. The average sentence imposed following convictions at jury trials, by contrast, was 63.1.[404] Defendants who pleaded guilty were somewhat less likely to be imprisoned than the defendants convicted at jury waived trials (34 percent v. 39 percent), but

neither group was nearly as likely to be imprisoned as the defendants convicted by juries (87 percent).[405] The defendants convicted at jury waived trials were in fact slightly less likely than the defendants who pleaded guilty to have been convicted of the most serious charge filed against them.[406]

To some extent, more severe sentences were imposed following jury trials in Philadelphia because jury trials occured more often in serious cases, but even when Uhlman and Walker controlled for the seriousness of the offense charged and other "criminality factors," they found that the sentences imposed after guilty pleas and after jury waived trials were virtually identical while the sentences imposed following jury verdicts were about twice as severe.[407] They also reported that the defendants' bail status, type of defense counsel, age, race and sex did not alter the basic relationship between method of conviction and sentencing outcomes.[408]

In light of these sentencing patterns, the significant question may seem to be, not why so many defendants preferred jury waived trials, but why significant numbers of defendants did plead guilty. Although Uhlman and Walker discussed this issue, they overlooked one reasonably obvious explanation--that apart from any possiblity of securing sentencing concessions, a substantial number of defendants recognized that they had no plausible defenses. Many of these defendants may have had no desire to undergo even very rapid trials whose outcomes seemed inevitable.[409] To be sure, some manifestly guilty defendants in both cities did insist on trials simply in the hope that

prosecutorial errors might lead to acquittals. Nevertheless, despite the relatively casual trial practices that characterized these jurisdictions,[410] there were undoubtedly cases in which this hope seemed unrealistic and others in which it seemed so slim as not to be worth even the emotional burdens of trial. Prosecutors and defense attorneys described a substantial portion of guilty pleas in both cities as "open pleas." These pleas were entered without any express bargain and usually with little reason to anticipate an "implicit" reward.

In addition, there were cases in Philadelphia and Pittsburgh in which defendants properly could view bargained guilty pleas as bargains. The slight indications in the Uhlman-Walker figures of a "sentence differential" between defendants who pleaded guilty and those convicted at jury waived trials may have reflected these atypical cases rather than a very small sentence differential applicable to all or most prosecutions. In homicide cases in Pittsburgh and in homicide and other "major" cases in Philadelphia, prosecutors recognized that trials of any description were likely to consume substantial resources, and they often were willing to bargain for guilty pleas in these cases.[411] Indeed, apart from the fact that jury waived trials were a frequently discussed option, plea negotiation in these "major" cases seemed little different from plea negotiation elsewhere. Certainly when a prosecutor offered to reduce a first degree murder charge to second degree murder or manslaughter in exchange for a plea of guilty, a defendant could sense that he had in effect been offered a significant sentencing concession

(especially in view of the mandatory life sentence prescribed for first degree murder in Pennsylvania).[412]

Moreover, when prosecutors in less serious cases recognized that they might be unable to obtain convictions at trial, they frequently offered significant concessions in an effort to secure pleas of guilty. In the overwhelming majority of these "weak" cases, the offer to a defendant who had secured his pretrial release was a recommendation of probation; and although the recommended sentence for a defendant in custody sometimes involved jail time, it was almost invariably jail time that the defendant had already served. Defendants who sensed even a slight possibility of conviction at trial usually found the prosecutors' offers irresistable.[413] Although prosecutors ordinarily seemed to have little interest in inducing defendants to plead guilty, these weak cases and some "major" cases were plainly exceptions. It is therefore not surprising that, in the aggregate, the Uhlman-Walker figures revealed a somewhat lesser likelihood of imprisonment for defendants who pleaded guilty than for those convicted at jury waived trials. Contrary to the apparent suggestion of the authors themselves,[414] the entry of guilty pleas in Philadelphia probably did not reflect a significant misperception of sentencing patterns on the part of most defense attorneys.

Because plea bargaining and "waiver" bargaining induced the overwhelming majority of criminal defendants in Pittsburgh and Philadelphia to relinquish the right to jury trial, some observers concluded that these cities' practices were not very

different from those of other jurisdictions. Charles E. Silberman wrote of Philadelphia:

> During his tenure as district attorney (1969-73),[415] Arlen Specter gained national acclaim for having abolished plea bargaining. The reputation was undeserved; all that Specter did was shift its locus. Instead of bargaining over the charge to which defendants would plead guilty, prosecutors and defense attorneys under Specter's regtime did their bargaining over whether or not defendants would waive their right to a jury trial and elect a bench trial instead. Since bench trials can be completed in a matter of minutes, they serve substantially the same purpose as guilty pleas; in some jurisdictions a bench trial . . . is referred to as "a slow plea of guilty." . . . In short, plea bargaining was abolished in name only.[416]

As this article has indicated, Philadelphia did not abolish plea bargaining even in name, and so far as I am aware, Arlen Specter did not suggest that it had. Specter maintained only that there was much less plea bargaining in Philadelphia than elsewhere, and this contention was accurate. Moreover, Specter did not claim to have brought about this phenomenon, which clearly antedated his service as district attorney.[417] The significant issue raised by Silberman's discussion, however, is the extent to which jury waived trials in Philadelphia and Pittsburgh should be regarded as the "functional equivalent" of pleas of guilty in other jurisdictions.

On occasion, as Silberman indicated, jury waived trials in Philadelphia, Pittsburgh and elsewhere were called "slow pleas of guilty."[418] There were some cases in which this label was appropriate. In a few cases, in fact, defense attorneys entered explicit "slow plea bargains." A Philadelphia defense attorney reported that he might approach a trial judge in chambers and

say, "Your Honor, my client is crazy. They've got him dead-to-rights, but he still says that he didn't do it. Let's give him a half hour trial just to make him happy, but when you find him guilty, give him no more than two years, O.K.?" The attorney added that the judge was likely to respond to this disloyal proposal by accepting it or else by haggling about the terms of the defendant's mock trial.[419]

Although concerted efforts to deceive defendants in this fashion were certainly exceptional, most defense attorneys in Philadelphia and Pittsburgh observed that these cities' criminal justice systems permitted them to take hopeless cases to trial without much fear of reprisal when defendants were unwilling for one reason or another to plead guilty. Indeed, in some "slow plea" situations, the defendants themselves entertained no hope that their trials would lead to acquittals. Their attorneys sometimes preferred jury waived trials for tactical reasons--for example, to emphasize some mitigating circumstance that might not have been developed fully in a presentence report or to preserve the defendant's right to appeal a trial judge's unfavorable ruling on a pretrial motion.[420] On other occasions, moreover, defendants who recognized that they would undoubtedly be convicted at trial simply found it psychologically difficult or impossible to convict themselves.[421]

In the overwhelming majority of cases resolved by jury waived trials, however, the term "slow plea of guilty" was a misnomer. Judges in Pittsburgh and Philadelphia did consider the evidence presented at these trials and were not reluctant to

acquit when this evidence failed to establish guilt beyond a reasonable doubt. As this article has noted, the acquittal rates at jury waived trials in these cities substantially exceeded the acquittal rates in most other American jurisdictions, and it is therefore nonsensical to dismiss these proceedings as the "functional equivalent" of pleas of guilty. Although bargaining for waivers of the right to jury trial seemed as common in these cities as elsewhere, the difference between inducing a defendant to select a particular form of trial and inducing him to forego any trial whatever is a difference of considerable importance. It is the difference between affording the defendant an unfettered opportunity to present a defense and pressing him to sacrifice any opportunity to be heard. From a social perspective, it is also the difference between seriously attempting to determine what happened and merely splitting the difference.

The term "slow plea of guilty" as applied to jury waived trials in Philadelphia and Pittsburgh was a misnomer in another respect as well, for there was nothing "slow" about these proceedings. Indeed, the usual failure of prosecutors and trial judges to seek pleas of guilty reflected their recognition that a jury waived trial often consumed fewer resources than the process of negotiating a guilty plea and of making the record that would justify its acceptance in the courtroom. In one sense, Silberman was therefore correct in suggesting that jury waived trials could "serve substantially the same purpose as guilty pleas"; although the jury waived trials of Philadelphia and Pittsburgh afforded

defendants a much greater opportunity to be heard than the plea negotiation practices of other jurisdictions, these informal trials were about equally effective in enabling the criminal justice system to handle large numbers of cases with resources that would have been inadequate to implement the right to jury trial.

Most lawyers and judges in Philadelphia and Pittsburgh estimated that a majority of jury waived trials were completed in less than an hour and that a single court could conduct eight to twelve of these trials in a day.[422] Indeed, I sometimes heard suggestions of greater dispatch. George H. Ross, the chief public defender in Pittsburgh, maintained that fifteen-minute trials were common and that a judge might hear twenty or perhaps even twenty-five cases in a day. This sort of expedition would of course exceed that of the Old Bailey in the eighteenth century, and even the more moderate estimates would make today's criminal trials on the European continent appear extraordinarily deliberative. When I expressed some doubt about these estimates, James G. Dunn, the first assistant district attorney in Pittsburgh, produced--seemingly at random--an official summary of court actions on a day shortly before my visit. It revealed that a single judge on a single Monday had conducted nineteen trials. More generally, the cases of 3005 defendants were resolved at jury waived trials in Pittsburgh in 1967--a time when there were only three "waiver courtrooms" in that jurisdiction. Apparently each judge assigned to one of these courtrooms tried an average of approximately four and one-half cases on each

working day (while receiving a substantial number of guilty pleas and conducting other judicial business as well).

Philadelphia's jury waived trials included some extraordinarily expeditious proceedings in which the defendants' trial rights were sharply curtailed. A small number of cases were included in a program called officially the Minor Case Program and much more commonly referred to as "crash" court, "trash" court, or "trash and crash" court. (A footnote to this article describes the operation of this unique Philadelphia institution.[423]) Of course, even with these "crash court" cases set aside, the jury waived trials of Philadelphia and Pittsburgh consumed far fewer resources than jury trials. The jury selection process, which typically requires half a day of even the simplest jury trial, was obviously unnecesary, and there was also no need to propose, discuss and deliver sets of jury instructions. Moreover, with very rare exceptions, both opening statements and summations were ommitted.

Perhaps most significantly, the rules of evidence were generally disregarded at jury waived trials. Witnesses, in fact, commonly were invited to present their testimony in narrative form. Despite occasional departures from this pattern, prosecutors and defense attorneys apparently shared a tacit understanding that they would invoke evidentiary restrictions only when a witness's testimony threatened to go far afield or to reveal information that plainly would be prejudicial.

Moreover, lawyers sometimes seemed so ill-prepared for trial that they might have had difficulty examining their witnesses in

accordance with customary standards. In Philadelphia, the prosecutor's office designated all prosecutions either as "major" or as "list room" cases, and the express criterion for placing a case in one category or the other was whether the prosecutor who would try it ought to interview his witnesses before presenting their testimony on the stand. In the overwhelming majority of cases (probably about 90 percent), prosecutors decided that this advance preparation was unnecessary and that the "list room" designation was appropriate. In Pittsburgh, moreover, the prosecutor's office was even less insistent on pretrial preparation; all cases except homicide cases were treated in the same manner as "list room" cases in Philadelphia.[424]

I observed some proceedings in which it seemed likely that the prosecutor not only had failed to interview his witnesses but had failed to review his file before trial. In one, both the prosecutor and his principal witness seemed baffled as the prosecutor asked a number of questions about sexual fondling without eliciting incriminating information; the prosecutor apparently learned the nature of the charge against the defendant only when the witness impatiently answered one of his questions, "My private parts are no part of this case. That guy hit me in the face with a bottle!" Prosecutors commonly avoided difficulties of this sort by asking very general questions. A prosecutor typically opened his case by calling a police officer to the stand, by searching through his file for a police offense report, by asking, "Officer, did you have occasion to be in the vicinity of 404 South 12th Street at approximately 3:27 p.m. on

June 29?," and then by inviting narrative testimony: "Will you tell us in your own words what happened?"

Although the informality that characterized jury waived trials in Philadelphia and Pittsburgh was sometimes troublesome,[425] it often seemed refreshing. From my perspective, the practice of permitting defendants to tell their stories without interruption was especially attractive. Some defendants failed even to deny the charges against them. They merely described their troubled lives and motivations to the court while their departure from legally relevant issues prompted no one in the courtroom to sound an alarm. Defendants often seemed to experience a sense both of gratitude and of gratification when their testimony was concluded. Although plea negotiation has been praised for its supposed promotion of "participation values,"[426] this process usually occurs in a closed-door conference between two lawyers and effectively resolves a defendant's case in his absence. The informal trial processes of Pittsburgh and Philadelphia seemed to promote "participation values" more effectively.[427]

The jury waived trials that differentiated Pennsylvania's largest cities from other jurisdictions in the mid-1960's were plainly far from perfect. Like other urban jurisdictions, these cities paid a price for the inadequacy of the resources devoted to their criminal justice systems. Nevertheless, when these jurisdictions are compared to the many jurisdictions more dependent on plea bargaining, the price may seem less high and the currency less debased. Jury waived trials in Philadephia and

Pittsburgh in the mid-1960's were public rather than closed-door proceedings; each of the defendants tried in these jurisdictions had an opportunity to present his side of the story to an impartial third party (a procedure that apparently had therapeutic value in itself); and most importantly, defendants in Philadelphia and Pittsburgh did not surrender their chances for acquittal.

Moreover, the experience of these cities illustrates that from a social perspective there is an enormous difference between even a simple and expeditious adjudicative procedure and a very elaborate and "safeguarded" settlement procedure, one that is likely to consume as many resources. A person who observes plea negotiation sessions frequently encounters troublesome issues that are never resolved. The process truly is one of "split the difference"--a process by which opposing lawyers manage to reach an accommodation "although the shifting and fallible bases of their conflicting assumptions are never tested."[428] Nevertheless, most of the disturbing issues that plea negotiation would have left open were resolved authoritatively, effectively and fairly in short jury waived trials in Philadelphia and Pittsburgh. Even when lawyers were ill-prepared and foundering and essentially left the witnesses to their own devices, the circumstances surrounding most street crimes did emerge with clarity in half-hour and 45-minute trials. And when, on occasion, important questions remained unanswered at the conclusion of these jury waived trials, the criminal justice systems of Philadelphia and Pittsburgh treated them in the only

manner that decent legal systems can--by resolving reasonable doubts in favor of those accused of crime.

When I returned to Philadelphia and Pittsburgh in 1977, guilty pleas and plea negotiation remained much less frequent than in most other jurisdictions, but these phenomena had become significantly more common than they had been nine years earlier.[429] In Philadelphia, the changes that had occurred seemed partly the product of a deliberate revision of policy. Arlen Specter, a notable opponent of plea negotiation, had been replaced as distict attorney by Emmett Fitzpatrick who favored the practice. As John Morris, the First Assistant District Attorney under Fitzpatrick, summarized his office's policy, "We have no aversion to plea negotiation in any case in which we believe that we can get more than we give. Still, we recognize that it is usually no more work to try a case on a waiver than to negotiate and formalize a guilty plea. We therefore don't go out of our way to make deals."[430]

In both Philadephia and Pittsburgh, gradual changes in the trial process may have been more significant than deliberate changes in plea negotiation policy. By 1977, Philadelphia's bizarre but expeditious "crash court" had disappeared,[431] and although most lawyers and judges in Philadelphia and Pittsburgh maintained that twenty-minute and half-hour trials still occurred, they agreed that these very rapid trials had become far less common than in the past. Indeed, my own visits to "waiver rooms" in Pittsburgh and Philadelphia enabled me to see only two-, three-, and four-hour trials--a dramatic change from the

many trials lasting less than an hour that I had observed in 1968.

Especially in Pittsburgh where the changes were more pronounced, the quality of lawyers in the public defender and distict attorney's offices plainly had improved in the years since my initial study. The more energetic and capable lawyers who had joined these offices may have been more insistent on careful trial practices. Although I continued to observe some departures from evidentiary rules in jury waived trials (frequent leading questions, for example, and one case in which a police officer was permitted to testify without objection to what other officers had done after he had gone off duty), in the main the formalities of the trial process seemed to be observed about as carefully as in most jury trials.

More importantly, the level of trial preparation was far higher than it had been in 1968; the lawyers on both sides knew their cases well and certainly had spoken with their witnesses before calling them to the stand. Indeed, it is difficult to imagine that these lawyers' cases could have been tried much mo e thoroughly in jury proceedings lasting three or four times longer. Nevertheless, the greater professionalization that finally had come even to Pittsburgh may have had its darker side. In a small way, it may have had an effect similar to that of the professionalization of the Anglo-American trial generally over the course of a much longer period of time. This professionalization undoubtedly increased the complexity of the trial process and, in the absence of adequate resources, may have

increased the administrative pressure for plea negotiation.

The jury waived trials of Philadelphia and Pittsburgh in the mid-1960's seemed to indicate that American jurisdictions could reduce their reliance on plea bargaining very substantially by making some sacrifices in the quality of the trial process--sacrifices that, although troublesome, would leave this process far more able to assure the guilt of the people subjected to criminal punishment than the more common plea bargaining alternative. Similarly, the jury waived trials of Pittsburgh and Philadelphia a decade later seemed to indicate that American jurisdictions could reduce their reliance on plea negotiation somewhat less substantially while retaining a trial process in which relevant factual circumstances were developed in a careful, thorough and professional manner.

To be sure, the "waiver bargaining" that still occurred in Philadelphia and Pittsburgh had much in common with plea bargaining and was disturbing for some of the same reasons. Federal and state constitutions guarantee a right to jury trial, and defendants should not pay the price of added criminal punishment for daring to exercise it. If, however, the resources that our nation can devote to criminal justice are truly as paltry as many advocates of plea negotiation contend, Philadelphia and Pittsburgh may have found a more appropriate way to allocate these resources than most other jurisdictions.

The experience of these cities indicates that if a legislature were to prohibit plea bargaining without providing additional funds to courts, prosecutors' offices and defender agencies, the probable result would be neither evasion nor crisis. Administrators could respond to this prohibition partly by eliminating inefficiencies,[433] prosecuting less,[434] and implementing trial reforms[435]; and much more importantly, they could respond by turning from plea bargaining to "waiver bargaining." In view of the substantial extent to which Philadelphia and Pittsburgh have limited their reliance on plea bargaining despite resource constraints more severe than the norm, most other jurisdictions undoubtedly could substitute "waiver bargaining" for plea bargaining altogether.[435A] Indeed, a proposition about criminal justice reform that may seem to simple to be true may be true in fact. Without elaborate planning, scholarly

studies and additional funding, one effective way to prohibit plea bargaining would be just to prohibit it.

When confronted with an immediate and unqualified prohibition, the criminal justice system's powerful mechanisms of bureaucratic adjustment would not wither away. In the absence of dishonesty and evasion, however,[436] these mechanisms would match resources to caseloads, not by continuing to provide costly trials to the few while inducing the many to plead guilty, but by affording simpler trials to all who wished to be heard. Moreover, courts whose fear of administrative overload have led them to invoke disingenuous concepts of waiver in support of plea bargaining surely would invoke these same theories in support of the less sweeping waivers by defendants that could bring this different system into existence without additional resources. In short, if a legislature were to prohibit the exchange of concessions for pleas of guilty without forbidding the exchange of concessions for waivers of the right to jury trial, the invisible hand that sometimes is thought to make plea bargaining inevitable would continue its disturbing work. The differing resource limitations of various jurisdictions would be reflected, however, not in differing guilty plea rates or differing concessions offered for pleas of guilty, but in the forms and procedures of the bench trials that most defendants would be induced to accept.[437]

E. <u>"Waiver Bargaining" and Sentencing Reform</u>

Although this article has argued that the "waiver bargaining" systems of Philadelphia and Pittsburgh are superior

to the guilty plea systems of other jurisdictions, an even more satisfactory system of "waiver bargaining" could emerge from the development of sentencing guidelines that would both prohibit the imposition of a penalty for insistence upon a jury waived trial and articulate limitations on the extent to which conviction by a jury could lead to a more severe sentence. At the same time (to view these reforms from a different perspective), the substitution of "waiver bargaining" for plea bargaining could help resolve some serious difficulties that have plagued sentencing reform efforts.

As a number of states have reduced substantially the sentencing discretion of trial judges and parole boards,[438] plea negotiation has remained virtually immune from serious reform efforts.[438A] When judged by any criterion other than the self-interest and political power of lawyers, this development seems odd. There is almost no objection to the sentencing discretion of judges and parole boards that does not apply in full measure to the sentencing discretion that prosecutors and defense attorneys exercise in plea bargaining; there are many objections to plea bargaining that have little or no application to judicial sentencing discretion and parole.[439] Moreover, so long as prosecutors retain an unchecked power to bargain, progress toward certainty in sentencing will remain miniscule. Indeed, a determinate sentencing scheme may yield its antithesis--"a system every bit as lawless as the current sentencing regime,

in which discretion is concentrated in an inappropriate agency, and in which the benefits of this discretion are made available only to defendants who sacrifice their constitutional rights."[440]

Recent sentencing reform efforts at least have focused attention on what once were called "hidden issues of sentencing." Some of the most troublesome of these issues have arisen from America's misuse of sentencing power to avoid the burdens of trial. Scholars have debated the question of "real offense sentencing"--whether an offender's sentence should be based on what he did or on the artificial label that his crime may bear when it emerges from the plea bargaining process.[441] They have considered whether statutes or administrative guidelines should specify a precise "guilty plea discount"--a reduction in sentence that a defendant would secure automatically by submitting a plea of guilty.[442]

Legislative or administrative designation of the reward that would follow the entry of a plea of guilty would accord with the logic of today's search for certainty in sentencing. If the submission of a guilty plea were treated no differently from other mitigating circumstances whose significance was specified in a statute or administrative guideline (and of course if plea bargaining by prosecutors were prohibited),

> the "break" that follow[ed] the entry of a guilty plea would not depend upon the prosecutor's whim. The extent of this "break" would not be affected by a prosecutor's feelings of friendship for particular defense attorneys, by his desire to go home early on an especially busy day, by his apparent inability to establish a defendant's guilt at trial, by his (or the trial judge's) unusually vindictive attitude toward a defendant's exercise of the right to trial, by the race,

> wealth or bail status of the defendant, by a defense attorney's success in threatening the court's or the prosecutor's time with dilatory motions, by the publicity that a case ha[d] generated, or by any of a number of other factors--irrelevent to the goals of the criminal process--that commonly influence plea bargaining today.[443]

Nevertheless, the direct specification by a legislature or sentencing commission of a "guilty plea discount" or of a fixed "tariff" for exercise of the right to trial seems unpalatable.[443A] For one thing, some defenders of plea bargaining might object in principle to the development of uniform sentence differentials,[444] and more importantly, open articulation of the sentencing practices that make the bargaining process effective would raise issues that most plea bargaining proponents prefer to keep hidden--whether, for example, the sentence imposed following a conviction at trial should be ten percent higher or 500 percent higher than the sentence that would have been imposed following a guilty plea. Finally, people who hope for an eventual prohibition of plea bargaining also would be likely to oppose the official approval of explicit sentence differentials.

In systems of "waiver bargaining," however, the recognition, regularization and limitation of sentence differentials might become more feasible. First, a legislature might prohibit both plea bargaining and "waiver bargaining" by prosecutors--a step that would restore sentencing power to the judiciary and eliminate the intriguing but insoluble problem of "real offense sentencing."[445] Second, rather than articulate inflexible

numerical sentencing "tariffs" for all convicted defendants who exercise the right to be heard, a legislature or sentencing commission might develop guidelines that expressed more discriminating principles:

1) Because the right to a hearing before an impartial tribunal is fundamental, no sentencing "tariff" may be imposed for demanding a trial by the court without a jury;

2) A sentencing "tariff" sometimes may be imposed for exercise of the right to jury trial but not an extreme or "unconscionable" tariff[446];

3) The sometimes permissible "jury tariff" must be withheld when a convicted defendant has raised issues that a jury ought to have heard--for example, when he has advanced an insanity defense supported by plausible expert testimony.

These principles would represent so substantial a step away from present practices and toward the civilized administration of criminal justice that plea bargaining proponents might not blush at their openness and plea bargaining opponents might not resist the imprimatur that they would give to one form of differential sentencing.

An attempt by a legislature or sentencing commission to specify precisely in advance the sentencing consequences of conviction by a jury in various sorts of cases would be artificial--the product mostly of guesswork. A better course would be to provide for the appellate review of sentences to help make the guidelines effective. A process of judicial inclusion and exclusion gradually could give content to the

concept of the "triable" case (the sort of case in which any sentencing "tariff" would be inappropriate), and to the concept of "unconscionability" (a concept that would limit the extent of the sentence differential in "non-triable" cases).[445A] Within whatever limits appellate courts established, trial judges might consider resource limitations and the press of judicial business in deciding on a case-by-case basis whether any jury-trial "tariff" was appropriate and, if so, how large a "tariff." If many defendants pleaded guilty despite the prohibition of plea bargaining, if legislatures provided additional resources to trial courts, if these courts began to use their current capacities more effectively, or if a generous implementation of the right to jury trial seemed feasible for other reasons, trial judges might decide to eliminate the jury-trial "tariff" altogether or else to hold it well below the level that would raise issues of "unconscionability."

To speak in these terms is admittedly troublesome. Justice to defendants does not consist of choosing the best plan for spreading existing resources, however meager, to cover existing caseloads; this article has recognized that Philadelphia's less restrictive alternative is still restrictive. This "waiver bargaining" alternative not only delivers less than the law promises but also makes criminal sentences depend in part on the mode of trial employed in individual cases. Either a full implementation of the right to jury trial without shortcuts or a direct "nonbargained" simplification of trial procedures would avoid these defects

and would accordingly be preferable.[447]

Nevertheless, the proposed system of "waiver bargaining" would respond to the principal concerns of many proponents of plea bargaining. It would permit trial judges to discourage the use of an extraordinarily expensive trial mechanism in cases presenting only insubstantial issues, and it would provide a "safety valve" that would enable these judges, within limits established by law, to match resources to caseloads. At the same time, this proposal would prohibit both explicit and implicit plea bargaining and afford an unfettered right to a simplified form of trial to every criminal defendant. Our nation could conserve its resources and still implement procedures that would allow defendants a greater opportunity to be heard, lead to acquittal when guilt could not be proven beyond a reasonable doubt, and resolve criminal disputes on the merits rather than adjudge most defendants half-guilty in a spirit of indeterminacy and compromise.

Conclusion

The impediments to implementation of a plea bargaining prohibition have not been worth a fraction of the paralysis in the face of injustice that they have prompted. Americans certainly could afford full implementation of the right to jury trial in both felony and misdemeanor prosecutions. Moreover, they could allocate existing resources more effectively by

simplifying the trial process and making trials more available. Finally, at a minimum, states could substitute "waiver bargaining" for plea bargaining. The cynics who proclaim implementation of the right to trial impossible have perpetrated a remarkable myth--a myth whose effectiveness depends largely on the "outsider's" fear of being thought naive or utopian, a myth that any glance outside our own legal system destroys, and the most pernicious of the myths with which the advocates of plea bargaining have surrounded this unfortunate process.

At the end of a long investigation of plea bargaining, I confess to some bafflement concerning the insistence of most lawyers and judges that plea bargaining is inevitable and desirable--the same sense of bafflement that I had when I started. Although it might be tempting to dismiss the position of these plea bargaining proponents as the product of narrow self-interest and of a tendency to confound the familiar with what is necessary,[448] most of these people are certainly thoughtful and humane; some whom I have met seem almost to be saints. Perhaps I am wrong in thinking that a few simple precepts of criminal justice should command the unqualified support of fair-minded people:

> --that it is important to hear what someone may be able to say in his defense before convicting him of crime;
>
> --that, when he denies his guilt, it is also important to try to determine on the basis of all the evidence whether he is guilty;
>
> --that it is wrong to punish a person, not for what he did, but for asking that the evidence be heard--and wrong to turn his sentence more on his strategies than on his crime;
>
> --and, finally, that it is wrong to alibi departures from these precepts by saying that we do not have the time and money to listen, that most defendants are guilty anyway, that trials are not perfect, that it is all an inevitable product of organizational interaction among stable courtroom work groups, and that any effort to listen would merely drive our failure to listen underground.

From my viewpoint, it is difficult to understand why these precepts are controversial and what is more, why the legal profession, far from according them special reverence, apparently values them less than the public in general.[449] Daniel Webster thought it a matter of definition that a thing called "law" would hear before it condemned, proceed upon inquiry and render judgment only after trial.[450] Apparently the legal profession has lost sight of Webster's kind of law, and for all the pages that I have written about plea bargaining, the issue in the end may be that simple.

FOOTNOTES

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+ Professor of Law, University of Colorado.

1 Quoted in Peterson, A Bad Bargain, TRIAL, May-June 1973, at 16.

2 People v. Byrd, 12 Mich. App. 186, 223, 162 N.W.2d 777, 797 (1968) (Levin, J., concurring).

3 Alarcon, Court Reform Would Solve the Problem, L.A. Times, Nov. 9, 1975, at 11.

4 Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. CHI. L. REV. 50 (1968) [hereinafter cited as The Prosecutor's Role]; Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 YALE L.J. 1179 (1975) [hereinafter cited as The Defense

Attorney's Role]; Alschuler, The Supreme Court, the Defense Attorney, and the Guilty Plea, 47 U. COLO. L. REV. 1 (1975) [hereinafter cited as The Supreme Court and the Guilty Plea]; Alschuler, The Trial Judge's Role in Plea Bargaining (pt. I), 76 COLUM. L. REV. 1059 (1976) [hereinafter cited as The Trial Judge's Role]; Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 126 U. PA. L. REV. 550 (1978) [hereinafter cited as Sentencing Reform and Prosecutorial Power]; Alschuler, Plea Bargaining and Its History, 79 COLUM. L. REV. 1 (1979) [hereinafter cited as Plea Bargaining and Its History]; Alschuler, The Changing Plea Bargaining Debate, 69 CAL. L. REV. 652 (1981) [hereinafter cited as The Changing Plea Bargaining Debate]; Alschuler, Book Review, 66 LAW LIB. J. 122 (1973); Alschuler, Book Review, 12 CRIM. L. BUL. 629 (1976); Alschuler, Book Review, 46 U. CHI. L. REV. 1007 (1979) (of C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE) [hereinafter cited as Silberman Book Review].

5 See The Trial Judge's Role, supra note 4, at 1145-46.

6 See Silberman Book Review, supra note 4, at 1041; J. BENNETT, OF PRISONS AND JUSTICE 124, 364-65 (1964); REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 253-54 (1966) (statement of William E. Carr).

7 See The Changing Plea Bargaining Debate, supra note 4.

[8] See id. at 703-07.

[9] See id. at 670-80.

[10] See The Defense Attorney's Role, supra note 4, at 1117. A probation officer in Alaska described the frustration that she and her colleagues had experienced prior to the prohibition of plea bargaining by that state's Attorney General: "When we began to interview a defendant in order to prepare a presentence report, he would tell us what sentence he was going to get. And the defendant was always right. Even when we discovered significant new facts that the prosecutor and defense attorney hadn't known about at the time they struck their bargain, the judge disregarded them." Interview with Karen Rogers, Probation-Parole Office of the Alaska Division of Corrections, in Juneau, June 22, 1976.

[12] See id. at 1063-67.

[13] See The Prosecutor's Role, supra note 4, at 85-105.

[14] See The Trial Judge's Role, supra note 4, at 1141-42.

[15] Silberman Book Review, supra note 4, at 1041 (statement of J. Eugene Pincham).

[16] See The Defense Attorney's Role, supra note 4, at 1197-

98 & n.55.

[17] See The Supreme Court and the Guilty Plea, supra note 4, at 68-69; Halberstam, Toward Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process, 73 J. CRIM. L. & CRIM. 1 (1982).

[18] See The Supreme Court and the Guilty Plea, supra note 4, at 63-65; The Changing Plea Bargaining Debate, supra note 4, at 677.

[19] See The Prosecutor's Role, supra note 4, at 82-83; The Changing Plea Bargaining Debate, supra note 4, at 711-13.

[20] See The Prosecutor's Role, supra note 4, at 72-75.

[21] See The Trial Judge's Role, supra note 4, at 1127 n.226.

[22] See id. at 1134-36.

[23] See The Changing Plea Bargaining Debate, supra note 4, at 719-720.

[24] See Sentencing Reform and Prosecutorial Power, supra note 4, at 563-77.

25 See Plea Bargaining and Its History, supra note 4, at 37-40 & n.209.

26 On the danger to innocent defendants, see The Changing Plea Bargaining Debate, supra note 4, at 713-16.

27 M. HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 162 (1978).

28 It is commonly estimated that ninety percent of all criminal convictions in the United States are by pleas of guilty. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966).

29 See, e.g., Santobello v. New York, 404 U.S. 257, 260 (1971) (plea bargaining is "an essential component of the administration of justice. . . . If every 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"); People v. Griffith, 43 App. Div. 2d 20, 22, 349 N.Y.S.2d 94, 97 (1973) (the elimination of plea bargaining "would result in a total breakdown of the courts' operations"); M. MAYER, THE LAWYERS 159 (1967) ("If even one percent of [the criminal defendants in Manhattan] were actually to proceed to a full-fledged trial, the system would break down instantly"); Welch, Settling Criminal Cases, LITIGATION, Winter 1980, at 32 ("our court system would be crushed by the case load"); Arenella,

Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication, 78 MICH. L. REV. 463, 523-24 (1980); White, A Proposal for Reform of the Plea Bargaining Process, 119 U. PA. L. REV. 439, 440 (1971) ("removal of the incentive to plead guilty would place an intolerable strain on the system"); George, Book Review, 67 MICH L. REV. 815, 817 (1967) ("It is futile to talk of abolishing [plea bargaining] unless we prefer the alternative of complete breakdown of the system").

30 See, e.g., 18 U.S.C.A. FED. R. CRIM. P. 11, Advisory Committee Note at 24 (West 1975); Rosett, The Negotiated Guilty Plea, 374 ANNALS 70, 74 (1967); The Supreme Court, 1978 Term, 93 HARV. L. REV. 60, 80-81 (1979); Simon, Judge Explains Why He Backs Open Plea Bargaining System, Chicago Sun Times, Jan. 15, 1975, p. 8 (statement of Judge Richard J. Fitzgerald: "[B]y necessity plea bargaining will always be with us. . . . If they passed a law saying you can't have it, you'd still have it secretly because it simply exists").

31 Mayer v. Chicago, 404 U.S. 189, 201 (1971) (Burger, C.J., concurring).

32 Burger, "No Man Is an Island", 56 A.B.A.J. 325 (1970).

33 Stanley v. Illinois, 405 U.S. 645, 656 (1972).

[34] Bruton v. United States, 391 U.S. 123, 125 (1968).

[35] United States v. Reliable Transfer Co., 421 U.S. 397, 408 (1975).

[36] Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632, 647 (1974).

[37] Burger, The State of the Judiciary--1970, 56 A.B.A.J. 929, 931 (1970).

[38] E.g., Arenella, supra note 29, at 524; Parnas & Atkins, Abolishing Plea Bargaining: A Proposal, 14 CRIM. L. BUL. 101, 117 (1978).

[39] See note 28 supra.

[40] K. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING 35 (1979) (figures in the text derived by aggregating the figures for the individual jurisdictions shown).

[41] A California-based study found that the cost to the Superior Court of a case dismissed before trial or transferred to another jurisdiction was $1,444. Although less high than the cost of a case that ended in a jury trial ($1,772), this cost was greater than the cost of a case resolved by a nonjury trial ($844) or by a plea of guilty ($250). D. Weller & M. Block,

Estimating the Cost of Judicial Services 6, 8 (1979) (unpublished technical report CERDCR-1-79 of the Center for Econometric Studies of the Justice System of the Hoover Institution, Stanford University). See also Castillo, New York Courts found to Lag in Focusing on Dangerous Crime, N.Y. Times, Oct. 19, 1980, at 1, 29 ("The city's criminal justice system spends more--$945--in processing an arrest that results in a dismissal, than in processing an arrest resulting in imprisonment. . . . The cost of the latter, on the average, is $877"). Commonly, of course, dismissal occurs only after a hearing on a motion to suppress evidence or other judicial proceeding.

[42] These cases include, not only prosecutions that are dismissed before trial, see note 41 supra, but cases of acquittal at trial that obviously consume significant resources.

[43] I have observed half-hour and 45-minute guilty plea proceedings in which defendants have been given instruction in some aspects of criminal procedure that I do not discuss in a one-semester course on that subject. The defendants have been advised of their right to challenge the jurisdiction of the court, of their right to challenge jurors for cause, of their right to peremptory challenges, of the fact that juries must be unanimous to convict, of the fact that juries must be unanimous to acquit, and so on (and on). The defendants have been asked to affirm after each advisement that they understand it. It generally is regarded as coercive for a trial judge to tell a guilty plea defendant what

he most wants to know--the sentence that will follow his plea. See The Trial Judge's Role, supra note 4. Nevertheless, judges routinely tell guilty plea defendants many things that they do not want to know at all.

44 The Prosecutor's Role, supra note 4, at 56.

45 Id. at 104.

46 The Trial Judge's Role, supra note 4, at 1132 (statement of James Gould).

47 M. RUBINSTEIN, S. CLARKE & T. WHITE, ALASKA BANS PLEA BARGAINING 151, 274 Table II-2 (1980).

48 Id. at 105-06.

49 Whether sufficient legal manpower is available to implement a plea bargaining prohibition is obviously a different question from whether sufficient funds are available. Nevertheless, at a time when law school enrollments have grown more substantially than the demand for legal services so that many qualified graduates are unable to secure employment as lawyers, any manpower concerns that a plea bargaining prohibition might raise seem surmountable. Morover, a nation that uses lawyers in welfare termination hearings and many other nontraditional settings, see, e.g., Goldberg v. Kelly, 397 U.S.

254, 270-71 (1970), should be able to find enough lawyers to perform the more basic functions of prosecuting and defending criminal cases.

50 See, e.g., UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS--1980 at 178 Table 2.14 (1981) (92 percent of the respondents to a Harris survey regarded controlling crime as "very important in making the quality of life better in this country"--a greater proportion than regarded "achieving quality education for children," "conserving energy," or any other item included in the survey in the same way.)

51 See Justice on Trial--A Special Report, Newsweek, March 8, 1971, at 16, 43 (a Gallup poll "found fully 83% of Americans reconciled to the notion of putting more money into the [crime] problem").

52 UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE U.S., 1979: PRELIMINARY REPORT at 1 (1980).

53 See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMNISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT--AN ASSESSMENT 54 (1967); E. Noam, A Cost-Benefit Model of Criminal Courts 11 (unpublished rev. ed. 1980) [hereinafter cited as A Cost-Benefit Model]. Both of these sources indicated that

about one-third of judicial budgets are expended on criminal matters, but they based these estimates on data from the District of Columbia and the federal district courts where the ratio of criminal to civil expenditures may be unusually high. In 1970, when four Superior Court judges in San Francisco heard all criminal matters, twenty were assigned to civil proceedings. SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON THE CRIMINAL COURTS OF SAN FRANCISCO, PART I: THE SUPERIOR COURT BACKLOG--CONSEQUENCES AND REMEDIES 28 (1970). In 1973, according to the Executive Director of the Chicago Crime Commission, 90 percent of the 134 judges of the Circuit Court of Cook County were assigned to non-criminal matters. Jury Trials Increase the Rap Here, Chicago Sun Times Special Section--Inside Justice, p. 3 (1973).

54 A Cost-Benefit Model, supra note 53. See also E. Noam, The Criminal Justice System: An Economic Analysis of Benefits and Interrelationships (unpublished Ph.D. thesis in the Department of Economics, Harvard University 1975) [hereinafter cited as The Criminal Justice System].

55 The Criminal Justice System, supra note 54, at 7.

56 Id. at 69.

57 Although I have written that "a substantial influx of resources" might lead to more severe sentences, The Changing Plea Bargaining Debate, supra note 4, at 725, I doubt that either the

imprecise relationship between expenditure levels and sentence severity or the imprecise relationship between sentence severity and crime control can be approximated even remotely by an econometric formula. At the same time, a plea bargaining prohibition ultimately might enhance the effectiveness of the criminal sanction quite apart from any effect that the prohibition might have on sentencing. See id. at 706-07.

58 United States v. Griffin, 462 F. Supp. 928, 932 (D. Ark. 1978) (Eisele, C.J.).

59 M. RUBINSTEIN, S. CLARKE & T. WHITE, supra note 47, at 118 (percentages derived from figure 2 on this page).

60 Alaska's plea bargaining prohibition, which was instituted by the state's Attorney General, obviously did not restrict the ability of trial judges to sentence defendants who were were convicted at trial more severly than comparable defendants who pleaded guilty. An evaluation of the Alaska reform found evidence of this "implicit bargaining" in some crime categories but not in others. Id. at 88.

61 See, e.g., id. at 80.

62 Halberstam, supra note 17, at 36.

63 The judges themselves were unwilling to adopt this

position without significant qualifications. Judge Sam Callan, for example, said that a defendant who insisted on trial when he had no plausible defense ought to receive a more severe sentence than the same defendant would have received following a plea of guilty. Interview with Judge Callan in El Paso, June 8, 1976.

64 El Paso's plea bargaining prohibition led within a few years to an increase in the backlog of criminal cases--an unsurprising result in view of the fact that two judges conducted all felony proceedings in that city. The increased backlog, in turn, led El Paso's judges to replace their initial plan for eliminating plea bargaining with a strange regime of bargaining by probation officers. See Callan, An Experience in Justice Without Plea Negotiation, 13 LAW & SOC'Y REV. 327, app. B at 346 (1979). Nevertheless, Judge Sam W. Callan, the principal architect of both El Paso's plea bargaining prohibition and its replacement, was confident that the addition of a single judge to the El Paso bench would have made modification of the initial plan unnecessary. Interview with Judge Callan in French Lick, Indiana, June 14, 1978.

65 Lawyers and judges in Alaska emphasized this circumstance in explaining the persistence of a reasonably high rate of guilty pleas after the state's prohibition of plea bargaining. As one judge expressed it, "Human nature doesn't want to engage in a fruitless act." M. RUBINSTEIN, S. CLARKE & T. WHITE, supra note 47, at 81.

66 For further discussion of the significance of "process costs" in inducing pleas of guilty, see pp. infra.

67 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 55 (1967) ("According to the only available estimate, there are approximately 314,000 felony defendants formally charged by the filing of an indictment or information each year in State courts, and about 24,000 felony defendants are prosecuted in Federal courts").

68 The population of the United States was estimated at 197,864,000 in 1967 and at 223,239,000 in 1980. See UNITED STATES BUREAU OF THE CENSUS, PUBLICATIONS SERIES P-25.

69 5,422,626 arrests were reported to the F.B.I. in 1967 and 9,488,212 in 1979. See FEDERAL BUREAU OF INVESTIGATION, 1967 UNIFORM CRIME REPORTS 116-17, Table 23 (1968); FEDERAL BUREAU OF INVESTIGATION, 1979 UNIFORM CRIME REPORTS 188-89, Table 25 (1980).

70 K. BROSI, supra note 40, at 15.

71 This figure represents eight per cent of the initial felony filings. See Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN

CRIMINAL PROCEDURE: CASES, COMMENTS, QUESTIONS 23 (5th ed. 1980) (10 to 15 percent of all felony cases filed are ultimately tried, and perhaps 60 to 65 percent of all felony trials are jury trials; accordingly, between 6 and 9.75 percent of all cases filed are resolved by jury trial).

72 K. BROSI, supra note 40, at 47, Table 7 (figures in text derived by averaging the figures for individual jurisdictions shown in this table).

73 One reason is that public defenders commonly are paid less than prosecutors. See NATIONAL LEGAL AID & DEFENDER ASSOCIATION, THE OTHER FACE OF JUSTICE 67 (1973) (in 86 percent of defender offices the chief public defender is paid less than his counterpart in the local prosecutor's office; and in 63 percent, staff attorney salaries are lower than in the prosecutor's office). Of course, because nonindigent defendants are expected to hire their own attorneys, not all of the increased costs of defense services caused by a plea bargaining prohibition would be borne by the public. In view of the current fee-setting practices of private defense attorneys, moreover, it seems doubtful that an increase in the time devoted to trials would lead to a proportional increase in legal fees. See The Defense Attorney's Role, supra note 4, at 1199-1200.

74 At the same time, this figure may not include all the costs that a plea bargaining prohibition would impose. Most

notably, an increase in the frequency of trials probably would lead to an increase in the frequency of appeals. The estimate does not consider the financial impact of a plea bargaining prohibition upon appellate courts or upon the appellate work of prosecutor and defender offices.

75 K. BROSI, supra note 40, at 47.

76 See Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 13 (4th ed. 1974); Bird Engineering-Research Associates, Inc., Jury System Operation Final Report 14-17 & app. D (unpublished Nov. 1974).

77 See, e.g., H. KALVEN & H. ZEISEL, THE AMERICAN JURY 20, Table 2 (1966).

78 Although $2428 is an estimate of the cost savings effected by a guilty plea rather than an estimate of the total cost of a jury trial, the estimate was based on the assumption that a guilty plea proceeding requires only one ninety-seventh of the resources required for a jury trial. The total cost figure is therefore only slightly higher.

79 There are probably about 27,800 jury waived trials each year in the United States (4.7 percent of the 591,500 felony cases initially filed--see note 71 supra). For one estimate of the differing costs of jury trials, jury waived trials and guilty

plea proceedings, see note 41 supra.

80 See B. RICE, THE C-5A SCANDAL; AN INSIDE STORY OF THE MILITARY-INDUSTRIAL COMPLEX (1971).

81 Is America Strong Enough?, Newsweek, Oct. 27, 1980 at 48, 55.

82 The 1977 budget of the Law Enforcement Assistance Administration was $887,171,000. UNITED STATES OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1977 253 (1977). In 1971, a representative of the LEAA told a Congressional committee that the courts had received ten percent of the agency's block grant funds. 92nd Cong., 1st Sess., House of Representatives, Subcomm. of Comm. on Government Operations, Hearings on the Block Grant Programs of the Law Enforcement Assistance Administration, pt. 2, at 666 (1971) (statement of Jerris Leonard). An independent study later estimated, however, that only 2.2 percent of LEAA funds had been allocated to the courts. Criminal Courts Technical Assistance Project of the American University, Report of the Special Study Team on LEAA Support of the State Courts (Feb. 1975).

83 See UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, supra note 52, at 1.

84 COMMITTEE FOR ECONOMIC DEVELOPMENT, RESEARCH AND POLICY COMMITTEE, REDUCING CRIME AND ASSURING JUSTICE 16 (1972).

85 See M. FEELEY, THE PROCESS IS THE PUNISHMENT XV (1979); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, supra note 67, at 29.

86 See, e.g., Baldwin v. New York, 399 U.S. 66 (1970) (constitutional right to jury trial inapplicable to offenses not punishable by six months' imprisonment); Scott v. Illinois, 440 U.S. 367 (1979) (constitutional right to counsel inapplicable when defendants not threatened with imprisonment).

87 397 U.S. 742 (1970).

88 Id. at 749-50.

89 Id. at 750.

90 Id.

91 See Kipnis, Plea Bargaining: A Critic's Rejoiner, 13 LAW & SOC'Y REV. 555, 556-57 (1979).

92 See pp. infra.

93 Note, Costs and the Plea Bargaining Process: Reducing

the Price of Justice to the Nonindigent Defendant, 89 YALE L.J. 333 (1979).

94 See The Supreme Court and the Guilty Plea, supra note 4, at 64-65.

95 For example, in the majority of misdemeanor cases in which the state does not seek a defendant's imprisonment, a mixed tribunal of two lay judges and one professional judge might be employed. (This reform might require a minor modification of constitutional doctrine regarding the right to jury trial, for current doctrine turns the availability of a jury on the legislatively authorized penalty rather than the penalty sought in fact.) The complainant, the defendant and other witnesses might present their testimony informally without regard to traditional evidentiary rules, and lawyers for the prosecution and the defense (even retained defense counsel) might not be permitted to appear. This procedure would have something in common with the procedures of community courts in many socialist countries and with the mediation procedures that are used increasingly to resolve minor criminal disputes in the United States. Nevertheless, the trial format and the presence of a professional judge would be likely to promote a closer adherence to substantive legal requirements than is found in these other forums and, indeed, in current American plea bargaining sessions. To a considerable extent, the question whether this simplified procedure would permit the trial of all or most

misdemeanor defendants seems academic; as this article will indicate, most misdemeanor defendants do not want trials of any description.

96 M. FEELEY, supra note 85.

97 Id. at 9.

98 For one thing, many defendants already have misdemeanor records. For another, a minor criminal record is not likely to limit the employment opportunities of many day laborers or to cause the discharge of people who already have jobs. Finally, Feeley observed that, as a group, misdemeanor defendants tend to be "present oriented" and to discount the remote possible consequences of conviction. Even when they probably should take the collateral consequences of misdemeanor conviction seriously, they usually do not. See id. at 201.

99 Id. at 236.

100 Id. at 238.

101 Id.

102 See id. at 31-32, 219-22.

103 Id. at 220.

104 Id. at 9. A defendant eligible for a pretrial diversion program may be able to avoid conviction by participating in regularly scheduled meetings for a three-month period. If he declines to participate, however, his case is reasonably likely to be dismissed anyway. Moreover, if the defendant is convicted, he runs virtually no risk of incarceration and ordinarily pays only a $10 or $20 fine. It is not surprising that only 2.3 percent of the eligible defendants chose to participate in the court's diversion program. Id. at 233. Indeed, Feeley noted that even a decision to engage in protracted plea negotiation is likely to increase the practical burdens of the criminal process from a defendant's perspective. Id. at 30.

105 Id. at 239-40.

106 Id. at 30-31.

107 The reluctance of some American observers to draw lessons from comparative study is so strong that one may hesitate to mention that a proposed reform has been implemented elsewhere. Even when one suggests that the proposal might be evaluated on its own terms without reference to an apparently successful foreign experience, a skeptic may dismiss it with observations about differing crime rates, differing legal traditions, differing cultures and the like. For example, Professor Lloyd L. Weinreb prefaced his proposals for substantial

revision of the American criminal justice system by saying, "'Continental' criminal procedure provided a direction for my thinking . . . . The reason for adopting a model like the one I have outlined, however, is not that something similar has worked acceptably elsewhere, but that that is where our own principles and experience lead." L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES x (1977). Nevertheless, Weinreb's critics generally failed to evaluate his proposals in the way that he suggested. Instead, they asserted a lack of empirical proof that continental procedures truly work better than ours. See, e.g., Johnson, Book Review, 87 YALE L.J. 406 (1977). It is conceivable that Weinreb's proposals would have had a more favorable reception if he had managed to keep their continental origins a secret so that observations about the distinctive nature of our problems could not have been substituted so readily for an evaluation of the proposals' merits.

108 See, e.g., Myhre, Conviction Without Trial in the United States and Norway: A Comparison, 5 HOUS. L. R. 652 (1968) (Norway); Pugh, Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived From a Study of the French System, 36 LA. L. REV. 947, 969 (1976) (France); Stepan, Possible Lessons From Continental Criminal Procedure, in THE ECONOMICS OF CRIME AND PUNISHMENT 181 at 198 (S. Rottenberg, ed. 1973) (Austria); H. SILVING, ESSAYS ON CRIMINAL PROCEDURE 255 (1964) (Spain); Felstiner & Drew, European Alternatives to Criminal Trials: What We Can Learn, JUDGES' J.,

Summer 1978, at 21-22 (Sweden, Denmark and Belgium).

109 See Langbein, Land Without Plea Bargaining: How the Germans Do It, 78 MICH. L. REV. 204, 213 (1979). For evidence that the judicial review of proposed penal orders is not always perfunctory, however, see Felstiner & Drew, supra note 108, at 23.

110 Langbein, supra note 109, at 214.

111 Id.

112 Felstiner, Plea Contracts in West Germany, 13 LAW & SOC'Y REV. 309, 315 (1979).

113 Id.

114 Of course even a defendant who risks incarceration may find it in his interest not to incur the process costs of trial when he recognizes that the chances of acquittal are small. A pretrial procedure that enabled this defendant to know the sanction at issue and to weigh this sanction against the burdens of trial would therefore have some virtue. Although extension of the penal order procedure to situations in which the state sought a defendant's imprisonment might not be seriously objectionable in any case and might in some cases be useful, any use of an essentially administrative procedure to impose severe sanctions

may remain somewhat troublesome. On balance, the focus of proceedings that may lead to incarceration probably should remain the courtroom, and judges should take a more active part in these proceedings than they are likely to take in the formulation of penal orders.

115 In West Germany, judges have tended to approve proposed penal orders without close scrutiny, and one suspects that judicial approval could become something of a rubberstamp process in the United States as well. Nevertheless, when a defendant accepts a proposed penal order, the order does determine his sentence. This article will suggest in addition that the sanction proposed in a penal order should limit the sentence that a judge may impose following a trial. It therefore seems appropriate to give a representative of the judiciary the opportunity to veto proposals that he considers inappropriate even if he is unlikely to exercise this power very often.

116 For example, use of the word "order" probably should be avoided unless it is accompanied by a word like "tentative." The format of the West German penal order is probably too authoritative to serve as a close model for written prosecutorial proposals here. See K. MARQUART, HANDBUCH DER RECHTSPRAXIS, BAND 8: STRAFPROCESS 113-14 (3d ed. 1977).

117 Whether obtained through a penal order procedure or through current plea negotiation practices, misdemeanor

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117 Whether obtained through a penal order procedure or through current plea negotiation practices, misdemeanor

convictions are unlikely to reflect the careful deliberation that should accompany the imposition of lifetime disabilities. For this reason as well as others, it probably would be desirable to provide for the automatic expungement of misdemeanor convictions after a specified period of time.

118 Of course limitation of the posttrial sentence to the punishment specified in a pretrial proposal might seem incongruous in an unusual case in which the prosecutor had not investigated the circumstances adequately and in which evidence presented at trial clearly showed the proposal to be too lenient. Nevertheless, a similar incongruity can arise when new evidence emerges after a final judicial imposition of sentence, and of course the too lenient sentence would have gone undetected had the defendant simply accepted the prosecutor's proposal. In view of the offers that prosecutors commonly make in plea bargaining on the basis of incomplete information and their great effect on sentencing, a defender of plea negotiation probably should not insist too vigorously that sentencing always should be based on the fullest possible information. In any event, the incongruity of an occasionally inappropriate sentence would seem a small price to pay in order to assure defendants that their invocation of procedural safeguards will not itself be punished.

119 In most cases, prosecutors probably would base their proposed penal orders on a review of police offense reports and the defendants' prior records, the same sources that they

currently consult in formulating plea bargaining offers. As in plea bargaining, however, prosecutors would be free to interview witnesses or to consult other sources of information about their cases.

120 The language is from Bordenkircher v. Hayes, 434 U.S. 357, 365 (1968). See also the sources cited in note 30 supra.

121 Indeed, some opponents of plea bargaining apparently share the same view. One plan for prohibiting plea bargaining--involving an early "charge-setting hearing" at which a magistrate or judge would approve a charge that a prosecutor could not alter without presenting "significant new information" to the court--is contained in Parnas & Atkins, supra note 38.

122 397 U.S. 742 (1970).

123 Id. at 753.

124 F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 136-54 (1982).

125 E.g., M. HEUMANN, supra note 27, at 162.

126 See H. PACKER, THE LIMITS OF CRIMINAL SANCTION 267 (1968).

127 This formulation or something close to it might be appropriate for prosecutors and defense attorneys, but simpler language might be more suitable for interrogating defendants: Has anyone made any deal with you concerning your guilty plea? So far as you know, has anyone made any deal with your attorney? Has anyone told you that you are likely to receive a lighter sentence because you are pleading guilty? Have you been told that you are likely to receive some other break? Although no one may have told you to expect a break, do you in fact expect to obtain a lighter sentence or some other break because you are pleading guilty? In your own words, why have you decided to plead guilty?

128 E.g., M. HEUMANN, supra note 27, at 158.

129 In Deloach v. State, 77 Miss. 691, 692 (1900), the court declared, "As the plea of guilty is often made because the defendant supposes that he will thereby receive some favor of the court in the sentence, it is the English practice not to receive such plea unless it is persisted in by the defendant after being informed that such plea will make no alteration in the punishment." In support of this statement, the court cited 1 F. ARCHBOLD, CRIMINAL PRACTICE AND PLEADING 334 (8th ed. 1877). I have been unable to locate the eighth edition of Archbold to confirm the court's citation, and I have not seen reference to the reported practice elsewhere. I therefore do not vouch for the proposal's historic credentials but only for its soundness.

130 This proposal raises the question whether a defendant's plea of guilty might be relevant to the sentence that he should receive on some occasions. The issue is discussed in The Changing Plea Bargaining Debate, supra note 4, at 661-69, and I repeat here only a small part of that discussion:

> One can imagine, if one likes, that a defendant once pleaded guilty out of remorse and therefore received a relatively lenient sentence. A second defendant, however, after noting the sentence that the first defendant received, may have pleaded guilty, not because he was remorseful, but because he hoped to obtain the same favorable treatment. From the day of this first strategic guilty plea until the present, no one has been able to tell simply by examining a defendant's plea whether or not he was remorseful.
>
> Of course there may be guilty-plea cases in which remorse is evidenced by circumstances other than the defendant's plea of guilty, and in some of these cases, a failure to plead guilty might have called into question the inference of remorse that otherwise would have seemed warranted. One would not hesitate to grant the defenders of plea bargaining this inch were it not for the strong likelihood that they would take a mile.

Id. at 662 & n.29.

131 Silberman Book Review, supra note 4, at 1036-38.

132 See, e.g., id. (discussing the proposals of Charles E. Silberman for improving the plea bargaining process).

133 18 U.S.C.A. FED. R. CRIM. P. 11, Advisory Committee Note at 24 (West 1975).

134 FED. R. CRIM. P. 11(e)(1).

135 But see The Trial Judge's Role, supra note 4, at 1151-52.

136 3 AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 14-3.1(c) (2d ed. 1980).

137 Of course, without any deliberate turnabout, a trial judge might inadvertently impose upon a defendant convicted at trial a more severe sentence than the judge would have imposed following a plea of guilty, but in my view, a judge would have done enough when he had done the best that he could. A "sentence differential" so small that the judge himself could not perceive it would be unlikely to discourage exercise of the right to trial.

And of course, even if the "sentence differential" were eliminated, defense attorneys might "con" their clients by advising them that guilty pleas probably would be rewarded, but a defendant might become skeptical of his attorney's description of a judge's sentencing practices when the judge himself assured the defendant in court that his practices were different. Moreover, an attorney who offered this advice would be ethically obliged to

reveal its nature when asked in court whether he anticipated that the defendant's guilty plea would be rewarded. An attorney who regularly advised his clients in one way and answered the court's inquiries in another could not be at all confident that his misconduct would escape detection.

138 See, e.g., McCarthy v. United States, 394 U.S. 459 (1969); Blackledge v. Allison, 431 U.S. 63 (1977).

139 See, e.g., Erickson, The Finalty of a Plea of Guilty, 48 NOTRE DAME LAW. 835 (1973).

140 See Brady v. United States, 397 U.S. 742, 755 (1970); Bordenkircher v. Hayes, 434 U.S. 357 (1978).

141 It is possible to place plea agreements "on the record," but perhaps only to the extent that courts decline to review very seriously the terms of these agreements. Once some sorts of plea agreements were denied judicial approval, a court could not be at all certain that agreements of the prohibited variety would be revealed. Of course this circumstance does not argue against placing plea agreements "on the record"; but the function served by recording them is not the facilitation of judicial review of the fairness of their terms. Instead it is to prevent misunderstandings and contrived claims concerning the contents of these agreements, the same function served by the requirement of the statute of frauds that especially important private contracts be memorialized in writing.

142 Use of this "waiting period" was suggested by Professors John C. Coffee, Jr., and Michael Tonry.

143 See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 153 (1931).

144 The Changing Plea Bargaining Debate, supra note 4, at 713.

145 See, e.g., Bivens v. Six Unknown Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (the hope that the exclusionary rule could "give meaning and teeth to the constitutional guarantees" was "hardly more than a wistful dream").

146 367 U.S. 643 (1961).

147 See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, supra note 143; Brown v. Mississippi, 297 U.S. 278 (1936).

148 The available evidence suggests that Americans are not in fact so miserly. See note 51 supra.

149 See note 27 supra.

149a Plea Bargaining and Its History, supra note 4, at 42.

150 Plea Bargaining and Its History, supra note 4.

151 Id. at 7-12.

152 Id. at 7 & n.31.

153 Id. at 7, 17 & n.98.

154 Id. at 8-9, 17-18.

155 Id. at 8-10.

156 Id. at 27 (citing AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, pt. I, at 58 (1934)).

157 O'Hara v. People, 41 Mich. 623, 624, 3 N.W. 161, 162 (1879).

158 Wright v. Rindskopf, 43 Wis. 244, 357 (1877).

159 Griffin v. State, 12 Ga. App. 615, 622 (1913).

160 Deloach v. State, 77 Miss. 691, 692, 27 So. 618, 619 (1900).

161 Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874).

162 Plea Bargaining and Its History, supra note 4, at 40-41.

163 Langbein, The Criminal Trial Before the Lawyers, 45 U. CHI. L. REV. 263 (1978). See also Baker, Criminal Courts and Procedure at Common Law 1550-1800, in J. COCKBURN, CRIME IN ENGLAND 1550-1800 at 15, 32-45 (1977).

164 Friedman, Plea Bargaining in Historical Perspective, 13 LAW & SOC'Y REV. 247, 257 n.16 (1979).

165 See Plea Bargaining and Its History, supra note 4, at 41.

166 Langbein, Torture and Plea Bargaining, 46 U. CHI. L. REV. 3 (1978).

167 See id. at 14-15.

168 365 U.S. 534 (1961).

169 Id. at 540-41.

170 L. WEINREB, supra note 107, at 148.

171 Schlesinger, Comparative Criminal Procedure: A Plea

for Utilizing Foreign Experience, 26 BUF. L. REV. 361, 363 (1977).

172 E.g., ABA House of Delegates Approves Fair Trial-Free Press Guidelines, 19 CRIM. L. REP. 2437, 2440 (1976) (statement of London barrister Richard DuCann).

173 For example, one prosecuting counsel in England told an interviewer, "There is a difference between plea-bargaining and accepting on behalf of the prosecution a plea to one of the counts, perhaps one of the lesser ones, in an indictment." Seifman, Plea-Bargaining in England, in W. McDONALD & J. CRAMER, PLEA BARGAINING 179 at 188 (1980).

174 See id.; J. BALDWIN & M. McCONVILLE, NEGOTIATED JUSTICE: PRESSURES TO PLEAD GUILTY (1977); Baldwin & McConville, Plea Bargaining and Plea Negotiation in England, 13 LAW & SOC'Y REV. 287 (1979); Thomas, An Exploration of Plea Bargaining, [1969] CRIM. L. REV. 69; Davis, Sentences for Sale: A New Look at Plea Bargaining in England and America, [1971] CRIM. L. REV. 150, 218; Purves, That Plea Bargaining Business: Some Conclusions From Research, [1971] CRIM. L. REV. 470.

175 See B. GROSMAN, THE PROSECUTOR: AN INQUIRY INTO THE EXERCISE OF DISCRETION (1969) (Canada); Parker, Copping a Plea, [1972] CHITTY'S L.J. 310 (1972) (Canada); Ratushny, Plea Bargaining and the Public, 20 CHITTY'S L.J. 238 (1972) (Canada);

Cousineau & Verdun-Jones, Evaluating Research into Plea Bargaining in Canada and the United States: Pitfalls Facing the Policy Makers, 21 CAN. J. CRIM. 293 (1979); Verdun-Jones & Cousineau, Cleansing the Augean Stables: A Critical Analysis of Recent Trends in the Plea Bargaining Debate in Canada, 17 OSGOODE HALL L.J. 227 (1979); Westling, Plea Bargaining: A Forecast for the Future, 7 SIDNEY L. REV. 424 (1976) (Australia); Letter from Robert D. Seifman, University of Melbourne, June 24, 1980 (Australia); interview with David Libai, former prosecutor and defense attorney in Israel, in Chicago, Oct. 11, 1967. For an indication that plea bargaining, if it occurs, lacks any official sanction in New Zealand, see The King v. Walsh, [1948] N.Z.L.R. 937 (New Zealand S. Ct.) (guilty plea set aside because defective sergeant might have led defendant to believe that his best course was to plead guilty).

176 For example, a former Los Angeles prosecutor who had become a Senior Lecturer in Law at the University of Sydney began a discussion of plea bargaining in Australia by saying, "There can be little doubt that some plea bargaining exists in Australian courts. It may not be very widespread, it may lack official sanction, but it does exist in some degree." Westling, supra note 175, at 424.

Although he knew of no official statistics, a former Israeli prosecutor and defense attorney expressed his confidence that guilty plea rates in Israel were substantially lower than those

in the United States. He described plea bargaining in Israel as "neither very widespread nor very unusual." Noting the absence of jury trials, he observed, "There is no feeling that the great mass of defendants must be induced to plead guilty. Two or three ordinary trials, involving neither terribly simple nor terribly complex cases, can usually be conducted in a single morning. It is a rare case that cannot be proven with two or three witnesses, and prosecutors know that they may very well spend more time bargaining a case than they would spend at trial. Accordingly they do not regard plea bargaining as a great administrative boon." Interview with David Libai, supra note 175.

177 Ferguson, The Role of the Judge in Plea Bargaining, 15 CRIM. L. QUART. 26, 30 (1972). For a review of several studies of guilty plea rates in Canada, see Verdun-Jones & Cousineau, supra note 175, at 250-51. The figure cited in text is apparently derived from studies of Magistrates Courts; guilty plea rates in the County Courts and the Supreme Court are apparently lower. See CANADIAN COMMITTEE ON CORRECTIONS, TOWARD UNITY: CRIMINAL JUSTICE AND CORRECTIONS 134 (1969) ("it is believed by law enforcement officers that at least from 40 to 50 percent of all convictions for indictable offences are the result of pleas of guilty"). Some studies of Magistrates Courts also have suggested lower figures. See Verdun-Jones & Cousineau, supra note 175, at 250-51 (43.5 percent guilty plea rate in a sample of 1655 cases from the Magistrates Court of Toronto during 1970 and 1971).

178 Compare M. FRIEDLAND, DETENTION BEFORE TRIAL: A STUDY OF CRIMINAL CASES TRIED IN THE TORONTO MAGISTRATES COURTS 121 n.12 (1965) and J. HOGARTH, SENTENCING AS A HUMAN PROCESS 345-49 (1971) with The Changing Plea Bargaining Debate, supra note 4, at 652-56.

179 Cousineau & Verdun-Jones, supra note 175, at 294 (footnotes omitted). See also the sources cited by these authors: Perkins & Pigeau v. The Queen, 35 C.R.N.S. 222 (Que. C.A. 1976); Attorney General v. Roy, 18 C.R.N.S. 89 (Que. Q.B. 1972); Regina v. Wood, 26 C.C.C. 2d 100 (Alberta S. Ct. 1976); LAW REFORM COMMISSION OF ONTARIO, REPORT OF ADMINISTRATION OF ONTARIO COURTS, PART II (1973).

180 Wilson, Crime and Punishment in England, THE PUBLIC INTEREST, Spring 1976, at 3, 18. See also Baldwin & McConville, supra note 174, at 287 n.1 (suggesting a somewhat lower figure for 1976); Proceedings of the House of Commons, June 24, 1966, column 164 (in 1965, 58 percent of "those tried on indictment" pleaded guilty, 26 percent pleaded not guilty and were convicted, and 16 percent pleaded not guilty and were acquitted; thus 69 percent of all convictions were by guilty plea). Guilty plea rates in the Magistrates Courts seem considerably higher than those in the Crown Courts, however, see Baldwin & McConville, supra note 174, at 287 n.1; and the rate of guilty pleas in England apparently has increased in recent decades. During the 1940's, it was asserted that less than half of those indicted in

England pleaded guilty. L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 297 n.122 (1947). To establish the legal context of these statistics, it should be noted that all trials in the Crown courts are jury trials and all trials in the magistrates courts are bench trials.

181 See, e.g., Stockdale, The Problem of Wounding With Intent, [1958] CRIM. L. REV. 675, 677.

182 R. v. Turner, 54 Cr. App. R. 352, [1970] 2 All E.R. 281. This case held only that a judge could not indicate a probable sentence unless he also declared that this sentence would be unaffected by whether the defendant pleaded guilty or was convicted at trial. Nevertheless, this ruling led to a situation in which trial judges apparently never give advance indications of the sentences that they intend to impose. Interview with Ivan Lawrence, a Member of Parliament and London barrister whose practice consists largely of defending criminal cases, in London, Sept. 1, 1980.

183 Interview with David S. Gandy, Chief Prosecuting Solicitor of the County of Greater Manchester, in Washington, D.C., June 4, 1976; see Baldwin & McConville, supra note 174, at 289.

184 R. v. Soanes, 32 Cr. App. R. 136-37, [1948] 1 All E.R. 289, 290. See also R. v. Bedwellty Justices, [1970] CRIM. L.

REV. 601.

185 Davis, supra note 174, at 156.

186 Edwards, English Criminal Procedure and the Scales of Justice, in THE ECONOMICS OF CRIME AND PUNISHMENT 203 at 216-17 (S. Rottenberg, ed., 1973). See Kaufman, Criminal Procedure in England and the United States: Comparisons in Initiating Prosecutions, 49 FORDHAM L. REV. 26, 27 (1980).

187 Bivens v. Six Unknown Agents, 403 U.S. 388, 415 (1971) (Burger, C. J., dissenting); Jeffrey v. Black, [1977] 3 W.L.R. 895 (Q.B.), [1978] 1 All E.R. 555; Williams, The Exclusionary Rule Under Foreign Law--England, 52 J. CRIM. L., C. & P.S. 272 (1961).

188 See Stafford, Trial by Jury--the English Way, 66 A.B.A.J. 330, 332 (1980); Zeisel & Diamond, The Effect of Peremptory Challenges on Jury and Verdict, 30 STANF. L. REV. 491, 498-99 (1978).

189 See Schlesinger, supra note 171, at 377.

190 Langbein, Land Without Plea Bargaining: How the Germans Do It, 78 MICH. L. REV. 204, 208 (1979).

191 Stafford, supra note 188, at 330.

192 See, e.g., Kötz, Book Review, 48 U. CHI. L. REV. 478, 481 (1981) (on the continent "there is no plea bargaining in cases of serious crime"); Weigend, Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 381, 386 (Morris & Tonry eds. 1980) ("[P]lea bargaining -- the exchange of leniency for cooperation -- is virtually nonexistent in France and West Germany"); Damaska, The Realilty of Prosecutorial Discretion: Comments on a German Manuscript, 29 AM. J. COMP. L. 119, 130 (1980) ("In Germany one finds only timid equivalents, mainly for lesser crime, and such practices are still widely regarded as scandalous and demeaning to the administration of justice"); Schlesinger, supra note 171, at 382 ("[T]he French system is able to process the ever-growing mass of routine cases without throwing justice and judicial dignity to the winds -- without, in other words, resorting to the plea bargain").

193 See K. HAUKAAS, NORWEGIAN LEGAL PUBLICATIONS IN ENGLISH, FRENCH AND GERMAN 46-47 (1966). A useful description of Swedish criminal procedure, however, is H. BECKER & E. HJELLEMO, JUSTICE IN MODERN SWEDEN (1976) (indicating the existence of a guilty plea procedure but the absence of plea bargaining at pp. 85 & 87).

194 Myhre, Conviction Without Trial in the United States and Norway: A Comparison, 5 HOUS. L. REV. 647 (1968).

195 See H. SILVING, ESSAYS ON CRIMINAL PROCEDURE 255 (1964).

196 Myhre, supra note 194, at 649-50 (quoting section 283 of the Norwegian Code of Criminal Procedure).

197 See id. at 650, 653. In Japan, too, a procedure between a guilty plea and a full trial has been established--"a mode of summary trial which may be had when the accused, at the beginning of trial, has made a statement that he is guilty of the facts charged." Dando, Japanese Criminal Procedure Reform, in ESSAYS IN CRIMINAL SCIENCE 447 at 458 (G. Mueller, ed. 1961). Nevertheless, one knowledgeable source insists that there is no bargaining for guilty pleas or judicial confessions in Japan. Interview with Chisugi Mukai, a trial judge in Tokyo, in Boulder Colorado, Oct. 4, 1978.

198 Id. at 655-58.

199 Interview with Johannes Andenaes, Professor of Law and Director of the Institute of Criminology and Criminal Law at the University of Oslo, Norway, in Chicago, March 14, 1968. The criminal jury also has been retained in Denmark although not in Sweden. See H. KALVEN & H. ZEISEL, THE AMERICAN JURY 14 n.3 (1966).

200 Myhre, supra note 194, at 647.

201 Id. at 661.

202 Id. at 658. One rarely used Norwegian procedure, however, the pantale unnlatesle, can be viewed as a form of plea bargaining. It is an official judgment of guilt rendered, not by a court, but by a prosecutor. It cannot be accompanied by any fine or imprisonment whatever. Although the issuance of a pantale unnlatesle seems never to be the product of back-and-forth negotiations, it must be accepted by the accused, and the accused does risk a more severe sanction if he rejects it and insists upon standing trial before a court. See Felstiner & Drew, European Alternatives to Criminal Trials: What We Can Learn, JUDGES' J., Summer 1978, at 18, 21.

203 See Church, Plea Bargains, Concessions, and the Courts: Analysis of a Quasi-Experiment, 10 LAW & SOC'Y REV. 377 (1976).

204 See The Trial Judge's Role, supra note 4, at 1076-87.

205 Myhre, supra note 194, at 650. Of the continental lawyers and scholars with whom I have discussed the issue, however, the only one to concede the existence of a "functional equivalent" of plea bargaining in his nation spoke of a Scandanavian country. Professor Jørn Vestergaard of the Institute of Criminal Law and Criminology of the University of Copenhagen, Denmark, noted that 64 percent of the defendants in

cases filed by public prosecutors in Denmark in 1977 pleaded guilty, and he suggested that some form of implicit bargaining probably lay behind this figure. Although Professor Vestergaard doubted that lay judges tend to have harsher attitudes toward sentencing than professional judges, he observed that some professional judges and lawyers probably would take a different position. In Denmark as in Norway, a defendant's confession usually leads to sentencing by a professional judge rather than a mixed tribunal, and defendants with little chance of success at trial may confess partly because they prefer this alternative. Professor Vestergaard conceded that his speculation was based neither on experience, nor on observation of the criminal courts, nor on conversations with practitioners; he merely had drawn an inference from what the regarded as a high rate of confessions--a rate that does seem higher than that of most other continental jurisdictions. Interview with Professor Vestergaard, in Boulder, Colorado, Aug. 25, 1980.

Professor Johannes Andenaes of Norway was confident that in his country, too, a majority of defendants do not contest their guilt, but he rejected the suggestion that any sort of "implicit bargaining" might account for their confessions. It would be "impossible," Andenaes said, for a judge to declare that he viewed a defendant's failure to confess as an appropriate sentencing consideration, and a judge also would be unlikely to regard a defendant's confession as evidence of remorse except in the most unusual circumstances. See p. infra. According to

Andenaes, Norwegian defendants "feel no pressure to confess; the only benefits that a defendant may gain from confession are a simplified trial procedure and an escape from some publicity." Interview with Professor Andenaes, supra note 199.

206 See, e.g., Goldstein & Marcus, The Myth of Judicial Supervision in Three "Inquisitorial" System: France, Italy, and Germany, 87 YALE L.J. 240, 245 (1977); Johnson, Book Review, 87 YALE L.J. 406, 410 (1977).

207 See, e.g., Langbein, supra note 190, at 121; Goldstein & Marcus, supra note 206, at 269-70.

208 Langbein, supra note 190, at 210 (quoting section 152(II) of the West German Code of Criminal Procedure). See generally Herrmann, The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany, 41 U. CHI. L. REV. 468 (1974); Langbein, Controlling Prosecutorial Discretion in Germany, 41 U. CHI. L. REV. 439 (1974).

209 See Langbein, supra note 190, at 211.

210 See J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 66 (1977); Weigend, supra note 192, at 402-03. Of course, in an effort to prevent the exercise of this judicial power, a German prosecutor might attempt to keep incriminating evidence from the court, but this stratagem would also be

difficult. The court has the prosecutor's dossier before it, and the court conducts most of the courtroom examination of witnesses. Any facts that the prosecutor wished to suppress might very well be revealed.

211 Compare Casper & Zeisel, Lay Judges in the German Criminal Courts, 1 J. LEGAL STUD. 135, 167 n.31 (1972) (prosecutors' sentence recommendations adopted in 29 percent of the cases in a German sample), with Johnson, Sentencing in the Criminal District Courts, 9 HOUS. L. REV. 944, 971 (1972) (prosecutors' sentence recommendations adopted in 98 percent of the cases in an American sample).

212 See Goldstein & Marcus, supra note 206, at 269, 278; Goldstein & Marcus, Comment on Continental Criminal Procedure, 87 YALE L.J. 1570, 1571 (1978) ("plea bargaining as such does not take place").

213 Langbein, supra note 190, at 204.

214 Landes, Comments on the Papers in the Seminar, in THE ECONOMICS OF CRIME AND PUNISHMENT 225 at 228 (Rottenberg, ed. 1973). Accord, McDonald, From Plea Negotiation to Coercive Justice: Notes on the Respecification of a Concept, 13 LAW & SOC'Y REV. 385, 386 (1979).

215 Landes, supra note 214, at 228.

216 Goldstein & Marcus, supra note 206, at 264. For a forceful response to this article, see Langbein & Weinreb, Continental Criminal Procedure: "Myth" and Reality, 87 YALE L.J. 1549, 1569 (1978). See also the rejoinder--Goldstein & Marcus, Comment on Continental Criminal Procedure, 87 YALE L.J. 1570 (1978).

217 Casper & Zeisel, supra note 211, at 152 n.22 (1972). The fact that deliberation time is usually unaffected by confession suggests that, in most cases, this time is largely devoted to sentencing issues.

218 Id. at 149-50.

219 Goldstein and Marcus observed that Casper and Zeisel had not examined the lowest tier of German courts where large numbers of minor offenses are tried. In what appears to be a nonsequitur, the authors argued that trials in these courts "may well be shorter and, as a result, even more substantially affected by the accused's confession." Goldstein & Marcus, supra note 206, at 268 n.68.

220 Weigend, supra note 192, at 411 (citing D. DOLLING, DIE ZWEITEILUNG DER HAUPTVERHANDLUNG: EINE ERPROBUNG VOR EINZELRICHTERN UND SCHOFFENGERICHTEN 221 (1978).

221 Goldstein & Marcus, supra note 206, at 268.

222 The authors also noted that the German "penal order" procedure was "a direct analogue of the American guilty plea." For a discussion of the German "penal order," see pp. supra.

223 Goldstein & Marcus, supra note 206, at 271.

224 Id. at 280. For a sensitive analysis of the rule of compulsory prosecution, see Damaska, supra note 192.

225 Silberman Book Review, supra note 4, at 1032.

226 Goldstein & Marcus, supra note 206, at 277.

227 Cf. Langbein & Weinreb, supra note 216, at 1557 ("it would startle all those involved, the accused not least, to suggest that he has given up something when he does not insist on being prosecuted for a more serious offense").

228 A French prosecutor apparently is no more likely to "correctionalize" a case when the defendant has confessed than when he has not. See Weigend, supra note 192, at 408-09.

229 Goldstein & Marcus, supra note 206, at 278.

230 One disturbing aspect of the Goldstein-Marcus article lay in its apparent tendency to treat European sources as believable only when they reported the violation of legal

norms. The article contained statements like this one:

> It is difficult to tell whether the repeated affirmations of adherence to the norm of compulsory prosecution and the repeated denials of agreements between prosecutor and defense attorney reflect the underlying truth, or whether they are a product of the habit of officials to answer questions in terms of formal doctrine rather than actual practice.

Id. at 270. Perhaps Goldstein and Marcus did not suggest the distinction between theory and practice in their questions; perhaps they suspected that European lawyers and judges were unable to understand this distinction even when the researchers presented it; or perhaps they simply suspected that virtually all European lawyers and judges were dishonest. I have encountered only one European lawyer who had read the Goldstein-Marcus article--Bostjan M. Zupancic of Yugoslavia, a Visiting Professor at the University of Iowa Law School during the 1979-80 academic year. His spontaneous, unsolicited comment was, "I found it difficult to believe that someone as respected as the senior author could write something so distorted."

231 Langbein, supra note 190, at 219. Professor Langbein also emphasized the immense difference between the 41 percent confession rate in Germany and the much higher guilty plea rates in the United States. Id. at 220.

237 Weigend maintains that "most German courts consider a voluntary confession a mitigating factor in sentencing," noting that the "practice is of dubious legality." Weigend, supra note 192, at 411.

Apparently formal legal doctrine in Germany does not sanction even trivial inducements to confess. The German supreme court has said, "[I]t is forbidden to punish more leniently the criminal who confesses, solely on account of his confession." Langbein, supra note 190, at 221 (citing 1 Entscheidungen des Bundesgerichtshofes in Strafsachen 105, 106 (1951)). The same decision declared the impropriety of inducing defendants to confess "through the threat of disadvantage--such as a more severe sentence . . . ."

[illegible], Professor Langbein, like Professor Weigend, conceded that German courts sometimes do reward confession; but unlike Professor Weigend, he apparently based his concession on formal legal doctrine--specifically, a statute that permits a court to consider along with many other factors a defendant's "conduct after the crime, especially his efforts to make amends for the harm." Id. at 221 n.50 (citing section 46 of the West German Code of Criminal Law). The reference to a defendant's efforts to make amends for his crime seems on its face to speak more of acts like restitution and victim compensation than of confession. In fact, Casper and Zeisel translated the relevant statutory language somewhat differently than Langbein. They read it to say that a court might consider the defendant's

"conduct after the act, especially his endeavor to make restitution." Casper & Zeisel, supra note 211, at 165. The Casper-Zeisel rendering of the statute avoids conflict between this statute and the German supreme court decision described above, and my colleague Hiroshi Motomura reports that the word that Langbein translated as "make amends for the harm" -- widergutzumachen -- is more commonly translated as "make reparations." This word is used, for example, in the German equivalent of the phrase "make reparations of war."

Apart from formal doctrine, Professor Langbein has noted that manuals on the defense of criminal cases in Germany have discussed whether it may be tactically advantageous for defendants to confess, noting that a confession may permit "counsel to narrow and direct the court's attention to ameliorating factors in the accused's background and his criminal conduct." In contrast to the extensive discussions of plea bargaining in similar American volumes, these manuals have offered no hint that a defendant's confession is itself likely to be rewarded with a more lenient sentence. Langbein, supra note 190, at 215 & n.40, 221 n.61 (citing H. DAHS, HANDBUCH DES STRAFVERTEIDIGERS (4th ed. 1977) and H. SCHORN, DER STRAFVERTEIDIGERS (1966).

238 See note 205 supra. Apart from Professor Vestergaard whose position is discussed in the footnote just cited, a letter from Professor Fritz W. Scharpf of West Germany recognized the possibility that some "implicit bargaining" might occur in his country. Scharpf ultimately took an agnostic position,

however: "It is hard to say whether something similar to plea bargaining goes on in order to obtain confessions." Letter from Professor Scharpf, Oct. 17, 1967.

239 Professor Hans Zeisel has reported that a similar provision was once included in the Austrian code (and may still be). For an indication that Austrian defendants who contest their guilt are not usually sentenced more severely than those who yield to conviction, however, see Felstiner & Drew, supra note 202, at 23 (referring specifically to the situation in which an Austrian defendant rejects a proposed penal order and exercises his right to trial).

240 The provision was replaced by one similar to the current West German provision. See note 235 supra. It says in

general terms that an offender's conduct after the crime may be considered in sentencing.

241 See United States v. Mandujano, 425 U.S. 564 (1976) (no majority opinion, but unanimous agreement that even if the privilege against self-incrimination would have entitled a defendant both to remain silent before a grand jury and to be advised of this right, it did not excuse his perjury, for perjury is not protected by the fifth amendment). On whether a sentencing judge properly may consider a defendant's apparent perjury at his trial, compare United States v. Grayson, 438 U.S. 41 (1978), with Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 YALE L.J. 204, 211-17 (1959).

242 W. SCHAEFER, THE SUSPECT AND SOCIETY 71 (1967). Cf. Felstiner, supra note 112, at 315:

> Nobody worries about "instantaneous repentance" . . . . A German defendant considers himself an adversary of state. He is expected to do whatever he can to better his position. He is not subject to jeopardy for perjury. He is not assumed to regret his behavior. . . . German authorities do not have to endorse transparent rationalizations to justify preferrential treatment for defendants who do not insist upon trials.

244 See J. LANGBEIN, supra note 210; Langbein, supra note 208; Langbein, supra note 190; Langbein, Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?, [1981] A.B.F.J. 195; Felstiner, supra note 112; Herrmann, supra note 208; Casper & Zeisel, supra note 211; Goldstein & Marcus, supra note 206; Langbein & Weinreb, supra note 216; Felstiner & Drew, supra note 202; Weigend, supra note 192; Damaska, supra note 192; Sessar, Prosecutorial Discretion in Germany, in THE PROSECUTOR 225 at 229 (W. McDonald, ed. 1979); ASSOCIATION INTERNATIONALE DE DROIT PENAL, THE CRIMINAL JUSTICE SYSTEM OF THE FEDERAL REPUBLIC OF GERMANY (1981); Jescheck, The Discretionary Powers of the Prosecuting Attorney in West Germany, 18 AM. J. COMP. L. 508 (1970); Jescheck, Principles of German Criminal Procedure in Comparison with American Law, 56 VA. L. REV. 239 (1970); Schram, The Obligation to Prosecute in West Germany, 17 AM. J. COMP. L. 627 (1969); K. DAVIS, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (1976); THE GERMAN CODE OF CRIMINAL PROCEDURE (H. Niebler trans. 1965).

245 See Casper & Zeisel, supra note 211, at 152 n.22. West Germany also seems to devote greater resources to its courts than France. See Johnson & Drew, This Nation Has Money for Everything--Except Its Courts, JUDGES' J., Summer 1978, at 8.

246 See J. LANGBEIN, supra note 210, at 2.

248 These misconceptions sometimes find their way into the scholarly literature. Professor Graham Hughes has written:

> [T]he German system depends for its trial efficiency on the existence of an elaborate pretrial procedure that presents the trial court with a complete dossier containing depositions and the work-up of the case by a magistrate who has examined the accused and witnesses. Indeed, it is possible to regard the "real trial" in Europe as taking place before the examining magistrate so that the later public trial only serves two principal functions--first, to "review" the magistrate's determination of the validity of the case against the accused and, second, to bring out all the facts necessary for a proper determination of the sentence. The conservation of judicial resources through the creation of a leaner trial mode might not be significant if it had to be accompanied by setting up cadres of magistrates to conduct the complex pretrial procedures found in Europe. Furthermore, for such procedures to become the centerpiece of a criminal prosecution, conducted in camera as they are in Europe, would be alien, if not odious, to our traditions and constitutionally unacceptable.

Hughes, Pleas Without Bargains, 33 RUTGERS L. REV. 753, 756 (1981) (footnote omitted).

For the proposition that the efficiency of the German trial system depends upon the pretrial work of "a magistrate who has examined the accused and the witnesses," Professor Hughes cited Professor Langbein, who in fact wrote something else. The office of the examining magistrate does not exist in Germany; the preparation of criminal cases for trial is the task of the public prosecutor. Langbein, supra note 190, at 207-08 (the material cited by Hughes); cf. J. LANGBEIN, supra note 210, at 2 ("German pretrial procedure is closer to American than that of many other European systems, because in Germany the public prosecutor

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performs functions that in France and elsewhere are left to a more alien figure, the investigating magistrate").

It may not be of critical importance whether a nation calls the official who prepares criminal cases for trial a judge or a prosecutor. Nevertheless, use of the German label might have led Professor Hughes to the proper comparison. To duplicate the German system, it certainly would not be necessary for Americans to "set up cadres of magistrates to conduct complex pretrial procedures." We already have prosecutors. These prosecutors already are expected to--and sometimes do--prepare their cases for trial (which is all that Hughes seems to mean when he refers to "complex pretrial procedures").

The function of European trials is no more to review European prosecutors' (or magistrates') decisions to charge than the function of American trials is to review our prosecutors' charge decisions. In both European and American systems, a defendant can be convicted lawfully only if the evidence presented at trial itself establishes his guilt with a very high degree of certainty. Moreover, there is no apparent reason to conclude that European tribunals defer informally to pretrial prosecutorial (or magisterial) decisions to a greater extent than American judges and juries. Finally, pretrial proceedings in Europe certainly are no more in camera than the pretrial work of prosecutors' offices here.

Indeed, I know of only four significant differences between the pretrial work of European magistrates and prosecutors and the work of their American counterparts. First, European magistrates and prosecutors have a clearer obligation to investigate factual circumstances favorable to the accused. Second, they have a clearer obligation to disclose all of the results of their investigations to the defense. Third, their investigations generally are more thorough and the results more carefully recorded. And fourth, their tentative conclusions of criminal guilt are more regularly tested at trial. In most of these respects, the European procedure seems more favorable to defendants than the American. It is difficult to see anything in the European approach to trial preparation that is "alien, if not odious, to our traditions and constitutionally unacceptable."

249 Id. at 208.

250 78 HARV L. REV. 460, 461 & n.15 (1964).

251 Goldstein & Marcus, supra note 206, at 242 n.7. See Hermann, The German Criminal Justice System: The Trial Phase, Appellate and Review Proceedings, in ASSOCIATION INTERNATIONALE DE DROIT PENAL, supra note 244, at 65 (1981); Kötz, supra note 192, at 485.

252 See J. LANGBEIN, supra note 210, at 32-35. Moreover, the defendant need not rely entirely on his counsel. He, too,

can question the witnesses and make a closing statement. See id. at 65.

253 See id. at 72.

254 See id; Damaska, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. PA. L. REV. 506, 527 (1973).

255 J. LANGBEIN, supra note 210, at 63. The only limitation of the lay judges' power to force acquittal arises from the power of the prosecutor to appeal a judgment of acquittal. If an appellate court composed entirely of professional judges concludes that the acquittal was erroneous (and if both the court and the prosecutor are willing to accept the minimum punishment prescribed by law), the appellate court can order the defendant convicted without remanding the case for a new trial. Id. at 84-85. This facet of German procedure is designed to preclude the nullification of disfavored laws by lay judges.

256 See id. at 142.

257 See, e.g., Charrow & Charrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 COLUM. L. REV. 1306 (1979) (critically reviewing prior studies

at 1308-09 n.8); Schwarzer, Communicating with Juries: Problems and Remedies, 69 CALIF. L. REV. 731 (1981).

259 A somewhat similar relaxation of evidentiary rules has occurred in the United States in cases tried without juries. See, e.g., United States v. Compania Cubana De Aviacion, 224 F.2d 811 (5th Cir. 1955).

260 See J. LANGBEIN, supra note 210, at 67.

261 See id. at 69.

262 Langbein, supra note 190, at 207.

263 See id. at 207-09.

264 Id. at 207.

265 Id. at 209.

266 See id. at 209. Professor Langbein has argued, however, that even if West Germany had our levels of serious crime, it probably would not resort to plea bargaining. This nation might instead divert a larger portion of its criminal cases to the various nontrial channels that it has already established. Id. at 209-10. It seems noteworthy that the number of West German criminal defendants did increase thirty percent

between 1965 and 1976. Sessar, supra note 244, at 272.

267 Sessar, supra note 244, at 257. Felstiner and Drew have indicated, for example, that prostitution is punishable in West Germany only when the solicitation occurs near a church. Felstiner & Drew, supra note 202, at 24. Indeed, there has been serious discussion in West Germany of decriminalizing even one non-victimless offense--the theft from a self-service store of goods worth less than 200 dollars. A distinguished study group proposed that the victim of this theft should be entitled merely to a civil recovery of both the goods and an amount of money equal to their value. A somewhat similar proposal has been enacted in East Germany. See Felstiner & Drew, Should Some Theft Be Decriminalized?--A Look at the German Experience, JUDGES' J., Fall 1978, at 16.

268 See Felstiner & Drew, supra note 202, at 24; Sessar, supra note 244, at 256-60.

269 Johnson & Drew, supra note 245, at 10.

270 Id.

271 Id.

272 Id. at 11. In addition, the number of prosecuting attorneys in West Germany increased by thirty-five percent

between 1965 and 1976--approximately as rapidly as the number of criminal suspects and more rapidly than the number of filed cases. Sessar, supra note 244, at 258, 261-62.

273 Professor Langbein emphasized this fact in his vigorous criticism of the Johnson-Drew study. Although Langbein did not dispute any of the study's findings, he objected that

> the authors have undertaken their comparison of American and European legal systems on a purely quantitative basis, disregarding the qualitative differences between our adversarial and the Europeans' nonadversarial procedures. These qualitative differences are the true source of the quantitative differences. Johnson and Drew derived erroneous implications for the manning of American courts because they ignored those characteristics of European procedure that explain European manpower levels.

Langbein, Judging Foreign Judges Badly: Nose Counting Isn't Enough, JUDGES' J., Fall 1979, at 4.

Unlike Professor Langbein, I did not understand Johnson and Drew to argue that the United States should have more judges simply because West Germany and other European nations do. Plainly the demonstration that American courts are understaffed must come from another source. If, however, the claim that plea bargaining is an economic necessity has any foundation, this demonstration should not be difficult. The Johnson-Drew study does suggest that greater social effort on our part is conceivable and that the "realists" who dismiss this option out of hand are not truly realists.

274 Comparisons of our judicial expenditures with those of several other European nations are presented in Johnson & Drew, supra note 245. These comparisons are less dramatic than comparisons with West German expenditures, but they are still extremely striking.

275 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). See, e.g., Maxwell v. Dow, 176 U.S. 581, 603 (1900); Missouri v. Lewis, 101 U.S. 22, 31 (1879); Jordan v. Massachusetts, 225 U.S. 167, 176 (1912); Palko v. Connecticut, 302 U.S. 319, 325 (1937); Fay v. New York, 332 U.S. 261, 288 (1947); Irvin v. Dowd, 366 U.S. 717, 721 (1961).

276 391 U.S. 145, 149 (1968).

277 Hughes, supra note 248, at 756.

278 Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968).

278a Of course a substantially simplified state trial procedure might include some revision of the doctines of Miranda v. Arizona, 384 U.S. 436 (1966), Mapp v. Ohio, 367 U.S. 643 (1961), and Griffin v. California, 380 U.S. 609 (1965). Nevertheless, a state could not appropriately assume that the dissatisfaction with these decisions expressed by various Supreme Court Justices would lead them to approve a procedural system designed primarily to revise particular constitutional rulings.

279 These proceedings might include those in which defendants assert defenses like insanity and necessity. They also might include cases in which "political crimes" are alleged (assuming that an appropriate definition of that term or an appropriate list of "political" charges could be devised).

280 See Langbein, Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?, 1981 A.B.F.R.J. 195 (1981).

281 See Casper & Zeisel, supra note 211, at 185-91; but see J. LANGBEIN, supra note 210, at 137-38.

282 Casper and Zeisel sometimes seemed to intimate disapproval of the extent to which professional judges influence lay judges in German mixed tribunals. Nevertheless, my reaction to the two authors' many descriptions of mixed-tribunal deliberations was that when the influence of the professional judges did prove decisive, it almost invariably led to more just results. This reaction may not be surprising in view of the fact that I am a law-trained professional myself, but of course, in every case one or more of the lay judges were persuaded to the same view. For example, one defendant was a member of a gang that had been removing cigarette machines and stealing their contents. When surprised by the police, the gang had shot at the officers. The lay judges voted initially to convict the defendant of aggravated robbery, but one or more of the

professional judges apparently persuaded them that the defendant's crimes were only grand larceny and resisting a peace officer. Casper & Zeisel, supra note 211, at 158-59. Of course a properly instructed American jury might have reached the same verdict, but it may have been fortunate for the defendant in this case that a direct interchange between the lay and professional judges could occur.

283 Discussions of the American jury system have tended to romanticize our citizenry as a group of hearty yeomen ever alert to incursions on their liberty, but of course our citizenry includes people who throw rocks at children to prevent school integration.

285 Swain v. Alabama, 380 U.S. 202 (1965). But see People v. Wheeler, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 831 (1979); People v. Payne, 436 N.E.2d 1046 (Ill. App. 1982).

286 See J. Sparling, Jury Selection (unpublished, undated manual used in training sessions in the District Attorney's Office, Dallas, Texas); W. WAGNER, ART OF ADVOCACY; JURY SELECTION § 1.04 (1981).

287 In a drunk driving prosecution, for example, it apparently is routine to ask prospective jurors about their drinking habits, their driving habits and their religious

beliefs. Compare Oster & Simon, Inside Justice: "We Want As Biased a Jury as We Can Get", Chicago Sun Times, June 19, 1974, at 4, 10 ("For the next two days, the prospective jurors would . . . be asked hundreds of questions about their jobs, their spouses' jobs, their sons' and daughters' jobs, and their sons' and daughters-in-laws' jobs"); W. WAGNER, supra note 286, at MQ 1 - MQ 30 suggesting "model questions" for attorneys to ask).

288 Zeisel & Diamond, supra note 188. See Broeder, Voir Dire Examinations: An Empirical Study, 38 S. CAL. L. REV. 503, 505 (1965) ("Voir dire was grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as very likely to prove unfavorable").

289 A lawyer's goals typically include impressing upon prospective jurors the lawyer's theory of the case, emphasizing particular points of law and charming them completely. Charles R. Garry offered an illustration in a presentation at the University of Washington Law School in Seattle on June 23, 1979, "Packaging Voir Dire, Opening and Closing Argument." He suggested asking a prospective juror whether, as he viewed the defendant at the counsel table, the defendant was guilty or innocent. The prospective juror was likely to answer that of course he did not know. Garry suggested challenging this prospective juror for cause on the ground he was unwilling to accord the defendant the presumption of innocence. Garry

recognized that the challenge was unlikely to be successful, but he thought that it would forcefully impress the presumption of innocence upon the jurors ultimately seated.

After listening to Garry suggest a number of equally plausible strategems, Judge Marvin E. Frankel remarked that any lawyer who had attempted them in his courtroom would have been held in contempt. I later mentioned Garry's remarks as offering extreme examples of the waste and abuse that can occur during voir dire. A California prosecutor responded, however, that the examples were not extreme. Indeed, every defense attorney whom he knew routinely asked some prospective juror whether the attorney's client was guilty or innocent, and most of the attorneys thought it a sad comment on civil liberties in America that so many prospective jurors responded truthfully, "I don't know." Cf. Broeder, supra note 288, at 522 ("Conservatively, about eighty per cent of the lawyers' voir dire time was spent indoctrinating, only twenty percent in sifting out the favorable from the unfavorable veniremen . . . . [Nevertheless,] indoctrination did not often appear to succeed").

290 Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

291 I once observed a homicide prosecution in which there was no doubt that the alleged victim had died. Nevertheless, when the prosecutor attempted to introduce a hospital record to

establish this fact, the defense attorney resisted; the jury was excused; a hospital administrator testified about the way in which the record had been prepared; both attorneys argued at length about the adequacy of the administrator's testimony; the trial judge ruled that the record was admissible; and the jury returned to the courtroom after nearly an hour of idleness.

292 In Sellars v. United States, 401 A.2d 974 (D.C. Ct. App. 1979), nine jurors of twelve testified that they had accepted the defendant's claim of self-defense and had meant to acquit when they convicted him of manslaughter. Both the trial court and the court of appeals refused to set the manslaughter verdict aside. (In addition, the appellate court rejected the defendant's claim that the prosecutor's closing argument had been prejudicial. It noted that "the verdict of manslaughter demonstrates that the jury rejected . . . the prosecutor's remark." Id. at 978). Cf. M. GLEISSER, JURIES AND JUSTICE 171 (1968) (describing a case in which two jurors admitted that they and their fellows had failed to realize that a conviction without a recommendation of mercy carried a death sentence so that they had condemned a defendant to death without meaning to).

293 See, e.g., Sellars v. United States, 401 A.2d 974 (D.C. Ct. App. 1979) (described in the preceeding footnote); United States v. Green, 523 F.2d 229 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976) (compromise verdict); Jorgenson v. York Ice Machinery Corp., 160 F.2d 432 (2d Cir.), cert. denied, 332 U.S.

764 (1947) (agreement to abide by majority vote); Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245, 1247-48 (3d Cir.), cert. denied, 404 U.S. 883 (1971) (failure to follow instructions).

294 See J. FRANK, COURTS ON TRIAL 115 (1950); F. JAMES & G. HAZARD, CIVIL PROCEDURE 310 (2d ed. 1977).

Perhaps what we say that we want juries to do and what we truly want them to do are different things. On the one hand, we tell juries to follow the law; on the other hand, when juries do not follow the law, they serve the primeval purposes of the jury system. If we were to talk out loud about these extra-legal purposes, we might emphasize them too much. Perhaps we achieve the best blend of law and community sentiment when we pretend, contrary to fact, that law is all we want.

In other words, we can assume, if we like, that our lying is poetry and that everything turns out for the best in the end; yet / it might become difficult to maintain this viewpoint if we looked more closely at what happens in jury rooms.

295 The worth of these rules depends not only on their authors' understanding of the limited value of certain sorts of evidence but on the conclusion that jurors will lack the same understanding. The judicial sentiment that must have informed these rules is suggested by the following defense of the hearsay

rule, published in 1824:

> [U]pon the minds of a jury unskilled in the nature of judicial proofs, evidence of this kind would frequently make an erroneous impression. Being accustomed, in the common concerns of life, to act upon hearsay and report, they would naturally be inclined to give such credit when acting judicially; they would be unable to reduce such evidence to its proper standard when placed in competition with more certain and satisfactory evidence; they would, in consequence of their previous habits, be apt to forget how little reliance ought to be placed upon evidence which may so easily and securely be fabricated; their minds would be confused and embarrassed by a mass of conflicting testimony; and they would be liable to be prejudiced and biassed by the character of the person from whom the evidence was derived.

T. STARKIE, EVIDENCE 44-46 (1st Am. ed. 1824). See also Petition of Berkeley, 4 Camp. 402, 171 Eng. Rep. 128 (1811).

296 See M. FRANKEL, PARTISAN JUSTICE (1980); Frankel, The Search for Truth: An Umpireal View, 123 U. PA. L. REV. 1031 (1975).

297 See Kötz, supra note 192; Pizzi, Judge Frankel and the Adversary System, 52 U. COLO. L. REV. 357 (1981); Alschuler, The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?, 52 U. COLO. L. REV. 349 (1981).

298 See Pizzi, supra note 297, at 366.

299 Judges currently have the power to call witnesses not called by the parties and to ask questions that they have failed to ask. See, e.g., FED. R. EVID. 614; Johnson v. United States,

333 U.S. 46 (1948). But judges rarely exercise this power. See, e.g., Fink, The Unused Power of a Federal Judge to Call His Own Expert Witness, 29 SO. CAL. L. REV. 195 (1956).

300 Of course a judge could not perform this function unless he were supplied with some kind of pretrial dossier. Nevertheless, this dossier might be less elaborate than those employed in Europe, and it might be compiled in a more adversarial fashion. It might be sufficient, for example, for opposing lawyers to supply the judge with lists of witnesses whom they thought should be heard along with a brief summary of each witness' anticipated testimony. Perhaps the prosecutor also should be expected to reveal the identity of people whose testimony he considered unnecessary but whom he believed to possess relevant information.

301 Indeed, one might hope that it would. The passive role of lawyers at European trials gives rise to legitimate concern about the extent to which continental procedure truly achieves the virtues of a "mixed" system. See J. LANGBEIN, supra note 210, at 64-64. Nevertheless, a more adversarial procedure than is usually exhibited by European systems might be encouraged not only by our different courtroom traditions but by our deliberate use of a less detailed pretrial dossier than is usually employed in Europe. See note 300 supra. Such a dosier might permit a judicial officer effectively to control the order of proof at trial, to invite narrative testimony, to confine this testimony to relevant

issues, and to ask obvious questions. A more detailed probing of each witness' testimony might remain the task of counsel.

302 Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion of Black, J.).

303 See The Defense Attorney's Role, supra note 4, at 1181-98.

304 Malloy v. Hogan, 378 U.S. 1, 7 (1964).

305 See J. LANGBEIN, supra note 210, at 65.

306 W. SCHAEFER, supra note 242, at 59.

307 See McCormick, Law and the Future: Evidence, 51 NW. U. L. REV. 218, 222 (1956) ("ordinary morality . . . sees nothing wrong in asking a man, for adequate reason, about particular misdeeds of which he has been suspected and charged. . . . I predict that the weaknesses of the privilege [against self-incrimination] in point of policy and morality will become more widely understood").

308 384 U.S. 436 (1966).

309 Frankel, From Private Fights Toward Public Justice, 51 N.Y.U. L. REV. 516, 527 (1976). See also M. FRANKEL, supra note

296, at 95-100.

310 Frankel, supra note 309, at 527-28.

311 In his dissenting opinion in Lakeside v. Oregon, 435 U.S. 333, 345 n.5 (Stevens, J., dissenting), Justice Stevens commented that "the roster of scholars and judges with reservations about expanding the Fifth Amendment privilege reads like an honor roll of the legal profession." He then cited works by Wigmore, Corwin, Pound, Friendly, Schaefer, and Traynor. At least four of the six honorees--Wigmore, Pound, Friendly and Schaefer--had manifested their reservations about expanding the fifth amendment privilege by endorsing proposals for judicially supervised interrogation. What is sometimes called "the Kauper-Schaefer-Friendly model," see Kamisar, Kauper's "Judicial Examination of the Accused" Forty Years Later--Some Comments on a Remarkable Article, 73 MICH. L. REV. 15, 33 (1974); Frankel, supra note 309, at 530, might better be called "the Wigmore-Kauper-Pound-Schaefer-Friendly-Frankel model."

312 Like a police search, interrogation invades a suspect's privacy and should not be permitted without antecedent justification. Judicial supervision of the interrogation process should not become a fishing license.

One collateral virtue of judicially supervised interrogation is that it would encourage police officers to bring suspects

before magistrates promptly, for it would be only before magistrates that admissible confessions could be obtained. This reform would promote a prompt advisement of rights, a prompt bail determination, and a prompt determination of probable cause (something that the decision in Gerstein v. Pugh, 420 U.S. 103 (1975), did not achieve in practice even for incarcerated suspects).

313 Remarkably, permitting the defendant to present this probative evidence would require some modification of our arcane evidentiary rules. Today, the hearsay rule often prevents defendants from introducing evidence of their prior consistent statements. These statements become admissible only when the prosecutor has "opened the door" to them by advancing "an express or implied charge . . . of recent fabrication or improper influence or motive." The fact that the prosecutor has accused the defendant of a crime and introduced evidence of his guilt, moreover, carries no "door opening" implications. This circumstance is never enough to permit the defendant to bolster a current denial of guilt with proof of an earlier willingness to submit to interrogation and of the detail and consistency of his responses. FED. R. EVID. 801(d)(1)(B); United States v. Navarro-Varelas, 541 F.2d 1331 (9th Cir. 1976).

314 Today, by contrast, although discovery depositions are routine in civil cases, even the most liberal criminal discovery rules ordinarily do not permit defendants or their attorneys to

depose prosecution witnesses. See AMERICAN BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRETRIAL DISCOVERY AND PROCEDURE BEFORE TRIAL 87-88 (1970); FED. R. CRIM. P. 15(a).

315 The use of prior convictions for impeachment purposes could be eliminated either by forbidding their use altogether or by permitting their introduction as part of the prosecutor's case-in-chief. Descriptions of mixed-tribunal deliberations in Germany indicate that German tribunals give considerable weight to the always-admitted evidence of prior convictions, but as I read these descriptions, they do not support the fear that a tribunal may convict a previously convicted defendant simply because he is an "evil person" and not because he committed the crime alleged. Indeed, a "clean" record may help a defendant more than a "bad" record would hurt him. In one case, a defendant accused of attempting to rob a jewelry store claimed not only that he had not attacked the store owner but that the store owner had attacked him. Although this story seemed dubious, the defendant had no prior criminal record and was personally appealing in other ways. The two lay judges forced an acquittal over the dissent of the professional judge. Casper & Zeisel, supra note 211, at 159.

One of the jury-waived trials that I observed in Philadelphia in 1968, see pp. infra, offered a striking comment on the American rule that ordinarily excludes evidence of

a defendant's prior criminal convictions unless he testifies. The charge was purse-snatching, and the state's case depended upon the victim's identification of the defendant. At the conclusion of the trial, the judge announced that he had a reasonable doubt of the defendant's guilt and that he would acquit. He then said, "Mr. Prosecutor, let me see if I got it right." The prosecutor, with a resigned nod, handed the judge a copy of the defendant's prior criminal record, one apparently indicating the defendant's involvement in a number of similar offenses. "Oh hell, I blew it," said the judge. I was impressed both by the judge's willingness to play by the rules and by the rules' artificiality. The judge resembled a quiz show contestant awaiting the opening of a sealed envelope with the correct answer.

316 P. UTZ, SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT 139 (1978).

317 Following the prohibition of plea bargaining in Alaska, prosecutors declined prosecution in 70 percent more drug cases than they had before the ban. The declination rate in "morals" cases increased by 540 percent. In one city, Fairbanks, the rate of declination also increased in fraud, forgery and embezzlement cases, but there was no increase in the declination rate for more serious offenses. M. RUBINSTEIN, S. CLARKE & T. WHITE, supra note 47, at 139-40.

318 See, e.g., N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 1-28 (1970); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 249-366 (1968).

319 See Plea Bargaining and Its History, supra note 4, at 32; Mather, Comments on the History of Plea Bargaining, 13 LAW & SOC'Y REV. 281, 282-84 (1979).

320 In California, the number of adult arrests for marihuana use increased from 3,300 in 1962 to 34,000 in 1968, and by the end of this period, marihuana violations accounted for approximately one-fourth of the state's felony complaints. J. KAPLAN, MARIJUANA: THE NEW PROHIBITION 29 (1970). On the overall doubling of felony caseloads during the 1960's, see The Prosecutor's Role, supra note 4, at 51 & n.7.

321 AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (1968).

322 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967).

323 E.g., Brady v. United States, 397 U.S. 742 (1970).

324 Justice on Trial--A Special Report, supra note 51, at 18.

325 Cf. Oster & Simon, Jury Trial A Sure Way to Increase the Rap, Chicago Sun Times, Sept. 17, 1973, at 4, 68 (a Chicago Crime Commission survey revealed that between 40 and 60 percent of all Circuit Court courtrooms were vacant between 10:00 and 11:30 a.m. and between 2:00 and 3:30 p.m.).

326 Simon & Oster, Judges on Bench 2 3/4 Hours a Day, Chicago Sun Times, Jan. 20, 1974, at 1. The story added:

> A variety of special methods were used in the study to give judges the benefit of the doubt: (1) The legal court days preceding and following the Thanksgiving, Christmas, Hanukkah and New year's holidays were excluded from the study. (2) If a judge did not show up in court at all, that day was not included in the study. This means that if a judge chose to take the entire day off--a not uncommon occurrence, especially on Fridays--it was not counted against his average time in court.
>
> The average bench starting time was about 10:15 a.m. . . . , but about 45 minutes later, after 11 a.m., judges start leaving their courtrooms, some never to return. . . . [B]y 3 pm. the number of times judges appear on the bench is less than half the 10:30 a.m. total.
>
> As to the central debate--whether judges spend their time valuably and properly when they are off the bench--virtually every judge interviewed said they do and virtually every lawyer and assistant state's attorney said they do not.

Id. at 1, 4.

327 Castillo, New York Courts Found to Lag in Focusing on Dangerous Crime, New York Times, Oct. 19, 1980, at 1. This report also found that, owing to judicial liberality in the granting of continuances, seventeen court appearances per case had become the norm in felony prosecutions resolved by the

Supreme Court in New York City. The report suggested that only six to nine appearances should be necessary. Id. at 29.

328 See text at note 47 supra. Justice Robert C. Erwin of the Alaska Supreme Court has observed:

> A no-plea-bargaining policy forces the police to investigate their cases more thoroughly. It forces prosecutors to screen their cases more rigorously and to prepare them more carefully. It forces the courts to face the problem of the lazy judge who comes to court late and leaves early, to search out a good presiding judge, and to adopt a sensible calendaring system. All of these things have in fact happened here.

Silberman Book Review, supra note 4, at 1029 n.81; see Plea Bargaining and Its History, supra note 4, at 34 (statement of Judge Arthur L. Alarcon: "Prosecutors say that bargaining is a way to reduce the backlog, but in reality it is simply a way to reduce the work").

329 See, for example, the pages of The Justice System Journal, which began publication in 1974 under the auspices of the Institute for Court Management.

330 Greenberg, How a Connecticut County Converted a Supermarket into a Courthouse, 64 JUDICATURE 290 (1981).

331 P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 105 (1976).

332 Id. at 104.

333 Id. at 103-18.

334 ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 58-60 (1981).

335 Moreover, I believe that the Supreme Court already has restricted the availability of federal habeas corpus relief unfortunately through its misconstruction of existing statutes. See, e.g., Stone v. Powell, 428 U.S. 465 (1976); Wainwright v. Sykes, 433 U.S. 72 (1977).

336 See pp. supra.

337 See The Supreme Court and the Guilty Plea, supra note 4, at 38-39; Halberstam, supra note 17, at 42.

338 399 U.S. 78 (1970).

339 E.g., M. SAKS, JURY VERDICTS (1977); Lempert, Uncovering "Nondiscernible Differences": Empirical Research and the Jury-Size Cases, 73 MICH. L. REV. 643 (1975).

340 See Lermack, No Right Number? Social Science and the Jury-Size Cases, 54 N.Y.U. L. REV. 951, 967-72 (1979); Comment, The Impact of Jury Size on the Court System, LOY. L.A. L. REV. 1103 (1979).

341 Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. CHI. L. REV. 710 (1971).

342 How many resources would be saved by a reduction in jury size is uncertain. Plainly a reduction from twelve jurors to six would save at least the time, salaries and expenses of six jurors per case. If the customary criticisms of six-person juries are sound, this reduction also ought to cut deliberation time significantly and reduce by about half the number of retrials necessitated by hung juries. Some jury-management problems (for example, those arising when a single juror engages in misconduct during a trial) also would become less frequent. Studies of civil proceedings, however, have indicated that a reduction in jury size might not limit notably the amount of time required for jury selection or for trial. See Beiser & Varrin, Six-Member Juries in the Federal Courts, 58 JUDICATURE 424 (1975); Pabst, What Do Six-Member Juries Really Save?, 57 JUDICATURE 6 (1973).

343 Absent the defendant's consent, only five states--Arizona, Connecticut, Florida, Massachusetts and Utah--authorize the use of juries of fewer than twelve to resolve criminal cases involving potential sanctions more severe than one year's imprisonment. See NATIONAL CENTER FOR STATE COURTS, FACETS OF THE JURY SYSTEM: A SURVEY 41-43, 61-111 (1976).

344 In Apodaca v. Oregon, 406 U.S. 404 (1972), the Supreme

Court held nonunanimous verdicts constitutionally permissible in state criminal proceedings. Like reductions in jury size, nonunanimous verdicts probably diminish both jury deliberation time and the number of retrials following hung juries. Nevertheless, nonunanimous verdicts raise much more severe doubts about the accuracy of criminal convictions than the use of six-person juries. Departure from the traditional requirement of unanimity is probably undesirable.

345 In addition to the material presented here, see the discussion of jury selection procedures at pp. supra.

346 See Seale Jury Seated After 4 Months of Questioning, New York Times, March 12, 1971, at 43. In a recent Illinois murder case, only four jurors had been seated three months after voir dire began. Mud Slinging Stalls Prison Murder Trial, The American Lawyer, Jan. 1981, at 16.

347 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE 47 (1931).

348 See The Jury System in the Federal Courts, 26 F.R.D. 409, 424 (1960) (recommendation of the judicial conference committee on the operation of the jury system that attorney-conducted voir dire be eliminated in federal courts).

349 See Draheim, Efficient Jury Utilization Techniques

. . . Or Proposition 12, 28 DRAKE L. REV. 21, 29-38 (1978-79).

350 See Note, Judge Conducted Voir Dire as a Time-Saving Trial Technique, 2 RUTGERS CAM. L.J. 161 (1970); Levit, Nelson, Ball & Chernick, Expediting Voir Dire: An Empirical Study, 44 S. CAL. L. REV. 916 (1971).

351 Professor Hans Zeisel once asked the Chief Justice of England, Lord Parker of Waddington, "What if one of the jurors were a cousin of the defendant?" The Chief Justice replied, "Wouldn't that be awkward?" Zeisel & Diamond, The Jury Selection in the Mitchell-Stans Conspiracy Trial, 1976 A.B.F.R.J. 151, 173 n.30.

352 The Supreme Court has said that a jury must be "a body truly representative of the community" and that "the fair cross section requirement" is "fundamental to the jury trial guaranteed by the Sixth Amendment." Taylor v. Louisiana, 419 U.S. 522, (1975). The author of the Taylor opinion, Justice White, also wrote for the Court in Swain v. Alabama, 380 U.S. 202 (1965), a case holding that a prosecutor may use his peremptory challenges to exclude all blacks from a jury without violating the constitution. Apart from the question whether the all-white jury in Swain was "a body truly representative of the community," one wonders whether the prosecutor's discrimination was justified by a "compelling governmental interest." The Court did not mention in Swain the heightened scrutiny to which racial classifications

ordinarily are subject, and a compelling reason for acting on the basis of the prosecutor's whim or hunch is difficult to conceive.

353 This simplification of the jury selection process, when coupled with a reduction in the size of criminal juries, might maintain about the same "balance of advantage" between the state and the accused as present procedures. A reduction in jury size would diminish the likelihood of deadlock and, perhaps, favor the state in other ways as well, see the materials cited in notes 339 and 341 supra, but a simplification of jury selection procedures might yield an offsetting increase in the diversity of jury panels to the apparent benefit of the accused. Moreover, a reduction in jury size would diminish the likelihood that a "wildcard juror" (one who exhibited no bias but somehow seemed untrustworthy) might appear on the panel, and the use of peremptory challenges might therefore seem less important. To some extent, a reduction in jury size and a simplification of jury selection procedures would exhibit countervailing tendencies, but in one respect these reforms would be alike. Both would conserve resources that could be used to make the right to trial not just a right that defendants have but one that they get.

Sensible though it is, this proposal for a greatly simplified voir dire procedure might encounter constitutional difficulty in exceptional situations. In Ham v. South Carolina, 409 U.S. 524 (1973), a trial judge had asked prospective jurors

about prejudice toward the defendant but had refused to ask specifically about racial prejudice. The Supreme Court held that the defendant, a black civil rights worker charged with marihuana possession, had been denied due process by the court's refusal to ask the prospective jurors about their possible racial biases. The Supreme Court's opinion was by Justice Rehnquist--who once again moved too far to the left.

If, as I believe, current jury selection procedures are scandalous, it is appropriate to ask with respect to every question propounded during voir dire whether the gains of asking it exceed the costs. The Supreme Court made clear in Ham that it had not discovered a due process right to an extended psychoanalytic probing of each prospective juror to ferret out subtle, hidden biases; instead, the defendant was entitled merely to have the court or counsel propound a single general question on racial prejudice to the panel. The single question required by the Court was, however, essentially useless. I know very few people who would avow their racial bigotry in response to this question. For example, I doubt that Lester Maddox, George Wallace, or Orville Faubus ever considered himself biased, and if any of them ever did, I am not sure that he would have conceded this fact in a public courtroom. If any prospective juror did admit his bias but pledged to judge the case fairly on the basis of the evidence presented in court, his extraordinary honesty on the first question might suggest his credibility on the second; and he might seem an exceptionally qualified juror. Moreover, if

a prospective juror recognized some bias within himself--perhaps a bias that he was trying to overcome--he probably should not have been required to avow this personal problem publically so long as he remained confident of his ability to judge the case fairly in accordance with the court's instructions. The due process clause apparently does not require United States Supreme Court Justices or even South Carolina trial judges to answer questions about their personal prejudices when they hear cases involving black civil rights workers.

Three years after Ham, in Ristaino v. Ross, 424 U.S. 589 (1976), the Supreme Court held that the constitution did not require voir dire inquiry concerning racial prejudice in a case in which black defendants were charged with robbing, assaulting and attempting to murder a white security guard. Ham thus became something of a sport, and the case probably would not pose a significant barrier to the proposal for simplified jury selection advanced in the text. See also Rosales-Lopez v. United States, 451 U.S. 182 (1981).

354 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 21 (London 1827).

355 Id. at 1.

356 Ohio v. Roberts, 448 U.S. 56, 62 (1980) (quoting Morgan & Maguire, Looking Backward and Forward at Evidence, 50 HARV. L. REV. 909, 921 (1937)).

357 Among other things, the court said that "reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Id. at 66.

358 3 J. BENTHAM, supra note 354, at 407-10; see Chadbourn, Bentham and the Hearsay Rule--A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 HARV. L. REV. 932, 937 (1962).

359 See James, The Role of Hearsay in a Rational Scheme of Evidence, 34 ILL. L. REV. 788 (1940); Chadbourn, supra note 358.

360 MODEL CODE OF EVIDENCE § 503(a) (1942).

361 See Westin, The Future of Confrontation, 77 MICH. L. REV. 1185, 1195 (1979) (arguing that the Supreme Court has excluded hearsay evidence under the confrontation clause only when declarants were available to testify in court or when the government itself was responsible for their unavailability).

362 See Westin, supra note 361; California v. Green, 399 U.S. 149, 172-89 (1970) (Harlan, J., concurring).

363 McCrystal & Young, Pre-Recorded Videotape Trials--An Ohio Innovation, 39 BROOKLYN L. REV. 560, 663-64 (1973). See also McCrystal, Videotaped Trials: Relief for Congested Courts?, 49 DENV. L.J. 463 (1973); McCrystal, Videotaped Trials: A Primer, 61 JUDICATURE 250 (1978); Shutkin, Videotape Trials: Legal and Practical Implications, 9 COLUM. J. OF L. & SOC. PROB. 363 (1972).

Although a twenty-one advantage salute might seem enough, Judge Marvin E. Frankel has noted two additional virtues of the prerecorded trial. First it would circumscribe attorney strategems like asking questions known to be dubious but intended for effect, and second, it would permit time for judicial thought between witnesses and even during the testimony of a single witness. Frankel, supra note 309, at 534.

364 See Note, The Role of Videotape in the Criminal Court, 10 SUFFOLK L. REV. 1107 (1976); Miller, Fontes & Dahnke, Using Videotape in the Courtroom: A Four Year Test Pattern, 55 U. DETROIT J. URB. L. 655 (1977); Miller, Televised Trials--How Do Juries React?, 58 JUDICATURE 242 (1974).

365 The sixth amendment confrontation clause has been read to guarantee a defendant the right to attend all phases of his trial, Lewis v. United States, 146 U.S. 370, 372 (1892); Illinois v. Allen, 397 U.S. 337 (1970), and the sixth amendment also guarantees the right to a public trial. Some uses of video pre-recording might raise close questions under these constitutional provisions, but any constitutional objection could be obviated by permitting both the defendant and the public to be present throughout the preparation, editing and exhibition of the videotape.

366 Specter, Book Review, 76 YALE L.J. 604, 605 (1967).

367 ADMINISTRATIVE OFFICE OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, 1966-67 ANNUAL REPORT 16 (1967) [hereinafter cited as 1966-67 ALLEGHENY COUNTY REPORT].

368 Unpublished statistic supplied by Carl Rolewick of the Administrative Office of the Illinois Courts.

369 Estimated on the basis of unpublished statistics supplied by John L. Lavelle, Court Administrator of the Court of Common Pleas of Cuyahoga County.

370 Unpublished statistic supplied by R. J. Roman of the Clerk's Office, Harris County District Courts.

371 ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, TWELFTH ANNUAL REPORT 419 (1967).

372 CALIFORNIA BUREAU OF CRIMINAL STATISTICS, CRIME AND DELINQUENCY IN CALIFORNIA 1966, p. 86 (1967).

373 Id.

374 See note 28 supra.

375 Commonwealth ex rel. Kerekes v. Maroney, 423 Pa. 337, A.2d n.5 (1966).

376 PHILADELPHIA BAR ASSOCIATION, REPORT OF THE CRIMES SURVEY COMMITTEE 404 (1926).

377 R. MOLEY, POLITICS AND CRIMINAL PROSECUTION 160 (1929).

378 THE PHILADELPHIA COURT OF COMMON PLEAS, 1979 ANNUAL REPORT 51 (1980). 1983 defendants pleaded guilty in Philadelphia in 1979, and 3015 were tried (2699 at jury waived trials and 316 before juries). Of the defendants who were tried, 1995 were convicted and 1020 acquitted. The acquittal rate was substantially higher at jury waived trials (35 per cent) than at jury trials (27 per cent). Id.

379 Unpublished statistics supplied by Grenville Hayes of the Administrative Office of the Court of Common Pleas of Allegheny County.

380 Unpublished statistics supplied by Dennis Starrett of the Allegheny Regional Advisory Committee of the Pennsylvania Council.

381 Levin, Delay in Five Criminal Courts, 4. J. LEGAL STUD. 83, 88 at Table 1 (1975).

382 According to unpublished material supplied by Edward Blake, Court Administrator of the Court of Common Pleas of Philadelphia, 2777 "court days" were devoted to criminal matters

in 1966. On the assumption that a judge devotes approximately 215 days per year to judicial business (250 days per year, exclusive of weekends and holidays, less 35 days for vacations, illnesses, workshops and the like), this figure suggests that the equivalent of about 13 full-time judges resolved the 12,308 cases that, according to the same unpublished materials, were completed during this year. (Two years later, at the time of my visit, there were indeed 13 judges sitting in the part of the Court of Common Pleas that heard criminal matters.) The average annual caseload per judge was therefore 947. Levin reported that the caseload per judge in Chicago was 450. Levin, supra note 381, at 88, Table 1. Nevertheless, one cannot be at all confident that these comparative caseload figures were computed on compatible bases; they are at best suggestive.

383 Unpublished statistics for 1966 supplied by Edward Blake, Court Administrator of the Court of Common Pleas of Philadelphia [hereinafter cited as 1966 Philadelphia Statistics].

384 1966-67 ALLEGHENY COUNTY REPORT, supra note 367, at 16.

385 Levin, supra note 381, at 88, Table 1.

386 See note 71 supra.

387 1966-67 ALLEGHENY COUNTY REPORT, supra note 367, at 16.

388 1966 Philadelphia statistics, supra note 383, at 16.

389 Although nonunanimous jury verdicts are constitutionally permissible, Apodaca v. Oregon, 406 U.S. 404 (1972), every state except Louisiana and Oregon requires unanimous verdicts in felony cases; and absent the defendant's consent, only three additional states permit nonunanimous verdicts in misdemeanor prosecutions. See NATIONAL CENTER FOR STATE COURTS, FACETS OF THE JURY SYSTEM: A SURVEY 41-43, 61-111 (1976).

390 Lawyers in both cities also suggested as a reason for waiving jury trials that judges were more predictable. "It's like having a standing jury," one commented.

391 Uhlman & Walker, "He Takes Some of My Time; I Take Some of His": An Analysis of Judicial Sentencing Patterns in Jury Cases, 14 LAW & SOC'Y REV. 323 (1980) [hereinafter cited as He Takes Some of My Time]; Uhlman & Walker, A Plea Is No Bargain: The Impact of Case Disposition on Sentencing, 60 SOC. SCI. Q. 218 (1979) [hereinafter cited as A Plea Is No Bargain].

392 Indeed, one who knew nothing of Philadelphia's judicial system easily might have recognized that city. There were not many Northeastern cities in 1979 that had populations of two million and conservative, Democratic "law and order" mayors. See T. UHLMAN, RACIAL JUSTICE: BLACK JUDGES AND DEFENDANTS IN AN

URBAN TRIAL COURT 27-32 (1979).

When researchers have obtained information by promising not to reveal the identity of the jurisdiction studied, a reader who is confident that he recognizes the city behind the pseudonym may confront an ethical issue in deciding whether to reveal it. In this instance and a few others, however, I have not hesitated to "blow the whistle." Obviously I was not a party to the authors' promises, and the gains of revealing this information seem to exceed the costs. Conceivably this action could diminish the willingness of potential sources to rely on similar promises and to share information in the future. Nevertheless, a source who does rely on this sort of promise seems likely to be misguided. When researchers supply sufficient clues that an academic reader can identify the jurisdiction in question, knowledgeable local readers are likely to have even less difficulty. Moreover, many local observers are likely to have had contact with the researchers, and whenever the researchers' findings are interesting enough to matter, the word does get around. A promise of jurisdictional anonymity therefore does not do much to prevent local embarrassment, the kind that is likely to concern local officials. At the same time, knowledge of the identity of the jurisdiction studied greatly increases the utility of the information presented. For example, "piercing the veil" of the Uhlman-Walker studies has enabled me to offer "hard" data in support of conclusions about Philadelphia's criminal justice system that otherwise would have rested entirely on my own

impressionistic observations and interview material. Moreover, my independently gathered knowledge of Philadelphia criminal justice has enabled me to offer some criticism of the conclusions that Uhlman and Walker advanced. This kind of interchange -- both the criticism and the reinforcement -- becomes impossible when one set of researchers can effectively keep secret the fact that they have studied the same jurisdiction as another.

Although sources sometimes may insist on promises of jurisdictional anonymity as a condition of revealing information, I suspect that some researchers make these promises too freely. Some, in fact, seem to believe that these promises should be made routinely, perhaps to preserve the researchers' lofty image as social scientists unconcerned with localism or the helter skelter of politics. See M. FEELEY, supra note 85, at XXI-XXII (discussing criticism that the author incurred by revealing the identity of the court that he examined while preserving the anonymity of individual sources). This view seems short-sighted and inconsistent with the openness that generally should characterize academic research. There may have been too many books and articles about Metro City, Metropolitan Court and Westville and not enough about places on the map.

393 He Takes Some of My Time, supra note 391, at 326; A Plea Is No Bargain, supra note 391, at 221.

394 K. BROSI, supra note 40.

395 He Takes Some of My Time, supra note 391, at 326; A Plea Is No Bargain, supra note 391, at 222.

396 1966-67 ALLEGHENY COUNTY REPORT, supra note 367, at 16.

397 He Takes Some of My Time, supra note 391, at 16.

398 See Levin, supra note 381, at 119.

399 See C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 279-80 (1978).

400 I did not, however, see any case in which this offer was accepted.

401 Interview with Albert A. Ciardi, Jr., in Philadelphia, Jan. 16, 1968.

402 In Pittsburgh, but not in Philadelphia, an additional reason for the relative lack of plea bargaining may have been what Professor James Eisenstein and Herbert Jacob would call the instability of courtroom work groups. See J. EISENSTEIN & H. JACOB, FELONY JUSTICE: AN ORGANIZATION PERSPECTIVE (1977). Lawyers in both Pittsburgh and Philadelphia, however, explained the principal organizational obstacle to plea bargaining simply in terms of case assignment practices. Because of these practices, defense attorneys usually did not know which

prosecutor would be responsible for a case until the day on which the case was set for trial. With the exception of homicide cases in Pittsburgh and cases designated "major cases" by the prosecutor's office in Philadelphia, the only opportunity for plea negotiation was usually a rushed conference in the courtroom or in chambers shortly before a case was to be tried and after the attorneys were as ready as they would ever be to try it.

403 See, e.g., Cook, Sentencing Behavior of Federal Judges: Draft Cases 1972, 42 U. CIN. L. REV. 597 (1973); Oster & Simon, Jury Trial a Sure Way to Increase the Rap, Chicago Sun Times, Sept. 17, 1973, at 4.

404 He Takes Some of My Time, supra note 391, at 328.

405 Id.; A Plea is No Bargain, supra note 391, at 225, Table 1.

406 A Plea Is No Bargain, supra note 391, at 224.

407 Id. at 227, Table 2. See He Takes Some of My Time, supra note 391, at 224.

408 A Plea Is No Bargain, supra note 391, at 228-30.

409 See pp. supra.

410 See pp. infra.

411 See The Prosecutor's Role, supra note 4, at 61-62.

412 See Zimring, Eigen & O'Malley, Punishing Homicide in Philadelphia: Perspective on the Death Penalty, 43 U. CHI. L. REV. 227 (1976).

413 See The Prosecutor's Role, supra note 4, at 62.

414 A Plea Is No Bargain, supra note 391, at 232.

415 Sic.--the date should be 1966.

416 C. SILBERMAN, supra note 399, at 279-80.

417 See Specter, supra note 366, at 605.

418 The chief public defender in Pittsburgh even recalled an instance when a trial judge had employed this description in court in the presence of a defendant--one whom the judge was about to try without a jury. Interview with George H. Ross, in Pittsburgh, Jan. 17, 1968.

419 The Defense Attorney's Role, supra note 4, at 1288.

420 A guilty plea ordinarily precludes a defendant from

challenging the denial of a pretrial motion on appeal or in post-conviction proceedings, see, e.g., McMann v. Richardson, 397 U.S. 759 (1970); a "slow plea," however, does not.

421 See The Changing Plea Bargaining Debate, supra note 4, at 66-67.

422 Cf. Levin, supra note 381, at 85 n.5 (most "brief informal trials" of the sort commonly used to resolve criminal prosecutions in Pittsburgh are completed in 10 to 30 minutes).

423 The district attorney's office determined whether to "list" a case in the "crash" program, and although a defendant could refuse to participate by demanding either a jury trial or an orthodox "waiver" trial, a defendant who accepted the prosecutor's listing was required to stipulate both to the truth and to the admissibility of the police offense report. When an assistant district attorney first described this program to me, I suggested that agreeing to the truth of a police offense report was probably an almost certain route to conviction. To the contrary, the assistant replied, a majority of the defendants tried in the "crash" program were acquitted. Interview with Joseph M. Smith, in Philadelphia, Jan. 16, 1968. Some acquittals in the relatively minor cases included in this program may have been the product of judicial sympathy rather than of bona fide doubt concerning the defendants' guilt, but lawyers insisted that an equal or greater number of acquittals were based on the

"evidence." Although a defendant could not "contradict" the police offense report, he could "explain" and "supplement" it, and both the defendants' explanations and the frequent defects of the reports themselves commonly made guilt seem doubtful. In addition, defense attorneys maintained that, on occasion, they could "wiggle around" their stipulations and challenge portions of the police offense report.

Prosecutors reported that only about ten percent of the criminal cases in the Court of Common Pleas were included in the "crash" program. The prosecutors added that they always examined the defendant's prior record before listing a case in the program, that gambling and liquor violations accounted for a very high proportion of cases in "crash" court, and that cases in which violence was alleged were ineligible for inclusion. Defense attorneys, however, maintained that assault cases were often tried in "crash" court; that, in an effort to avoid the presence of police witnesses who might criticize lenient dispositions, even cases of assault on police officers were listed in the program; and that defendants with extensive prior records often appeared in "crash" court as well.

Defense attorneys reported that defendants virtually never objected to "crash" court listings. The principal reason, they observed, was that the presiding judge deliberately assigned judges to the "crash" court who were even more lenient than those assigned to other "waiver" trials. When defendants were not

simply acquitted, most of them were satisfied with their sentences. Some attorneys also maintained the district attorney's office had entered a standing agreement that any defendant sentenced to incarceration following a "crash" court proceeding could obtain a new trial free of "crash" court restrictions. Moreover, they expressed their confidence that, apart from this agreement, the "crash" court procedures were constitutionally defective so that any "crash" court conviction could be upset on appeal. Other defense attorneys reported that although the district attorney's office once had adhered to the described agreement, it had rescinded this understanding. Prosecutors, however, maintained that the supposed agreement had never been entered and was always a figment of some defense attorneys' imaginations. They also insisted that there were no legal defects in "crash" court proceedings and that their office was ready to submit the issue to an appellate court whenever a defendant sought review. (The fact that no defendant apparently had appealed a "crash" court conviction, however, may suggest either that prosecutors did circumvent appeals by agreeing to new trials or, more probably, that the program's outcomes were fully as lenient as the defense attorneys suggested.)

Of course the "crash" court procedures may seem shocking, but as limited as a defendant's trial options were in "crash" court, these options were at least somewhat greater than those that the defendant would have enjoyed following a bargained plea of guilty. It is difficult to conceive of any legal principle

that would uphold bargained guilty pleas but condemn Philadelphia's somewhat more limited "crash" court waivers.

In practice, prosecutors did not defend "crash" court procedures on the ground that they were less restrictive of constitutional rights than plea bargaining. An assistant district attorney, who said that he could not begin to justify his office's "official position" that the results of "crash" court trials were comparable to those of more elaborate jury waived proceedings, also maintained that plea bargaining would not increase significantly if the "crash" court were abolished. Instead, he said, the overwhelming majority of cases that formerly would have been "listed" in this court simply would not be prosecuted. For that reason, he declined to characterize Philadelphia's "crash" court as a substitute for plea bargaining. Interview with Alan J. Davis, in Philadelphia, Jan. 16, 1968.

424 A little more than one week before my visit, the District Attorney's office in Pittsburgh had adopted a new case assignment system that would have permitted the advance preparation of cases of other than homicide cases, but no one had yet had any significant experience with this system.

425 For example, the harshest treatment of a complaining witness that I have observed occurred in a Pittsburgh courtroom. The case was one of attempted rape by a stranger, and

the victim's lack of consent did not seem a disputable issue. On cross-examination, however, the defense attorney asked whether the victim had ever engaged in sexual relations with her fiancee. Moreover, upon receiving her denial, the attorney mocked and taunted the witnesss in a series of crude and explicit questions. Neither the prosecutor nor the trial judge sought to prevent this abuse, and the defendant seemed thoroughly to enjoy both his lawyer's performance and the witness's discomfort.

426 See, e.g., Enker, Perspectives on Plea Bargaining, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 115 (1967); Note, Plea Bargaining and the Transformation of the Criminal Process, 90 HARV. L. REV. 564, 576-77 (1977).

428 The Prosecutor's Role, supra note 4, at 72.

429 See pp. supra.

430 Interview with Mr. Morris, in Philadelphia, Dec. 20, 1977. Philadelphia's current district attorney, Edward Rendell, is, like Spector and unlike Fitzpatrick, an opponent of plea negotiation.

431 At least they had disappeared from the Court of Common Pleas; I heard rumors that "crash court" procedures still could be found in the Municipal Court of Philadelphia.

433 See pp. supra.

434 See pp. supra.

435 See pp. supra.

435A Indeed, however limited a jurisdiction's resources, it could substitute adjudication for settlement in all cases if its adjudicative procedures were expedited enough. For example, if the sorry choice were presented, a jurisdiction could substitute five-minute trials for five-minute plea-acceptance procedures.

436 See pp. supra.

437 Legislatures are not the only potential sources of a plea bargaining prohibition. As I have indicated, the current failure of courts to hold this practice unconstitutional seems better explained by their fear of major change than by the strained doctrinal rationalizations for plea bargaining that they have offered. See pp. supra; The Supreme Court and the Guilty Plea, supra note 4, at 71. Nevertheless, legal and ethical constraints would make it more difficult for a court to substitute "waiver bargaining" for plea bargaining than for a legislature to do so. Although a legislature could prohibit plea bargaining without speaking to the question of "waiver bargaining" at all, any court that held plea bargaining unconstitutional could be required to pass upon the

constitutionality of "waiver bargaining" as well. It would be difficult for a court to uphold "waiver bargaining" and to forbid plea bargaining simply on the theory that one practice is "less unconstitutional" than the other.

Conceivably, however, an appellate court could adopt a Philadelphia-style solution by avoiding constitutional issues and relying on its supervisory power over the administration of justice in subordinate courts. Moreover, after holding that some entrenched unconstitutional practices need be eliminated only with "deliberate speed," a court might treat the immediate substitution of a "less constitutional alternative" as the first step toward a full implementation of constitutional rights. See People v. Byrd, 12 Mich. App. 186, 224-25, 162 N.W.2d 777, 797-98 (1968) (Levin, J., concurring) ("The problem is not unlike that of segregated schools in that it is too ingrained to be eliminated forthwith. I suggest that we proceed to its eventual elimination. . . .")

Of course, prior to the decision in Duncan v. Louisiana, 391 U.S. 45 (1968), there would have been a clear constitutional basis for distinguishing plea bargaining from waiver bargaining. Because the right to jury trial had not been "incorporated" in the fourteenth amendment's due process clause, state court "waiver bargaining" would not have burdened the exercise of a federal constitutional right. At the same time, the right to some kind of impartial trial always has been at the

core of due process concepts. A practice like plea bargaining whose very purpose was to prevent large numbers of defendants from obtaining trials of any kind would have raised substantial issues from the earliest days of fourteenth amendment adjudication. See, e.g., Hurtado v. California, 110 U.S. 516, 535 (1884) (indicating that to be consistent with the fourteenth amendment a state procedure must be one that "renders judgment only after trial"); Jordan v. Massachusetts, 225 U.S. 167 (1912) (the requirements of due process "are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend"); Palko v. Connecticut, 302 U.S. 319, 327 (1937) ("fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial"); Fay v. New York, 332 U.S. 261, 288 (1947) (it is "inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense").

438 E.g., CAL. PENAL CODE § 1170 (a) (1) (West 1981); ILL. REV. STAT. 1977 ch. 38, § 1001-1-2(c); COLO. REV. STAT. 1973 § 18-1-102.5 (Cum. Supp. 1981). See MINNESOTA SENTENCING GUIDELINES COMMISSION, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY (1980). Professor Michael Tonry reported in 1981 that more than twenty states had enacted "major sentencing reform laws" since 1976. Tonry, Real Offense Sentencing: The Model Sentencing and Correction Act, 72 J. CRIM. L. & CRIM. 1550, 1552 (1981).

438A See id. at 1554 ("Not one of the major new sentencing systems faces up to the squalid reality that most guilty pleas are induced by promises of leniency").

439 See Sentencing Reform and Prosecutorial Power, supra note 4, at 564.

440 Id. at 551. Although this article emphasized the likelihood that sentencing reform efforts would enhance the bargaining power of prosecutors, it also noted that most "real world" proposals were characterized by countervailing tendencies and that the prediction of results was perilous. It concluded, "Determinate sentencing statutes may not always make things worse, but unless they achieve a major restriction of prosecutorial power, the reformers will not accomplish the goal of more certain sentencing. . . ." Id. at 576.

441 E.g., Tonry, supra note 438; Schulhofer, Due Process of Sentencing, 128 U. PA. L. REV. 733, 757-72 (1980); L. Schwartz, Options in Constructing a Sentencing System: Sentencing Guidelines Under Legislative or Judicial Hegemony, 67 VA. L. REV. 637, 680-84 (1981); Alschuler, Sentencing Reform and Parole Release Guidelines, 51 U. COLO. L. REV. 237, 241-44 (1980).

442 E.g., Schulhofer, supra note 441, at 778-98; Perlman & Stebbins, Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act, 65 VA. L. REV. 1175, 1264-65 (1979); Coffee, "Twisting Slowly in the Wind": A Search for Constitutional Limits on Coercion of the Criminal Defendant, 1980 S. CT. REV. 211, 246; Tonry, supra note 438, at 1555 & n.20.

443 Sentencing Reform and Prosecutorial Power, supra note 4, at 575.

443A Accord Perlman & Stebbins, supra note 442, at 1264-65.

444 See The Trial Judge's Role, supra note 4, at 1127-28.

445 On the insolubility of the issue of real offense sentencing, see Alschuler, supra note 441, at 243. On whether a prohibition of prosecutorial bargaining could be enforced effectively, see pp. supra.

445A An appellate court's ability to determine whether an "unconscionable" tariff had been imposed following conviction by a jury (and whether any sentencing tariff had been imposed following conviction by a court) would depend upon its ability to distinguish the "trial tariff" from the "baseline." A scheme of sentencing guidelines probably would need to be reasonably precise to permit the appellate

court to make this critical judgment. Nevertheless, the court could permit departures from the guidelines so long as these departures were explained in terms that the court was persuaded did not mask impermissible tariffs. Of course, if both trial and appellate courts winked at improper differentials / and disingenuous explanations, the scheme would collapse; but so long as an effective match of caseload and resources was achieved, the principal impetus for this evasion would be lacking.

446 Compare UNIFORM COMMERCIAL CODE § 2-302.

447 From my perspective, proposing the Pittsburgh-Philadelphia alternative to plea bargaining has something in common with urging a person to refrain from robbery on the ground that as much money can be obtained by shoplifting. A person who offered this advice might well be punished as an accessory to whatever shoplifting was committed by a person who followed it. Nevertheless, some forms of theft are indeed less objectionable than others.

448 Compare Langbein & Weinreb, supra note 216, at 1569.

449 Professor Stephen J. Schulhofer once wrote that a paper like this one ought to consider not only the economic feasibility of prohibiting plea bargaining but the political feasibility of doing it as well. Schulhofer, supra note 441, at 779 n.184. I claim no powers of political punditry, but I once expressed some views on the issue in a conversation with a Congressional staff

member who had asked my opinion concerning the position that the Chairman of the Senate Judiciary Committee ought to take. When I suggested that the Senator ought to introduce legislation to prohibit plea bargaining, the staff member appeared somewhat stunned. "My goodness," he said, "we'd have the United States Attorneys against us, and the federal judges, and the defense attorneys too."

"Yes," I replied, "and who else?" The staff member's comment obviously had not accounted for as much as one percent of the voting population.

Plea bargaining is a "strange bedfellows" issue that can unite the president of the inmates' union with the local police chief in denouncing the hypocrisy of the criminal justice system. Although lawyers tend to approve of the practice, corrections officials, police officers, victims of crime, civil libertarians, hard-line conservatives, and most other members of the public tend not to. The only public opinion poll on the issue of which I am aware showed 70 percent opposed to the practice and 21 percent in favor. D. FOGEL, ". . . WE ARE THE LIVING PROOF . . .": THE JUSTICE MODEL FOR CORRECTIONS app. III, at 300 (1975). Two questions come to mind: who owns the criminal justice system, and who ought to own it?

450 5 D. WEBSTER, THE WORKS OF DANIEL WEBSTER 487-88 (1851) (argument on March 10, 1818 before the Supreme Court in Dartmouth

College v. Woodward, 17 U.S. (4 Wheat.) 629 (1819)).

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