American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure

Markus Dirk Dubber*

In this article, Professor Dubber critically assesses recent proposals to eradicate plea bargaining by importing the juryless and judge-dominated German criminal trial. According to Professor Dubber, the ubiquity of plea bargaining, despite a constitutional guarantee of trial by jury, is symptomatic of the crisis of the modern criminal process, which in theory imposes punishment in formal public trials but in practice relies primarily on informal and nonpublic arrangements. To address this legitimacy crisis, Professor Dubber argues, the study of criminal procedure must shed its status as the poor relative of constitutional law and recover its criminal core by examining which, if any, principles can account for, and perhaps justify, our system of punishment imposition.

In modern criminal law, promise and reality diverge considerably. Take, for example, the venerable promise of legality, “the first principle” of criminal law.1 Criminal punishment, whether it is justified on deterrence or on retributive grounds, presupposes the offender’s knowledge of the penal code. The legality principle thus prohibits the expansive interpretation of penal laws and, more generally, punishment for acts that had not been defined as criminal at the time of their commission. Yet every day, the criminal law is enforced against people who have never seen—let alone read—a penal code. In fact, no single

---

* Associate Professor of Law, State University of New York at Buffalo School of Law. It is my pleasure to thank all those who contributed to the completion of this project: the judges, prosecutors, and lay judges at the Amtsgericht and Landgericht Hannover and at the Amtsgericht Frankfurt, who made time for a visitor from the United States in the winter of 1993 and the summer of 1995 (especially Sylvia Hartmann, Michael Geiger, and Dorothea Wewell von Krüger); Kyra Dreher, Peter and Angelika Landau, Wolfgang Naucke, Cornelius Nestler, Ingo Richter, Ludwig Salgo, Bernd Schünemann, Edgar Wallach, and Thomas Weigend; the participants in the Buffalo Faculty Workshop; Wolfgang Mattui; and last, but not least, my parents for their support in word and deed during the hot summer of 1995 and always. My research in Germany was supported by a summer research grant from the State University of New York at Buffalo School of Law. Translations from the German sources are my own unless otherwise indicated.

person can claim to be familiar with any one of today's bloated penal codes in its entirety.2

The observer of criminal law therefore must be ever vigilant to match the books against the facts of law. Professor John Langbein has for some time distinguished himself as one of the most incorruptible witnesses of the discrepancy between promise and performance, between text and reality in the American criminal justice system.3 In particular, he has relentlessly exposed the hypocrisy of the Sixth Amendment right to a jury trial. Although the U.S. Constitution guarantees every criminal defendant the right to a jury trial, only a small minority of criminal cases ever make it before a jury. Instead, the vast majority of cases are disposed of by plea bargaining, or, in Langbein's apt phrase, by "condemnation without adjudication."4

If the study of domestic criminal law requires a keen eye for the difference between promise and reality, the study of comparative criminal law surely requires an even keener one.5 The outside observer may have a particularly difficult time getting a sense of systemic reality based on depictions of that system in foreign law texts if these depictions are reinforced by system participants. An American prosecutor, for example, who does not believe that the right to a jury trial retains much practical significance in American criminal procedure might nonetheless impress upon a foreign observer the crucial place this right occupies in the firmament of constitutional protections for criminal defendants. Participants in a given justice system can develop a considerable pride in the system to whose maintenance they have dedicated their professional lives and may cultivate a sort of double consciousness that permits them to keep in mind both the principled promise and the inconsistent reality.

In short, comparative legal research is always difficult, and the hypocrisy of modern criminal law makes comparative work on criminal law that much more treacherous. A comparativist's proposals for domestic criminal justice reform, therefore, should be scrutinized with particular care.


3. See John H. Langbein, On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial, 15 Harv. J.L. & Pub. Pol'y 119, 119-20 (1992) [hereinafter Langbein, Myth] ("Although the texts mandate jury trial for 'all' criminal cases, the reality is far different."); id. at 120 (noting an "astonishing discrepancy between what the constitutional texts promise and what the criminal justice system delivers").

4. John H. Langbein, Land Without Plea Bargaining: How the Germans Do It, 78 Mich. L. Rev. 204, 204 (1979) [hereinafter Langbein, Land Without Plea Bargaining]; see also Langbein, Myth, supra note 3, at 120 (stating that "[l]ike those magnificent guarantees of human rights that grace the pretended constitutions of totalitarian states, our guarantee of routine criminal jury trial is a fraud").

In a series of articles beginning in 1974, and continued most recently in a *Newsweek* article on the O.J. Simpson criminal case\(^6\) and a television appearance on CNN's *Crossfire*, Professor Langbein has presented his American audience with an image of the German criminal justice system that well illustrates the limited usefulness of comparative criminal law for institutional reform. According to Langbein's idealized account, the German criminal justice system foregoes plea bargaining,\(^5\) controls prosecutorial discretion,\(^9\) and retains meaningful lay participation.\(^10\) Based on this account, Langbein has suggested that the United States import the German practice of conducting criminal trials before a mixed panel of professional and lay judges, which would help eliminate plea bargaining.\(^11\)

Germany, however, is not a "land without plea bargaining."\(^12\) According to Professor Joachim Herrmann of the University of Augsburg, "[t]he origin of bargaining in the German criminal justice system can be traced back to the early 1970s."\(^13\) Initially limited in scope, German plea bargaining became

---


8. See Langbein, *Land Without Plea Bargaining*, supra note 4. The term “plea bargaining” is problematic in the German context. A plea bargain strictly speaking, i.e., a prosecutorial and/or judicial concession in exchange for a guilty plea, is impossible in Germany because there is no guilty plea in German law. See text accompanying notes 52-69 infra.


more prevalent in the mid-1970s following an increase in white collar and drug prosecutions and the introduction in 1974 of conditional dismissal under section 153a of the German Code of Criminal Procedure.14 Today, plea bargaining is “common practice”15 as an estimated 20-30 percent of all German criminal cases are disposed of by some form of bargain.16

Langbein’s reform proposal provides a particularly fruitful illustration of the difficulties of comparative criminal law reform because Langbein’s hesitancy to probe the pretensions of the foreign system he describes and lauds so starkly contrasts with his incorruptibility as a critic of the U.S. criminal justice system. Whereas Langbein mercilessly exposes the “fraud”17 of the American constitutional guarantee of trial by jury, he can find no flaw in the “smooth-functioning,” “effective, fair and trouble-free”18 German criminal process.19

supra, at 755 n.2 (“Since bargaining was practiced in secret, Langbein cannot be blamed for having published an article on the absence of bargaining in Germany.”) (citing Langbein, Land Without Plea Bargaining, supra note 4). Even today, several German commentators recommend that bargaining be conducted in secrecy, and an aroma of impropriety continues to cling to the discussion and practice, in part because the legality of certain forms of plea bargaining remains in doubt. See SCHÖNEMANN, ABSPRACHEN, supra note 12, at B12 & n.3; Thomas Swenson, The German “Plea Bargaining” Debate, 7 PACE INT’L L. REV. 373, 400-04 (1995). Note also that German commentators and practitioners specifically distinguished their principled criminal justice system from what they considered to be the American practice of distributing criminal justice through horse trades. It is no accident that Germans often use the English term “deal” to refer to a plea bargain, nor that the author of the 1982 article exposing German plea bargaining chose the pseudonym “Deal.” See Deal, supra.


16. These bargaining rates and their consequences in exchange for a higher rate of convictions or agreements to a guilty plea would not only render the system more fair and efficient, it would also lead to a higher rate of convictions or agreements to a guilty plea. See also text accompanying notes 52-69 infra.

17. Langbein, Myth, supra note 3, at 120.

18. Langbein, Money Talks, supra note 6, at 32. Most recently Langbein has turned his attention to the criminal justice systems of Western Europe instead of the German system specifically. See, e.g., id.; Crossfire, supra note 7.

19. Langbein does identify one glitch in the German system: the selection of lay judges. See Langbein, Mixed Court, supra note 10, at 206-08, Langbein, Land Without Plea Bargaining, supra note 4, at 223. Otherwise, he has “made no secret of [his] admiration for the brilliant balance” the German system “strikes between safeguard and procedural effectiveness.” John H. Langbein, Torture and Plea Bargaining, 46 U. CHI. L. REV. 3, 21 (1978) [hereinafter Langbein, Torture]. The Germans provide for a “thorough, open, and impartial pretrial preparation” by the prosecutor, Langbein, Mixed Court, supra note 10, at 208, who, endowed by law with “judge-like impartiality” is the “watchman of the law,” as evenhanded an officer of enforcement as could be devised.” Langbein, Discretion, supra note 9, at 449 (footnote omitted) (quoting EBERHARD SCHMIDT, EINFÜHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STRAFRECHTSPLEGE 331 (3d ed. 1965)). In sum, the Germans are “blessed with an expeditious nonadversarial trial procedure.” Langbein, Land Without Plea Bargaining, supra note 4, at 223.
Langbein’s work, however, deserves careful consideration not only because it illustrates the difficulties of comparative criminal law reform, but also because it captures the crisis of modern criminal procedure. Langbein’s trenchant analysis extends beyond the American criminal justice system and the problem of plea bargaining. The unrealized ideal of the Sixth Amendment right to a jury trial is but one symptom of a more serious malaise that has plagued the modern system of state punishment since its inception at the turn of the nineteenth century. The Enlightenment both challenged the state’s punishment power and legitimized it by developing an account of punishment that made room for the autonomy of rational persons. According to the Enlightenment foundation of our modern criminal law, state punishment can only be justified insofar as its object will also become its subject, that is, insofar as the autonomous defendant can be said to participate in the application of the criminal norms governing her community to herself.20

The modern system of punishment, however, has failed to live up to its legitimizing promise. The laudable attempt to justify the threat, imposition, and infliction of punitive pain by the state on its purportedly autonomous constituents has given way to a hypocrisy that pervades the entire system of state punishment.21 At the core of this hypocrisy lies the attempt to deny not merely the painful nature of punishment (and therefore the need for its justification), but also the rift between legitimizing promise and systemic reality. The time has come to remind ourselves of the coercive and violent nature of state punishment and to address the justificatory challenge posed by the fact of this ubiquitous state practice.22

Langbein’s vociferous attack on plea bargaining highlights the crucial need to rethink the system of punishment imposition in the United States. The system’s traditional focus on the trial as the paradigmatic proceeding does not reflect the reality in our institutions of punishment imposition, the courts. Policies designed to restructure or reform the criminal justice system by restructuring or reforming the criminal trial, therefore, are doomed to failure. Plea bargaining has long ago replaced the trial as the main process by which the

20 See text accompanying notes 252-255 infra.

21 On the distinction between the three aspects of state punishment, threat (definition), imposition, and infliction, see Markus Dirk Dubber, The Pain of Punishment, 44 BUFF. L. REV. 545, 548-61 (1996); see also HANS-HEINRICH JESCHEK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 14 (4th ed. 1988); CLAUS ROXIN, SINF UND GRENZEN STAATLICHER STRAFE, IN STRAFRECHTLICHE GRUNDLAGEN-PROBLEME 1 (1973).

state imposes punishment. More recently, sentencing hearings have begun to
divid off the significance of trial determinations even in those few cases that still go
before a jury. The federal sentencing guidelines, in particular, have equipped
the sentencing judge with broad authority to disregard jury findings by revisiting
factual issues already resolved at trial.

Once the central importance of plea bargaining and sentencing in the ad-
ministration of criminal justice has been acknowledged, every effort must be
made to reform the criminal process in light of this fact. First, plea bargaining
should be limited. Thanks to the tireless efforts of Langbein and other critics of
plea bargaining, little doubt remains today that secret, unregulated, and coer-
cise plea bargaining is illegitimate. Any effort to eradicate plea bargaining,
however, is unlikely to succeed as informal bargaining has proved remarkably
resilient in the face of formal prohibition, both in the United States and else-
where. Moreover, plea bargaining has become widely accepted as a crucial
component of modern criminal justice systems.

Even if a partially successful legislative prohibition of plea bargaining
would result in fewer pleas, it would do nothing to improve the status of those
pleas that would be struck in spite of the prohibition. Therefore, second, plea
bargaining and sentencing should be improved. The procedural protections of
the trial must be fully extended to these procedures.

More generally, any attempt to improve plea bargaining must close the le-
gitimacy gap between jury verdicts and bargained pleas by moving plea bar-
gaining practices closer to the ideal of an autonomous process in which the
defendant participates in applying her own criminal norms to herself. Efforts to
improve plea bargaining should focus on its most disturbing defects: the hy-
pocrisy that reduces the public plea colloquy before the judge to a carefully
rehearsed charade during which the participants merely enact a script that was
carefully crafted in the backroom of the prosecutor’s office, and, most impor-
tant, the coerciveness that results from unregulated prosecutorial discretion and

23. See Milton Heumann, Plea Bargaining: The Experiences of Prosecutors, Judges, and
Defense Attorneys 1 (1978) ("notwithstanding the nomenclature, the 'trial court' is really a 'plea
bargaining court'").

24. See text accompanying notes 257-265 infra.

25. For a convenient summary of objections to plea bargaining, see Alschuler, supra note 11, at
932-34.

26. See note 273 infra (citing recent attempts to prohibit plea bargaining in California and
Alaska); see also Thomas Weigend, Absprachen in ausländischen Strafverfahren: Eine
rechtsvergleichende Untersuchung zu konsensuellen Elementen im Strafprozeß 81, 85, 92
(1990) [hereinafter Weigend, Absprachen] (discussing the discrepancy between the practice of plea
bargaining and its public denial in Canada, England, and Australia).

27. The "inducement of pleas," for example, is now considered a respectable goal of federal crimi-
nal justice policy. See United States Sentencing Commission, Special Report to the Congress:
Mandatory Minimum Penalties in the Federal Criminal Justice System 15, 34 (1991); see also
United States v. Harris, 70 F.3d 1001, 1003 (8th Cir. 1995) (reversing departure from sentencing guide-
lines based on counts dismissed pursuant to plea agreement because a "contrary rule would allow the
sentencing court to eviscerate the plea bargaining process that is vital to the courts' administration").

28. The colloquy, of course, is already a meager substitute for the ceremonial jury verdict—the
symbolic and indirect self-application of the criminal norms governing the defendant’s community by
her fellow community members. See text accompanying notes 252-255 infra.
the often considerable discrepancy between the offered plea sentence and the potential sentence after trial.

Plea bargaining can be limited and improved by lowering criminal penalties across the board and by providing for meaningful judicial supervision of the bargaining process. To fully address the problem of plea bargaining and the more basic hypocrisy of modern criminal procedure it exemplifies, however, we need to do more than extend procedural protections to plea bargaining and sentencing. Instead, we must take a fresh look at all aspects of our practice of state punishment, from the threat of punishment in our cluttered penal codes (the subject of "criminal law"), to its imposition in our courthouse corridors (the subject of "criminal procedure"), to its infliction in our "penitentiaries" (the subject of "penology"). There is no principled reason why so-called substantive criminal law should associate itself with moral philosophy as best it can, why criminal procedure should struggle to dress itself up as constitutional law, and why penology should be confined to a dark, dank corner in the social sciences. Criminal law, criminal procedure, and penology must be freed of their isolating idiosyncracies and reconceived as closely related subjects that focus on three aspects of a single practice, criminal punishment. Most relevant for present purposes, so-called constitutional criminal procedure must be stripped of its constitutional limitations and pretensions and reduced to its criminal core: the study of the principles and practices of the imposition of criminal punishment.

The crisis of criminal procedure is therefore a crisis not only of the criminal process but also of the academic discipline that studies it. Plea bargaining powerfully illustrates the limitations of viewing the criminal process through a constitutional lens. At bottom, the problem with plea bargaining is not that most criminal defendants do not exercise their constitutionally guaranteed right to a jury trial. Rather, the hypocrisy of the Sixth Amendment lies in the gap between the criminal process' justificatory ideal and its institutional reality. The rarity of jury trials is problematic because the imposition of punishment is justified, in part, by the participation of the defendant's fellow community members.

The lay verdict played a crucial role in the Enlightenment foundation of our system of punishment imposition because it respected the accused's autonomy by representing the indirect self-application of her community's criminal norms through representatives of that community. The central problem with plea bargaining is that it often constitutes an illegitimately heteronomous application of penal norms to the defendant. Thus, if plea bargaining could be reformed so that its heteronomous elements were minimized, it would no longer be illegitimate, notwithstanding the right to jury trial in the Sixth Amendment.

This article has three parts. Part I critiques Langbein's proposal to eliminate plea bargaining by importing the German collaborative court. Part II proposes a reform of American plea bargaining and sentencing in light of German and Italian practices. Part III extends the discussion from the particular prob-

---

29. See text accompanying note 255 infra.
lem of plea bargaining to the urgent need for a comprehensive account of the fundamental principles of state punishment that acknowledges and combats the hypocrisy of modern criminal law.

I. ELIMINATING PLEA BARGAINING

Professor Langbein has argued that the German collaborative court, in which two lay judges sit on a panel with from one to three professional judges, including the presiding judge, can help us eliminate plea bargaining. In particular, Langbein contends that German collaborative court trials are far more efficient than American jury trials. According to Langbein, the German criminal process moves with greater dispatch because, by employing a collaborative court of professional and lay judges, it can do without adversarial procedures, rules of evidence, and the sort of wasteful and irrelevant courtroom antics that retard our criminal trials. This efficiency advantage, the argument continues, permits the Germans to try before the collaborative court all the cases they want, i.e., all cases of serious crime, thus obviating the need for plea bargaining. In short, we can eliminate plea bargaining by accelerating our trials, and the Germans, who dispose of their criminal cases “vastly more rapidly,” can teach us how.

Langbein’s proposal to import the German collaborative court rests on three empirical claims about the German criminal justice system: 1) trials are far more efficient than in the United States; 2) all serious cases go to trial; and 3) plea bargaining is nonexistent. We have already noted that the third, and most significant, claim no longer holds. As we shall see, the German criminal process also is not as efficient as Langbein suggests, partly because, contrary to Langbein, it was not designed to be efficient. Finally, we shall see that it is also misleading to suggest that the Germans try all their cases of serious crime before a collaborative court.

Even if one concluded, however, that the German criminal process is, in general, more efficient than the American jury trial and that the Germans try more of their important cases, we should think twice before importing the col-

30. Langbein relies heavily on the concept of efficiency. See, e.g., Langbein, Mixed Court, supra note 10, at 215. Although he occasionally uses the concept in a strong normative sense and gives the impression that he considers efficiency improvements to be desirable for their own sake, see, e.g., id., I will assume that he considers efficiency a means to an end, such as the implementation of the “reasons of principle that would (and in former times did) incline us to try our cases of serious crime.” Langbein, Land Without Plea Bargaining, supra note 4, at 206. Moreover, the context of Langbein’s invocations of efficiency suggests that he says “more efficient” when he simply means “faster” (and perhaps occasionally also “cheaper”). In discussing Langbein’s proposals, I will use “efficiency” in this sense. At this point, I merely register my concern about the careless use of the efficiency concept by Langbein and others. Given the considerable malleability of that concept in legal scholarship today, it is difficult to evaluate a reform proposal that calls for greater efficiency. See Klaus Lüderssen, Law and Economics in der Kriminalpolitik, in AUSBACHEN DES STRAFENS? 391, 391-409 (1995).

31. See Langbein, Mixed Court, supra note 10, at 201.

32. Langbein, Money Talks, supra note 6, at 34; see also Langbein, Land Without Plea Bargaining, supra note 4, at 209.

33. See notes 12-16 supra and accompanying text. German plea bargaining practices will be discussed in detail below.
laborative court. German commentators have long bemoaned the inefficiency of trials before the collaborative court, some of which have been known to last for several years.\(^{34}\) Whatever efficiency the German process possesses derives from other procedural characteristics, such as the summary penal order,\(^{35}\) the recently revitalized accelerated trial,\(^{36}\) the prosecution’s extensive preliminary investigation, which results in the all-controlling case file,\(^{37}\) and, of course, plea bargaining. If efficiency is what we are after, it is these features of the German criminal process that we should emulate, not the trial before collaborative courts.

Let us assume, however, that the collaborative court turns out to be more efficient on average than the American jury court. In that case, the collaborative court’s efficiency edge may well derive from the presiding professional judge’s tendency to prejudge the case before trial based on the prosecution’s case file or from the presiding judge’s domination of the proceedings at the expense of the other process participants, including her lay colleagues.\(^{38}\)

Moreover, merely increasing the number of trials does not a better criminal justice system make. Much depends on the nature of the trials. On its face, the German trial differs so dramatically from the American jury trial that substituting the former for the latter would seem to require a constitutional amendment. While this fact by itself may make the introduction of the German collaborative court impracticable, it should not settle the fate of Langbein’s reform proposal.\(^{39}\) It does, however, highlight the need to investigate with some care the nature of the German criminal trial in order to assess Langbein’s proposal to

\(^{34}\) See text accompanying notes 114-124 infra. Note, however, that German trial dates may be separated by as many as ten days. See note 119 infra.

\(^{35}\) Langbein reports that one judge spent an average of 13 seconds on a routine penal order matter. See Langbein, Land Without Plea Bargaining, supra note 4, at 213 n.37. On the penal order procedure, see text accompanying notes 57-66 infra.

\(^{36}\) §§ 417-420 StPO [Code of Criminal Procedure] (added by Gesetz zur Änderung des Strafgesetzbuches, der Strafprozeßordnung und anderer Gesetze [Law Amending the Penal Code, the Code of Criminal Procedure, and other Laws] of Oct. 28, 1994, BGBl. I 3186). This previously little used, but recently revamped, procedure now applies in all trials following a defendant’s objections to a penal order and, on the prosecution’s motion, in simple open-and-shut cases before the single judge court or the 1-2 collaborative court. A 1-2 court is composed of one professional and two lay judges. See text accompanying note 48 infra. Under this accelerated procedure, the court may impose a sentence of up to, and including, one year’s imprisonment. The defendant receives a 24-hour notice of the trial date and possibly will learn of the charges against her only at this time since the prosecution need not file a written indictment and may read the charges at the beginning of the trial. The most significant procedural feature of the accelerated procedure is the curtailment of the important right to file evidentiary motions. See Hans Dahs, Das Verbrechensbekämpfungsgesetz vom 28.10.1994—ein Produkt des Superswahljahres, 1995 Neue Juristische Wochenschrift 553, 556-57; Fritz Loos & Henning Radtke, Das beschleunigte Verfahren (§§ 417-420 StPO) nach dem Verbrechensbekämpfungsgesetz, 1995 Neue Zeitschrift für Strafrecht 569 (part 1), 1996 Neue Zeitschrift für Strafrecht 7 (part 2); Uwe Scheffler, Kurzer Prozeß mit rechtsstaatlichen Grundsätzen?, 1994 Neue Juristische Wochenschrift 2191. The vast majority of accelerated trials will be held in the single judge court. See Loos & Radtke, supra, at 8.

\(^{37}\) §§ 160-170 StPO. For more on the dossier, see text accompanying note 186 infra.

\(^{38}\) See text accompanying notes 186-247 infra.

\(^{39}\) But cf. Frase, supra note 5, at 675-77 ("seriously question[ing] whether American legislators, judges, and trial lawyers would be willing to redefine fundamentally the meaning of 'trial by jury'").
make good on the constitutional promise of a jury trial by replacing the jury trial with a markedly different process. 40

Finally, Langbein's prescription for the elimination of plea bargaining rests on a questionable assumption regarding the motivation for plea bargaining. As has often been pointed out, the popular claim that plea bargaining exists because our criminal justice system otherwise would collapse under the weight of lengthy trials is a myth, or at least a gross exaggeration. 41 Nonetheless, plea bargaining apologists and Langbein alike appear to subscribe to this view, 42 although it leads them to radically different conclusions. The apologists celebrate the virtues of jury trial while relying on juryless plea bargaining to keep the criminal justice system afloat. Langbein instead tries to shorten the trial to render plea bargaining unnecessary. If plea bargaining occurs independently of the availability of the trial alternative, however, shortening trials and thereby increasing the number of trials the system can bear will do little to eradicate plea bargaining.

Therefore, even if Langbein's characterization of the German criminal justice system proved correct in every respect, and the importation of the German collaborative court would dramatically accelerate trials and increase the trial supply, the demand for plea bargains might well remain unaffected. Reforms designed to limit plea bargaining, therefore, must use other methods to reduce the incentives to plea bargain. 43

A. The German Criminal Court System

To assess Langbein's account of the German criminal process and the proposals for plea bargaining reform to which it gives rise, a brief overview of the German criminal court system and German plea bargaining practices is necessary (see Figure 1). 44 German criminal law distinguishes between two types of crime. A Vergehen is a crime whose minimum statutory penalty is either a fine or less than one year in prison. Crimes with higher minimum statutory penalties are called Verbrechen. The majority of criminal cases are processed without trial, either through a summary written procedure before a single professional judge (Strafrichter) called the penal order or through such procedures as

40. Langbein, after all, apparently prefers a literal reading of at least some parts of the Sixth Amendment. See Langbein, Myth, supra note 3, at 119 (remarking that the Sixth Amendment “mandate[s] jury trial for ‘all’ criminal cases”).


42. See Langbein, Land Without Plea Bargaining, supra note 4, at 205-06 (noting that even the Supreme Court has recognized “plea bargaining as ‘an essential component of the administration of justice’”) (quoting Santobello v. New York, 404 U.S. 257, 260 (1971)).

43. Some of these will be discussed in Part II. Langbein himself identifies one of these methods: the regulation of prosecutorial discretion. See Langbein, Land Without Plea Bargaining, supra note 4, at 210-12; text accompanying notes 273-304 infra.

prosecutorial diversion\textsuperscript{45} with a requirement of "contributions" to the state or a charitable organization under sections 153a of the German Code of Criminal Procedure.\textsuperscript{46} Penal orders and diversions are available only in \textit{Vergehen} cases.

There are three types of trial courts.\textsuperscript{47} A single professional judge \textit{(Strafrichter)} at the county court (\textit{Amtsgericht}) has trial jurisdiction over all \textit{Vergehen} cases not disposed of by penal order or otherwise, in which the defendant faces a fine, regardless of the amount, or at most two years’ imprisonment. Should the need arise during trial, however, the single judge may impose up to four years’ imprisonment. The second type of trial court, the collaborative court at the \textit{Amtsgericht}, consists of one professional presiding judge and two lay judges (\textit{Schöffengericht}, a 1-2 court). It has jurisdiction over cases in which a sentence of at most four years’ imprisonment is expected.\textsuperscript{48} The third type of trial court is the collaborative court at the district court (\textit{Landgericht}). It consists of either two professional and two lay judges (\textit{große Strafkammer}, a 2-2 court) or three professional and two lay judges (\textit{Schwurgericht}, a 3-2 court).\textsuperscript{49} The collaborative court at the \textit{Landgericht} decides cases that are too serious to fall within the jurisdiction of the 1-2 collaborative court at the \textit{Amtsgericht}.\textsuperscript{50}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{45} See Thomas Weigend, \textit{Sentencing in West Germany}, 42 Md. L. Rev. 37, 56 (1983) [hereinafter Weigend, \textit{Sentencing}].
\item \textsuperscript{46} \textit{STATISTISCHES JAHRBUCH 1994 FÜR DIE BUNDESREPUBLIK DEUTSCHLAND} [Statistical Yearbook 1994 for the Federal Republic of Germany] 384 (Statistisches Bundesamt ed., 1994) [hereinafter \textit{STATISTISCHES JAHRBUCH 1994}]. Some might, more honestly, refer to the "contributions" as fines. For more details on these procedures, see text accompanying notes 53-54 infra.
\item \textsuperscript{47} A fourth type of trial court has jurisdiction over rare crimes against the state like treason and terrorism. It is composed of five professional judges and has its seat in the 25 courts of appeals (\textit{Oberlandesgerichte}) throughout Germany. Because of its limited jurisdiction, this trial court is largely irrelevant for practical purposes. See \textit{STATISTISCHES JAHRBUCH 1994}, supra note 46, at 382 (indicating that in 1989, 1990, and 1991, 51, 37, and 76 proceedings, respectively, were initiated before this trial court).
\item \textsuperscript{48} In complex cases, this court may sit as a 2-2 court. See § 29 Nr. 1 GVG [Judicial Organization Code].
\item \textsuperscript{49} See § 76 Nr. 2 GVG. The 3-2 court deals with complex cases and cases involving one of about two dozen serious felonies. See § 74 Nr. 2 GVG. The 2-2 court was introduced for five years in 1993 to adjudicate the remaining cases within the jurisdiction of the Landgericht. On March 1, 1998, the 2-2 court is supposed to once again become a 3-2 court. See Gesetz zur Entlastung der Rechtspflege [Law for the Relief of the Administration of Justice] of Jan. 11, 1993, art. 15(2), BGBl. I 50, 57.
\item \textsuperscript{50} A collaborative appellate court of one professional and two lay judges at the district court (\textit{kleine Strafkammer}) decides appeals of facts and law from judgments of the single judge or the 1-2 collaborative court at the county court. See § 76 Nr. 1 GVG. In appeals of facts and law from judgments of the 2-2 collaborative court at the county court, this court sits as a 2-2 court. § 76 Nr. 3 GVG; see note 49 supra. In the following, I will not distinguish between the 1-2 courts at the county court and at the district court levels.
\end{enumerate}
\end{footnotesize}
**Figure 1: The German Criminal Court System**

- **Crimes**
  - *Vergehen:* crimes with a minimum statutory penalty of a fine or less than one year in prison
  - *Verbrechen:* crimes with a higher minimum statutory penalty than Vergehen

- **Courts**

<table>
<thead>
<tr>
<th>Seat</th>
<th>Process</th>
<th>Judge(s)</th>
<th>Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Amtsgericht</td>
<td>(a) penal order</td>
<td>1 professional (^{51}) (Strafrichter)</td>
<td>Vergehen with actual penalty of fine or ≤ 1 year probation</td>
</tr>
<tr>
<td>(county court)</td>
<td>(b) trial</td>
<td>(i) 1 professional (Strafrichter)</td>
<td>Vergehen with expected penalty of ≤ 2 years; may impose up to 4 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(ii) 1 prof., 2 lay (Schöffengericht)</td>
<td>Vergehen and Verbrechen with expected penalty of between 2 and 4 years; may impose up to 4 years</td>
</tr>
<tr>
<td>2. Landgericht</td>
<td>trial</td>
<td>(a) 2 prof., 2 lay (große Strafkammer)</td>
<td>Vergehen and Verbrechen with expected penalty of &gt; 4 years</td>
</tr>
<tr>
<td>(district court)</td>
<td></td>
<td>(b) 3 prof., 2 lay (Schwurgericht)</td>
<td>23 serious Verbrechen (mostly homicides and other acts resulting in death)</td>
</tr>
<tr>
<td>3. Oberlandesgericht</td>
<td>trial</td>
<td>5 professional</td>
<td>serious crimes against the state and international crimes, such as treason, terrorism, and genocide</td>
</tr>
</tbody>
</table>

B. **German Plea Bargaining**

One must exercise caution when applying the term “plea bargaining” to German bargaining practices because there is no such thing as a plea in German criminal procedure. The German defendant who seeks to obtain a lighter sentence may not enter a plea of guilty; instead, she must confess to the crime. Although a confession in German criminal court, like a guilty plea in the United States, may be withdrawn, the court may include the withdrawn confession in its consideration of the case in its entirety.\(^{52}\)

---

\(^{51}\) At least since the Relief Law of 1993, all penal orders are disposed of by the single professional judge sitting as Strafrichter. See Peter Rieß, *Die Zuständigkeit des Strafrichters und die mindere Bedeutung der Sache*, 1995 *Neue Zeitschrift für Strafrecht* 376 [hereinafter Rieß, *Die Zuständigkeit*]. Even before then, the single professional judge in effect disposed of all penal orders, though she might be sitting either as Strafrichter or, in the rare case, as the presiding judge in a 1-2 court. In the latter case, she would dispose of the penal order application without having to consult her lay colleagues. See *Karlsruher Kommentar zur Strafprozeßordnung und zum Gerichtsverfassungsgesetzauf Einführungsgesetzauf 1641* (§ 408s StPO Rn. 14) (1993) [hereinafter *Karlsruher Kommentar*]. Given that the professional judge disposes of penal orders in either case, the debate about the question whether the Relief Law retains the prosecutorial option of filing penal order applications in the 1-2 court is irrelevant for our purposes. On this debate, see Ekkehard Pulise, *Ist das Schöffengericht durch § 25 Nr. 2 GVG gehindert, Strafbefehle zu erlassen . . . ?*, 1995 *Neue Zeitschrift für Strafrecht* 165; see also Andreas Hochendorf, *Die neue Strafrichterzuständigkeit des § 25 Nr. 2 GVG, 1995 Neue Juristische Wochenchrift* 1454; Rieß, *Die Zuständigkeit*, supra.

\(^{52}\) See Schönemann, *Absprachen*, supra note 12, at B41. Unlike the U.S., where the defendant has the option of trying her luck with a jury instead of placing her fate in the hands of the very judge who had taken her guilty plea, the German defendant who withdraws her confession will be judged by the same judges who listened to her earlier confession.
Bargaining in German criminal cases can take many different forms. Section 153a of the German Code of Criminal Procedure has given rise to what might be called "diversion bargains." Section 153a permits the prosecution to divert (i.e., conditionally suspend) proceedings in exchange for paying a sum of money to a charitable organization or the state or performing charitable work.\(^{53}\) Prosecutors make particularly frequent use of section 153a in cases of serious white collar crime.\(^{54}\)

The limitation of section 153a to Vergehen should not lead an American reader to underestimate its scope.\(^{55}\) German Vergehen include several quite serious crimes that are considered felonies in the United States. These include lesser crimes against the person (such as battery), most drug offenses, environmental crimes, and property crimes (such as larceny and virtually all business crimes, regardless of the financial harm caused).\(^{56}\)

Plea bargaining in Germany also occurs by means of the penal order (Strafbefehl).\(^{57}\) Issued without a hearing, the penal order informs the defendant that she will receive a specified sentence for a specified crime unless she objects within two weeks, in which case the matter will proceed to trial before the appropriate court, generally the single professional judge.\(^{58}\) The prosecutor may submit an application for a penal order at any time, even after the beginning of trial.\(^{59}\) The judge must issue the penal order as requested "if no concerns suggest otherwise."\(^{60}\) This means judges grant virtually all applications for a penal order as a matter of course.\(^{61}\) Until recently, the prosecutor could seek only fines by penal order. Now, she can request a suspended prison sentence of up to one year, provided the defendant has legal representation.\(^{62}\)

---

53. The requirement that the court consent to section 153a diversions is of negligible practical significance since consent is almost never withheld. See id. at B34. A restriction of section 153a dismissals to defendants with "minor guilt" was abandoned in 1993. See KARLSRUHER KOMMENTAR, supra note 51, at 739 (§ 153a StPO Rn. 11).

54. See SCHÖNEMANN, AbspRECHEN, supra note 12, at B18 (estimating that plea bargaining may dispose of "up to 80\%" of cases before some courts specializing in white-collar cases); Herrmann, Bargaining, supra note 13, at 758 (noting that prosecutors have bargained in white collar cases involving up to 100,000 German Marks).

55. A Vergehen is any crime with a minimum statutory penalty of a fine or less than one year in prison. See text accompanying notes 44-46 supra.

56. See Herrmann, Bargaining, supra note 13, at 761.


58. See §§ 409, 410 StPO. Although a defendant who challenges a penal order may, in theory, end up before a 1-2 collaborative court, the Relief Law of 1993 extended the jurisdiction of the single professional judge court to cases with a potential penalty of 2 years imprisonment and thereby ensured that, in practice, all cases that qualify for penal order treatment will fall within the jurisdiction of the single professional judge. See Rieß, Die Zuständigkeit, supra note 51, at 377.

59. See § 408a StPO.

60. §§ 408a Nr. 3, 408a Nr. 2 StPO.

61. See WEIGEND, AbspRECHEN, supra note 26, at 54 (in 1980, 99.4\% of penal order applications approved); Langbein, Land Without Plea Bargaining, supra note 4, at 213 n.37 (providing anecdotal evidence that German judges can review 70 routine cases in 15 minutes) (quoting W. Felstner, Plea Contracts in West Germany, 14 L. & Soc'y Rev. 309, 319 (1979)).

62. Since the penal order is issued without a hearing, counsel's role is limited to advising the defendant on the decision whether or not to object to the order once it has been issued. See Gesine
In penal order bargains, the prosecutor may offer to initiate a penal order proceeding instead of filing the case in the single judge court, thereby limiting the defendant's maximum exposure to a suspended one year prison sentence, instead of the four years' imprisonment in the single judge court. Alternatively, she may offer to specify a particular sentence in her application for a penal order. In exchange, the defendant would agree not to object to the penal order, thus saving the prosecutor the trouble of a trial.  

The penal order’s limited punishment range should not obscure its significance as a bargaining mechanism. In Germany, fines—which may reach millions of dollars—are imposed in over 80 percent of criminal cases. By contrast, prison sentences of over one year are imposed in only 3 percent of cases. Fines are routinely imposed for any Vergehen, which include, as noted earlier, many crimes that would be felonies under U.S. law.

In addition to diversion and penal order bargaining, bargaining also occurs in non-Vergehen cases and in Vergehen cases in which the defendant refuses a deal under section 153a or objects to the penal order and requests a trial. In these “judgment bargains,” the judge normally offers the defendant more lenient treatment in exchange for a confession in open court.

As German judges routinely initiate plea bargaining, defendants regularly face substantial pressure to plead guilty in exchange for leniency. Not only may the defendant hesitate to rebuff an offer from the very judge who will decide her fate at trial, the judge herself may find her impartiality sorely challenged by a recalcitrant defendant.

In contrast to their professional colleagues, lay judges do not participate in plea bargaining. The German Supreme Court recently reminded professional judges that their lay colleagues must be consulted about plea agreements. Nonetheless, bargaining continues to be limited to the professional court elite. Lay judges tend to be informed of the terms of the bargain only after it has been struck.

Brackert & Gregor Staechelein, Die Reichweite der im Strafverfahren erfolgten Pflichtverteidigerbestellung, 1995 STRAFVERTEIDIGER 547.

63. See SCHMIDT-HIEBER, supra note 12, at 35-43.
64. The court may impose between 5 and 360 daily rates of between DM2 and DM10,000 each. See § 40 Nr. 1, Nr. 2 StGB [Penal Code]. The amount of the daily rate is to reflect the defendant's financial position, including income from government sources. See § 40 Nr. 2 StGB. The number of daily rates is to reflect her criminal conduct. See, e.g., § 160 Nr. 2 StGB (misleading a person to make a false statement to be punished by six months in prison or a fine of up to 180 daily rates). The penalty for failure to pay is quite harsh: each unpaid daily rate is the equivalent of one day in prison. See § 43 StGB. Around 6% of fines are converted into prison sentences for failure to pay. See Hans-Heinrich Jescheck, Einführung in STRAFGESETZBUCH IX, xxi (28th ed. 1994); see generally WEIGEND, ABSPRACHEN, supra note 26 (summarizing German sentencing law).
66. See text accompanying note 56 supra.
68. See Rainer Hamm, Anmerkung, 1989 STRAFVERTEIDIGER 147, 148. Consider, for example, a recent German case in which the three professional judges on a 3-2 court arranged a meeting with the defendant and his attorney to obtain a confession, despite the fact that the case file, with which they were familiar, contained the defendant's repeated and sustained professions of innocence. See Hans OLG Bremen, Judgment of Jan. 24, 1989—Ws 232/88 (BL 365/88), 1989 STRAFVERTEIDIGER 145.
69. See BGHSt 37, 298.
C. More Trials With Lay Participation

Professor Langbein not only claims that the Germans do not plea bargain, he also contends that they try all their cases of serious crime before a court of professional and lay judges.70 On its statutory face, the German system seems to bear out this assertion. The collaborative courts of the Amtsgericht and Landgericht, after all, have jurisdiction over all Verbrechen cases and over all Vergehen cases in which a penalty of more than two years' imprisonment is expected.71 That the German Judicial Organization Code assigns the collaborative court jurisdiction over a case does not, however, mean that lay judges participate in its disposition any more than the Sixth Amendment right to jury trial in all criminal cases means that all criminal cases are actually adjudicated by a jury.

Even if it is true that in Germany more cases of serious crime are resolved by a court with lay participation than in the United States, we need not import the German collaborative court. The higher percentage of trials in cases of serious crime results not from the characteristics of the German trial, but from the jurisdictional rules of German criminal procedure. These rules take the jurisdictional choice out of the hands of the defendant and put it into the hands of the prosecutor who chooses the proper court, depending, among other things, upon the potential penalty (and therefore on the seriousness of the charge).

Before considering lay participation in serious cases, let us first look at lay participation in German criminal cases generally. In 1989, 22 percent of German criminal trials were initiated before a lay court.72 As we shall see, today this figure is likely to be closer to 12 percent.73 This decrease can be attributed in part to the enactment of the Relief Law of 1993,74 which dramatically expanded the jurisdiction of the single professional judge at the expense of the jurisdiction of the 1-2 collaborative court.75

To get a better sense of the frequency of lay participation in German criminal cases today, consider the court statistics for Lower Saxony in 1994 (see Figure 2).76 That year, most criminal cases were not filed in any kind of trial

70. See Langbein, Money Talks, supra note 6, at 34 (stating "cases of serious crime are always fully tried"). Langbein is not alone in making this claim. Other commentators, among them German proceduralists, similarly insist that "all but the most petty cases" are tried before a collaborative court. See, e.g., Weigend, Procedure, supra note 5, at 542; Frase & Weigend, supra note 44, at 321-22.
71. See text accompanying notes 48-50 supra.
73. See text accompanying notes 76-79 infra.
75. In fact, commentators have debated whether the 1-2 collaborative court retained any jurisdiction at all. See Puhse, supra note 51, at 165; Hohendorf, supra note 51, at 1454.
court, with or without lay participation. Instead, prosecutors submitted 57,444 penal order applications (or 55.9 percent of all cases), of which 12,793 ended up in a trial court because the defendant filed a timely objection. The remaining 44,651 cases (43.4 percent of all cases) were disposed of by the single
judge without trial and without lay participation, via penal order, or otherwise (dismissals, etc.).

Of those cases that made it past the single judge summary penal order process and reached a trial court of some kind, only a small minority got to a court with lay judges. Of the 44,299 cases filed in a trial court at the Amtsgericht, only 9.9 percent (4400) landed in a collaborative court. The remaining 39,899 cases were filed in the single judge court (Strafrichter). Between 1992 and 1994, the year following the enactment of the 1993 Relief Law, the percentage of cases filed in a collaborative court of the Amtsgericht fell from 18.3 percent to 9.9 percent.77 Lay participation in the Landgericht is easier to estimate than that in the Amtsgericht since all courts at the Landgericht are collaborative courts. In 1994, 1034 cases were filed (and 1020 decided) in the collaborative courts of first instance.78 In sum, a total of 45,333 cases were filed in some form of trial court at either the Amtsgericht or the Landgericht, of which 5434, or approximately 12 percent, were filed in some form of trial court with lay participation.79

Just because a case reached a lay trial court, however, does not mean that a trial before the lay court occurred, nor that lay judges participated in the disposition of the case even if it did. The following considerations suggest that a trial without plea agreements, at the conclusion of which lay judges deliberate on guilt and sentence, occurs in perhaps 45 percent of cases filed in some form of trial court with lay participation. This would mean that only 5.4 percent of all cases filed in some form of trial court are resolved with lay participation.

To start with, only roughly 50 percent of the cases filed in the collaborative and single judge courts of the Amtsgericht are resolved through a judgment of the court.80 In general, the remainder are—in about equal proportion—diverted under section 153a of the German Code of Criminal Procedure,81 dismissed on substantive or procedural grounds, dropped by the prosecution, consolidated with another matter, or otherwise resolved.82

Cases not resolved by a judgment of the court, however, are generally resolved without lay participation.83 This is so even though lay judges are enti-

77. The Relief Law went into effect on March 1, 1993.
78. Since the case presumably was decided with lay participation at the first instance, I will disregard the 982 cases that were filed (of which 901 were decided) in the 1-2 collaborative court on appeal of facts and law from a judgment of the 1-2 collaborative court of the Amtsgericht.
79. Criminal trials at the Oberlandesgericht are extremely rare (37 for all of Germany in 1990) and therefore have been disregarded. See STATISTISCHES JAHRBUCH 1994, supra note 46, at 385. I have also ignored the 3394 retrials of cases originally decided by the single judge court that are now on appeal before the 1-2 collaborative court of the Landgericht. With these retrials, the number of cases filed in some form of collaborative court would rise to 8828, or 19.5%.
80. See id. at 385 (noting that in 1991, 307,399 of 614,880 cases, including juvenile cases, were resolved by judgment of the court).
81. See text accompanying notes 53-56 supra.
82. See STATISTISCHES JAHRBUCH 1994, supra note 46, at 385 (including juvenile cases). In the following, I will assume that this distribution of disposition methods applies to the collaborative and the single judge courts at the Amtsgericht in equal measure.
83. Some may object that cases that do not come to a judgment should not be considered for purposes of determining lay participation. After all, American plea bargaining statistics similarly disregard cases that do not make it to judgment, because they are dropped or dismissed along the way.
tled by statute to participate in any decision that affects the outcome of the trial.84 Even in cases resolved on nonformal grounds, say by diversion under section 153a or by substantive dismissal, lay judges tend to have little if any input, especially if the dismissal merely implements a prior plea agreement between the judge and the parties.85

Even cases that are resolved by a judgment of the lay court do not necessarily reflect any lay participation. As noted earlier, it has been estimated that 20-30 percent of cases are resolved through some form of bargain.86 If we estimate that half of these bargains result in a judgment of the court upon a confession (as opposed to, say, diversion under section 153a), 10-15 percent of cases that come to a judgment before the collaborative court are settled not by trial, but by bargain. Lay judges, however, generally have no more influence on these judgment bargains than they have on diversion bargains.87

Considering that approximately 50 percent of the cases filed in the lay court at the Amtsgericht result in a judgment of the court, that 10-15 percent of these are settled via bargain, and that lay judges do not influence cases that do not result in a judgment of the court or that are settled via bargain, lay judges deliberate on the resolution of 42.5-45 percent of the cases that make it to the lay court at the Amtsgericht. In the lay court at the Landgericht, roughly three-fourths of all cases filed are disposed of by a judgment of the court.88 Discounting this proportion for plea agreements, one may estimate that lay judges there participate in the adjudication of about half of the cases.

Combining the numbers for Landgericht trials and the vastly more frequent Amtsgericht trials, it appears that lay judges in fact deliberate on the judgment in roughly 45 percent of cases disposed of by some form of collaborative trial court. This figure amounts to 5.4 percent of all cases that are filed in a trial court, whether collaborative or not.89

This percentage may overrepresent lay participation, however. Recall that almost half of all cases (43.4 percent) never reach a trial court of any kind and are disposed of summarily by a single judge via penal order.90 The percentage

Nonetheless, excluding the many dismissed and dropped cases, none of which involve lay participation, would paint a misleading image of the role of German lay judges. For figures that do not discount for these cases, see notes 89 & 108 infra.

84. See note 200 infra and accompanying text.
85. To illustrate the insignificance of lay judges in these cases, one judge told me that, even in cases that had not been settled prior to the public hearing, German judges occasionally dismiss cases in open court without having consulted their lay colleagues, simply because they had forgotten that the lay judges were there. On lay judges' limited role in plea bargaining, see text accompanying notes 208-211 infra.
86. See text accompanying note 16 supra.
87. See text accompanying notes 208-211 infra. Lay judges obviously also do not influence penal order bargains since these are issued by the single professional judge. See text accompanying notes 57-62 supra.
89. This percentage would rise to 8.4-9.6 if one counted all cases filed in a collaborative court as cases decided with lay participation (including cases that are in fact resolved prior to a judgment and without lay participation) and merely discounted for a plea bargaining rate of 20-30%. See note 83 supra and note 108 infra.
90. See text accompanying notes 76-77 supra.
of cases resolved with lay participation would dramatically decrease should the number of cases decided by lay judges be compared to the total number of cases processed by the system, including those disposed of by penal order.91 Although the recent extension of the penal order to probationary imprisonment of up to one year means that one cannot ignore penal order cases as irrelevant trifles, these cases have been omitted because routine penal orders also dispose of less serious cases such as shoplifting and drunk driving.

The 5.4 percent figure may exaggerate lay participation in German criminal cases for another, more important, reason. Lay judges, as a rule, are so passive that the 5.4 percent of trial court cases that are resolved by a judgment of a lay court without prior plea agreements do not necessarily reflect lay participation of any kind.92 In the United States, the division of labor and space between judge and jury ensures that every case that makes it before a jury will be decided by, and only by, lay participants. In sharp contrast, German criminal cases tried before a collaborative lay court may be—and most often are—in fact decided by the professional judge or judges to whose authority the lay judges generally defer both at trial and during deliberations.93

If one looks at the totality of criminal cases, it therefore appears that the German criminal justice system does not actually try a significantly greater proportion of its caseload with lay participation. Even according to the most conservative estimates, at least 5 percent of criminal cases in the United States are in fact tried before a jury. In some jurisdictions, the percentage is considerably higher.94 Therefore adopting the German collaborative court would seem unlikely to eliminate plea bargaining by dramatically increasing the number of trials.

Langbein, however, presumably would still maintain that the German system is preferable, not because it brings more cases to trial, but because it brings the more appropriate cases to trial. After all, he merely contends that the Germans try all their cases of serious crimes before a lay court. This is also not quite the case, however. Only defendants accused of one among two dozen or so of the most serious crimes (mostly homicides and other acts resulting in death) are guaranteed that their case will be filed in a collaborative court, the 3-2 court of the Landgericht (Schwurgericht).95 By contrast, the vast majority of cases, including many involving crimes that would be considered felonies in

---

91. In 1994, of the 102,777 criminal cases filed in the Amtsgericht and the Landgericht, 5434 (5.3%) were filed in a collaborative court. Übersicht über den Geschäftsanfall, supra note 76, at 84. Assuming once again that 45% of these cases are resolved with lay participation, only 2.4% of all cases filed were accorded a full trial before a court with lay participation.

92. See text accompanying notes 199-248 infra.

93. If only 5.4% of all trial court cases are actually tried before a collaborative court and German lay judges affect the outcome in 1.4% of these cases, see Gerhard Casper & Hans Zweig, Lay Judges in the German Criminal Courts, 1 J. LEGAL. STUD. 135, 189 (1972), German lay judges actually affect the outcome in 0.076% of all trial court cases.

94. See, e.g., Lynch, supra note 41, at 117 n.4 (noting trial rates of up to 15% in some jurisdictions); see also James E. Bond, Plea Bargaining and Guilty Pleas § 1.2 (2d ed. 1983) (estimating that approximately 90% of defendants in the United States plead guilty, but noting that this figure varies greatly by jurisdiction).

95. See § 74 Nr. 2 GVG.
this country, will not even be filed in a collaborative court, much less decided with lay participation.

No matter what the standard of seriousness, the German professional judge disposes of a large proportion of serious cases without lay participation. Recall that the single professional judge can, by penal order, summarily impose fines of any amount and probationary prison terms of up to one year. The single professional judge also has jurisdiction over all trials in which a penalty of up to two years’ imprisonment is to be expected and may impose a sentence of up to four years’ imprisonment should the trial warrant such an increased penalty. German courts, however, hand out prison sentences in fewer than 20 percent of cases and impose prison sentences of more than two years in only about 1 percent of cases. If one instead measures seriousness not by the punishment but by the crime, the single professional judge has the authority to dispose of many drug crimes, and of certain lesser cases of negligent homicide, assault and aggravated assault, larceny, grand larceny, burglary, and robbery, money laundering, fraud, counterfeiting, gambling, destruction of property, and arson, among others.

As we have seen, even among those few and most serious cases that are filed in collaborative court, fewer than half are actually resolved with lay participation, after accounting for plea bargains and other alternative disposal methods. Still, 50 percent is better than 5 percent, Langebein might argue. Clearly, the Germans do try on average a greater percentage of the most serious cases.

However, even if we focused exclusively on the few cases that involve one of the two dozen or so most serious crimes enumerated in section 74 Nr. 2 GVG that therefore must be filed in a collaborative court, we would not bring any more of these cases to trial by adopting the German collaborative court. The Germans try more of the most serious cases than we do not because they have a collaborative court, but because they limit the right to a lay court trial to

96. See Statistisches Jahrbuch 1994, supra note 46, at 395 (1991 figures for adult offenders); Joachim Herrmann, The Federal Republic of Germany, in MAJOR CRIMINAL JUSTICE SYSTEMS: A COMPARATIVE SURVEY 106, 122 (George F. Cole, Stanislaw J. Frankowski & Mark G. Gertz eds., 2d ed 1987); see also Herrmann, Bargaining, supra note 13, at 758 n.14. The percentage of cases in which a prison sentence is imposed declines substantially at the 2-year point because probation may only be granted for sentences of up to and including two years. See § 56 Nr. 2 StGB; see also Fuhse, supra note 51, at 165.

97. See § 29 Betäubungsmittelgesetz [BtMG] [Narcotics Law].
98. See § 222 StGB.
99. See §§ 223-224 StGB.
100. See §§ 242-244, 249 Nr. 2 StGB.
101. See § 261 StGB.
102. See § 263 StGB.
103. See § 267 StGB.
104. See § 284 StGB.
105. See § 303 StGB.
106. See §§ 308, 309 StGB.
107. Namely cases involving a crime listed in § 74 Nr. 2 GVG and whatever other cases might be beyond the extensive jurisdiction of the single judge court. See text accompanying notes 95-106 supra.
108. Or, once again, 70-80% if one only deducts plea bargained cases. See notes 83 & 89 supra.
those few cases. A German defendant accused of a lesser crime simply cannot get her case tried before a court with lay participation.\footnote{See text accompanying notes 44-47 supra.}

There is no guarantee that only serious crimes make it to trial in the United States since the defendant selects the procedure. In Germany, by contrast, the prosecutor, not the defendant, decides where to initiate the proceedings based on the crime charged as well as on the statutory and the anticipated penalty. The German prosecutor thus enjoys considerable jurisdictional leeway in all but the most serious of cases that must be filed in a collaborative court of the \textit{Landgericht}.\footnote{The German Constitutional Court's efforts to limit this discretion by narrowly interpreting the Judicial Organization Code have been ineffective. \textit{See} Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 22, 254; BVerfGE 9, 223; \textit{see also} Rieß, \textit{Die Zuständigkeit, supra} note 51, at 376.} Once the prosecutor initiates the proceedings in a particular court, the defendant can only move to another court if she can establish that the court lacks jurisdiction. In the majority of cases, the prosecutor initiates proceedings before the single professional judge court. In these cases the defendant is automatically precluded from taking her case before a trial court with lay participants.\footnote{Conversely, she also cannot—absent jurisdictional infirmities—request a bench trial before the single professional judge if the prosecutor has filed her case in a lay court. Given the insignificance of lay judges in the collaborative court and the lower penalty exposure in bench trials, a German defendant is far more likely to request removal of her case from the collaborative court to the single professional judge, than vice versa.}

A similar guarantee that defendants charged with the most serious crimes be tried with lay participation could be instituted in the United States only through a prohibition of plea bargaining in these cases. Even such a prohibition, however, could not force criminal defendants to choose a jury over a bench trial. In addition, any attempt to restrict jury trials to the most serious cases, say by raising the minimum penalty exposure that triggers the right to a jury trial from the current six months,\footnote{\textit{See} Baldwin v. New York, 399 U.S. 66, 73-74 (1970) (holding defendants have a right to a jury trial when potential sentence exceeds six months); Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) (upholding \textit{Baldwin}). \textit{But see} Lewis v. United States, 116 S. Ct. 2163, 2168 (1996) (holding the Sixth Amendment right to jury trial inapplicable to defendant prosecuted in a single proceeding for multiple petty offenses where aggregate prison term authorized for the offenses exceeds six months).} would probably require a constitutional amendment. As Langbein stresses, the Sixth Amendment guarantees the right to choose a jury trial to all criminal defendants.\footnote{\textit{See} Langbein, \textit{Myth, supra} note 3, at 119.}

D. \textit{More Efficient Trials}

Like the claims that the Germans do not plea bargain and try all their cases of serious crime with lay participation, accounts of the efficiency of the German criminal process also do not withstand critical analysis. In fact, German commentators have cited the notorious inefficiency of the German criminal process as a reason for the rapid spread of plea bargaining.\footnote{\textit{See} Uwe Scheffler, \textit{Die überlange Dauer von Strafverfahren: Materiellrechtliche und prozessuale Rechtsfolgen} 20 (1991); \textit{see also} Hamm, \textit{supra} note 68, at 147 (noting that}
prised to find the German trial held up as an example of adjudicative alacrity. The last two decades have seen feverish legislative activity designed to streamline the German criminal process, which enjoys a reputation for excessive length. In 1994, the prestigious and influential biannual German Jurists' Congress considered, among others, the following question: "Should the law of criminal procedure be amended to accelerate the criminal process, in particular the criminal trial, without sacrificing the rule of law?" The professional literature and the popular press are abuzz with articles bemoaning the inefficiency of the German criminal process.

Horror stories about never-ending trials abound. The following examples were assembled from courts throughout Germany in 1994 and 1995. A Stuttgart trial of eleven Neo-Nazis ended in a mistrial after more than three years. A Düsseldorf trial of several Kurdish defendants took 353 trial days over the course of four and a half years. A rape trial in Wiesbaden lasted 107 days, while a Frankfurt trial of ticket fixers took seventy-eight days over nineteen months. In the North, a trial against five defendants in Hamburg

"the spectre of a trial of several months or years" provides a strong incentive for judge to seek a plea agreement.

115. For an overview, see Uwe Scheffler, Strafprozeßrecht, quo vadis?, 142 GOLDMAMMER'S ARCHIV FÜR STRAFREcht 449 (1995); Peter Rieß, Reflexionen zur Lage der Strafjustiz, 1994 NEUE ZEITSCHRIFT FÜR STRAFRECHT 409 [hereinafter Rieß, Reflexionen].


117. See, e.g., GÖSSL, supra note 116; SCHEFFLER, supra note 114, at 50; Rieß, Reflexionen, supra note 115, at 409; Ellen Schülchter, Beschleunigung des Strafprozesses und insbesondere der Hauptverhandlung ohne Rechtsstaatlicher Grundsätze den Strafprozeß, insbesondere die Hauptverhandlung ohne Rechtsstaatsverlust, in GOLDMAMMER'S ARCHIV FÜR STRAFRECHT 397 (1994); Rudolf Wassermann, Hausgemachte Probleme?, 1994 NEUE JURISTISCHE WOCHENSCHRIFT 2196 [hereinafter Wassermann, Hausgemachte Probleme]; Rudolf Wassermann, Von der Schwierigkeit, Strafverfahren in angemessener Zeit durch Urteil abzuschließen, 1994 NEUE JURISTISCHE WOCHENSCHRIFT 1106 [hereinafter Wassermann, Schwierigkeit]. Some of these complaints, however, must be taken with a grain of salt. See Günter Widmaier, Kritische Gedanken zu diskitierten Reform des Beweisantrags- und Revisionsrechts, 1994 NEUE ZEITSCHRIFT FÜR STRAFRECHT 414. For many years, conservative commentators, judges, and politicians have been unhappy with what they regard as the German criminal process's excessive protection of defendants' rights, a protection that they believe is available nowhere else in the world. See Rainer Hamm, Der Standort des Verteidigers im heutigen Strafprozeß, 1993 NEUE JURISTISCHE WOCHENSCHRIFT 289, 293. Complaints about inefficiency thus often mask attempts to cut back defendants' procedural rights.


119. See Bertram, supra note 118, at 2186, 2188. The length of German trials often is measured both in overall duration and in the number of trial days. A German trial does not necessarily meet on consecutive days. In fact, German law merely requires that the trial continue within eleven days of the last trial day. See § 229 Nr. 1 StPO. German courts often find themselves incapable of keeping even this rather flexible schedule when calling witnesses or experts or deciding motions. As a result, a substantial minority of trial days is scheduled merely for the purpose of meeting the eleven day requirement. All parties must be assembled during these useless meetings. For example, in one recent case, "[f]or two and half years, professional and lay judges gathered regularly for meetings that sometimes lasted only ten or twenty minutes . . . ." Bertram, supra note 118, at 2187.

120. See Bertram, supra note 118, at 2186.

121. See Wassermann, Hausgemachte Probleme, supra note 117, at 2196.
continued for 105 days;\textsuperscript{122} the trial of the three Jüschke brothers from Hildesheim for the murder of two policemen lasted 180 trial days over the course of two and a half years.\textsuperscript{123} One commentator summed up the dismal record of the state of Northrhine-Westfalia:

Two-, three-, and four-year-long trials are not unusual. One or more of these mammoth trials are pending in almost every one of the nineteen district courts in Northrhine-Westfalia . . . . Twenty-nine of the criminal trials completed in the district courts in 1993 lasted more than twelve months . . . . Trials of such duration are unique not only in Europe but in the West.\textsuperscript{124}

In fairness to Langbein, a recent study revealed that in 1989 and 1990, all trials before the professional judge court and the 1-2 collaborative court at the Amtsgericht combined lasted 1.2 days on average, whereas trials before the 3-2 collaborative court at the Landgericht lasted an average of 2.7 and 2.9 days, respectively.\textsuperscript{125} Nevertheless, these figures are likely to have increased substantially since 1990.\textsuperscript{126} At any rate, they do not by themselves establish that the German criminal process is more efficient than the American process since minor and open-and-shut cases that regularly make it to trial in Germany rarely if ever do so in the United States.\textsuperscript{127}

\textsuperscript{122} See Bertram, supra note 118, at 2188 n.21a.


\textsuperscript{124} Günter Bertram, Entwurf eines Zweiten Gesetzes zur Entlastung der Rechtspflege (Strafrecht) 1995, 1996 Zeitschrift für Rechtspolitik 46, 48 n.12 (quoting Krumsiek, 1994 Recht und Politik 127ff.). Given these German horror stories, it is odd that Langbein cites the O.J. Simpson criminal trial as evidence of the collapse of the American criminal process and as a reason to turn for inspiration to Germany. See Langbein, Money Talks, supra note 6, at 32. The Simpson trial makes clear that we should improve funding for public defenders and appointed counsel, not that we should import a foreign system that is as susceptible to manipulation by skilled and well-paid defense attorneys as is our own. If one feature of the German system deserves our immediate emulation, it is not its collaborative court but its superior system of funding appointed counsel. See id. at 34.

\textsuperscript{125} See Gössel, supra note 116, at C11. The average duration of trials before the collaborative courts is difficult to determine since the average for Amtsgericht trials considers both bench trials and trials before the 1-2 collaborative court, but will fall somewhere between 1.2 and 2.9. Langbein, writing in 1981, cited Casper & Zeisel's 1972 numbers of “about two hours” for the 1-2 court, and of “one day” for the 3-2 court. Langbein, Mixed Court, supra note 10, at 201.

\textsuperscript{126} See Bertram, supra note 118, at 2188 n.9.

\textsuperscript{127} See Langbein, Mixed Court, supra note 10, at 204-05. If nothing else, the cited examples of protracted, wasteful trials make clear that nothing in the German system of criminal adjudication—not even the collaborative court—can prevent the sort of lengthy trials that critics like Langbein invoke to condemn the American criminal trial as an inefficient institutional anachronism. A skillful and zealous German defense attorney can clutter the proceedings with side issues and irrelevant motions as easily as her American colleague. In Germany, the lawyer's delay and distract arsenal includes, among other weapons, see text accompanying notes 136-151 infra, evidentiary motions and recusal motions against professional and lay judges. See §§ 24, 31 StPO. A bootstrapping tactic that combines both types of motion has proved particularly popular. Every denial of an evidentiary motion can give rise to a recusal motion. Similarly, every denial of a recusal motion can itself provide the grounds for yet another recusal motion, and the whole cycle can be (and has been) repeated ad infinitum. For an entertaining account of this perpetuum mobile, see Wassermann, Schwierigkelt, supra note 117, at 1107. In the trial Wassermann describes, no fewer than sixty-four recusal motions were filed during the first one hundred trial days. Id. These recusal motions can, of course, be denied, but only after they have been made and submitted—preferably orally in open court—and after the court has taken a recess to decide them. See text accompanying notes 145-152 infra.
1. Sources of inefficiency.

Far from a paragon of efficiency, the statutory framework of the German criminal process provides a recipe for chaos in the courtroom. Absent a dominating presiding judge, the German trial could easily disintegrate if any of the other process participants decided to exhaust the procedural rights granted to her by statute. A close look at German criminal process reveals that the gap between the statutory model and courtroom reality has a proportional impact on the process’s efficiency: the greater the discrepancy, the more efficient the process.

As is well known, the German Code of Criminal Procedure equips the presiding judge with considerable statutory authority. "The presiding judge issues the subpoenas necessary for trial."128 In addition, she "directs the trial, interrogates the defendant, and collects the evidence."129 Collecting the evidence means interrogating the witnesses and experts. The presiding judge can disallow "inappropriate or irrelevant" questions from process participants other than her fellow professional judges.130 She has full discretion over defense counsel’s ability to begin, continue, or complete her examination of a witness.131

The judge and the prosecutor both have the right to call witnesses.132 By contrast, the defense must file an evidentiary motion requesting that the court call the witness.133 Both defense counsel and the defendant have the right to file evidentiary motions.134 They may bring their own witness or expert to trial even if the court denied the motion to subpoena that witness or expert provided she is reimbursed in cash.135

The requirement that the defense ask for every witness and every piece of evidence carries the seed of great inefficiency, one that bears fruit in an increasing number of trials.136 Because it insists on the court’s investigation monopoly, the German criminal process finds it difficult to place any restrictions on the defense’s right to request that certain evidence be assembled by the court.

128. § 214 Nr. 1 StPO.
129. § 238 Nr. 1 StPO. She also directs the activities of experts, if she deems it necessary to do so. See § 78 StPO.
130. § 241 Nr. 2 StPO.
131. See BGH, Judgment of Nov. 23, 1994 (2 StR 593/94 (LG Hanau)), 1995 STRAFVERTEIDIGER 172.
132. See § 214 Nr. 3 StPO.
133. See § 219 StPO.
134. The German Supreme Court recently held that the court may limit this right to defense counsel if the defendant herself has filed an inordinate number of evidentiary motions. For critical commentaries on this decision, see, for example, Hamm, supra note 117, at 291; Gunter Widmaier, Mitwirkungspflicht des Verteidigers in der Hauptverhandlung und Rügevertus(?), 1992 NEUE ZEITSCHRIFT FÜR STRAFRECHT 519.
135. See § 220 StPO. Apparently the defense only rarely needs to avail itself of this option since the relevance standard is rather low and most presiding judges today tend to err on the side of caution and call every witness whom either side considers relevant to the case. See §§ 244 Nr. 2, 244 Nr. 3, 245 Nr. 2 StPO.
136. See text accompanying notes 115-124 supra. It is no surprise that recent acceleration proposals have focused on this aspect of the German trial. See Dahs, supra note 36, at 556-57; Gössel, supra note 116, at C57.
Evidentiary motions may be filed at any time before or during trial.\textsuperscript{137} No evidentiary motion may be denied merely for its untimeliness, not even after the prosecutor’s closing argument.\textsuperscript{138}

Moreover, the principles of orality and immediacy are thought to require that, in general, all motions and documents must be read—if necessary at great length and leisure—in open court.\textsuperscript{139} If the prosecutor, the defense attorney, or the defendant herself objects to the court’s decision not to read certain documents, the entire court must deliberate on the question of whether the documents should be read.\textsuperscript{140}

Once an evidentiary motion has been made, the entire court, not the presiding judge alone, decides on its relevance.\textsuperscript{141} The relevance standard is so low that it would seem difficult to keep evidence out, thus extending and cluttering the trial.\textsuperscript{142} It is also quite complex, which could make for lengthy deliberations regarding the appropriateness of evidentiary motions.\textsuperscript{143} The court must provide a detailed justification for any denial of an evidentiary motion, which is reconsidered de novo on appeal.\textsuperscript{144}

The defense also has the right to file recusal motions to challenge the court’s impartiality or composition. Recusal motions alleging partiality may be filed at any time until the end of trial.\textsuperscript{145} Recusal motions alleging improper composition, especially those identifying an error in the rather complicated assignment procedures for lay judges,\textsuperscript{146} have been particularly popular among defense attorneys, not least because their improper denial constitutes reversible error.\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{137} See §§ 166, 219 StPO.
\item \textsuperscript{138} See § 246 StPO; see also Gesetzentwurf des Bundesrates, Entwurf eines Gesetzes zur Entlastung der Rechtspflege [Draft Legislation of the Bundesrat, Draft of a Law for the Relief of the Administration of Justice], Deutscher Bundestag, 12. Wahlperiode, Drucksache 12/1217, at 37 (Sept. 27, 1991) [hereinafter Gesetzentwurf des Bundesrates].
\item \textsuperscript{139} See § 249 Nr. 1 StPO; KARLSRUHER KOMMENTAR, supra note 51, at 4 (orality), 5 (immediacy).
\item \textsuperscript{140} See § 249 Nr. 2 StPO. These provisions have also attracted the interest of acceleration advocates. See Gesetzentwurf des Bundesrates, supra note 138, at 35; Gössel, supra note 116, at C58.
\item \textsuperscript{141} See § 244 Nr. 6 StPO.
\item \textsuperscript{142} Curiously, Professor Langbein cites this rather permissive evidentiary standard as a reason for the superior speed of German criminal trials. See Langbein, Land Without Plea Bargaining, supra note 4, at 207-09. All other things—in particular the relevance standard—being equal, the absence of evidentiary rules designed to keep confusing and prejudicial evidence from the jury means not only the absence of discussions about their application, but also an increase in the amount of relevant evidence. It is more plausible that less time is spent in German court haggling over evidence for a different reason: the presiding judge in fact determines what is and is not relevant. See id. at 208.
\item \textsuperscript{143} See §§ 244 Nr. 3, 245 Nr. 2 StPO.
\item \textsuperscript{144} See BGHSt 21, 118 (123); see also Gesetzentwurf des Bundesrates, supra note 138, at 36.
\item \textsuperscript{145} See §§ 24-25 StPO. Since 1987, recusal motions alleging partiality that are based on information available prior to trial must be filed at the beginning of trial. See § 25 StPO. In trials at the Landgericht and Oberlandesgericht, recusal motions alleging improper composition of the court must be filed before the first defendant has been examined. See §§ 222a, 222b StPO. No similar limitations apply to trials before the 1-2 court of the Amtsgericht, where a defendant may wait until the trial has been completed before filing a motion challenging the composition of the court. See KARLSRUHER KOMMENTAR, supra note 51, at 960 (§ 222a StPO Rn. 3).
\item \textsuperscript{146} On these procedures, see text accompanying notes 241-247 infra.
\item \textsuperscript{147} See § 338 StPO.
\end{itemize}
The right to file recusal motions is not limited to the defendant and her counsel. It is also available to the state prosecutor, as well as to the parallel prosecutor (Nebenkläger) and the private prosecutor (Privatkläger), two creatures of the German criminal process who may be unfamiliar to the American observer.\footnote{148. See §§ 24(3), 397 StPO. The parallel prosecutor and the private prosecutor provide for victim participation in the German criminal process; the latter also privatizes the prosecution of trivial crime. The victim may either join the public prosecutor as a second, parallel, prosecutor, see § 395 StPO, or may, in certain minor cases (e.g., criminal trespass or criminal libel) replace the public prosecutor entirely as private prosecutor, see § 374 StPO. In both cases, the victim is represented by an attorney. See §§ 378, 397, 397a StPO. The attorney representing the parallel prosecutor has proved useful, particularly in cases involving sexual abuse against women and children, where the victim can be advised by her attorney during trial (and even literally shielded from the defendant's stares during her testimony). The private prosecutor, by contrast, is still very rare. In all of 1994, a total of eighty-one cases were brought by private prosecutors in the state of Lower Saxony. See Übersicht über den Geschäftsfall, supra note 76, at 84.}

Along with the presiding judge, any associate professional judge, lay judge, expert appointed by the court,\footnote{149. See § 74 StPO.} or even the court reporter (who in Germany merely takes rough notes of the evidence and of formalities) may be the subject of a recusal motion.\footnote{150. See § 31 StPO.} The German Code of Criminal Procedure establishes a complex system for disposing of these motions.\footnote{151. See §§ 22-31 StPO.} It is difficult, for instance, to deny repetitive recusal motions simply on account of their repetitiveness since such a decision would require a unanimous decision of the panel. If the motion cannot be denied as untimely, incomplete, or repetitive, the court must consider its merits outside the presence of the challenged member. If the court loses its quorum on the recusal issue by excluding the challenged member or members, the next higher court rules on the recusal motion. Once a recusal motion has been denied, the denial itself may give rise to another recusal motion on partiality grounds, and so on.\footnote{152. See note 127 supra.}

The extension of the right to file recusal motions to the private and parallel prosecutor highlights another feature of the statutory model of the German trial that invites delay and disorder: the guarantee of active participation rights to every process participant. The German criminal trial can become a very crowded affair. In the United States, a one-defendant trial features mainly two active participants, the prosecutor and the defense attorney, who ask all (or almost all) the questions and make all the arguments. In a German trial, the presiding judge may be charged with directing the trial, but, say in a 3-2 collaborative court, the trial will also feature two associate professional judges, two lay judges, the state prosecutor (who may be joined by the parallel prosecutor and her attorney), the defense attorney, and the defendant.

According to the statutory promise of the German Code of Criminal Procedure, these persons are not merely present in the court room. The Code equips each of them, including the defendant, with extensive participation privileges, such as the right to file recusal and evidentiary motions, to put questions to any
witness, to comment on the completed testimony of each witness and on each piece of evidence as it is admitted during the trial, and to make closing statements.\textsuperscript{153}

It is unlikely that a group of legal experts locked in a room with the instruction to devise an efficient criminal process would come up with anything vaguely resembling the German Code of Criminal Procedure. Although the Code contains provisions that declare the presiding judge the dominant participant in the process and therefore could accelerate the proceedings, it also arms the other participants with a panoply of procedural privileges whose considerable potential for inefficiency easily outweigh whatever efficiency advantage the dominant judge provisions might have.\textsuperscript{154}

2. Efficiency by design?

One reason why the German criminal process carries such considerable potential for inefficiency may be that, in contrast to Langbein’s claims, it was not designed with efficiency in mind. According to Langbein, Germany became a land with efficient trials and therefore without plea bargaining “not by good fortune, but as a result of deliberate policies and careful institutional design.”\textsuperscript{155} According to Langbein’s account, the collaborative court in particular was adopted precisely to achieve the effect Langbein now assigns to it, to increase the number of trials by accelerating them:

More than a century ago, Europeans came to look at Anglo-American criminal justice. They took back with them the notion that lay participation in criminal adjudication is profoundly important, but they also came to the conclusion that systems of mass justice appropriate to urban industrial democracies could not use laypersons in the clumsy, time-consuming, costly fashion of the adversary jury trial. The Europeans devised ways of combining laypersons with professional judges in streamlined procedures that guarantee significant lay participation in every case of serious crime.\textsuperscript{156}

Based on this historical account, Langbein contends that, to modernize our criminal justice system, we need only follow the Germans’ example. The Germans after all successfully met the challenge of adjusting their criminal justice system to the demands of “mass justice” in “urban industrial democr-

\textsuperscript{153} See §§ 240, 241a Nr. 2, 244, 257 Nr. 2, 258, 385, 397 StPO; Karlsruher Kommentar, supra note 51, at 1592 (§ 385 StPO Rn. 4). Sua sponte or upon motion by any of the process participants, the presiding judge may reject a question posed by anyone other than her fellow professional judges, but only if it is “inappropriate or irrelevant.” § 241 Nr. 2 StPO. It takes the entire court, however, to decide on the appropriateness and relevance of questions asked by any of the professional judges, including the presiding judge, and to dispose of challenges to the presiding judge’s decision to cut off questioning by another process participant. See §§ 238 Nr. 2, 242 StPO; Karlsruher Kommentar, supra note 51, at 1026 (§ 242 StPO Rn. 1).

154. One feature of the German criminal process that probably accelerates the proceedings is the open-file policy that gives all process participants access to the entire dossier before, during, and after trial.


156. Langbein, Myth, supra note 3, at 126-27 (citing Langbein, Mixed Court, supra note 10); see also Crossfire, supra note 7; cf. Langbein, Mixed Court, supra note 10, at 198 (discussing the rise of the German collaborative court).
cies” by adopting the collaborative court. Unlike the Germans, the argument continues, we have failed to divest ourselves of the cumbersome and anachronistic jury trial that now clogs our criminal courts and forces the vast majority of our defendants into a system of condemnation without adjudication through plea bargaining.

Langbein’s teleological account of the deliberate development of the German criminal process toward greater efficiency, however, is unconvincing. Efficiency considerations played little, if any, part in the nineteenth century development of the modern German criminal process in general and of the collaborative court in particular. Likewise, the eventual replacement in 1924 of all jury courts with collaborative ones was not the product of a long-term effort to enhance the efficiency of the German criminal process. Instead it was dictated by a governmental emergency decree ostensibly designed to save the Reich from political and financial ruin. Efficiency did, however, play a central role in the Nazis’ reforms of the German criminal process. Partly for that reason, efficiency to this day occupies an uneasy place in the realm of German criminal procedure. It is only in the past two decades that efficiency considerations are beginning to be discussed openly.

The collaborative court played a fairly insignificant role during the first century of lay participation in Germany.157 Lay participation spread from the Rhine states to the rest of Germany after the 1848 revolution in the form of the independent jury court. The independent jury model that won the day was not the Anglo-American version with one judge and twelve jurors, but the far more cumbersome French version with five judges and twelve jurors. To make matters even more inefficient, jurors had to respond to lengthy and detailed interrogatories.158

In 1850, Hannover was the first German state to experiment with the collaborative court in cases of petty crime.159 The Hannoverian collaborative court, however, replaced not cumbersome jury courts but single judge courts. The collaborative court was introduced not to accelerate trials but to diminish “‘popular distrust in the justice of judgments in police matters.’”160

When the collaborative court later began to emerge as an alternative to the jury court, its supporters still did not invoke efficiency concerns. They instead


158. See Reinhard Frank, Empfehlt sich die Durchführung des Systems der Schöffengerichte auf die gesamte erstinstanzliche Straferrichtungsverfassung?, in 2 VERHANDLUNGEN DES ZWEIUNDZWANZIGSTEN DEUTSCHEN JURISTENTAGES 1, 15 (Berlin, Guttenag 1892) (reporting a case in which no fewer than 78 questions were put to the jury). Still, jury trials were considerably faster than the written inquisitorial process they replaced. See Stenglein, Empfehlt sich die Durchführung der Schöffengerichte durch die gesamte erstinstanzliche Straferrichtungs-Verfassung, in 1 VERHANDLUNGEN DES ZWEIUNDZWANZIGSTEN DEUTSCHEN JURISTENTAGES 108, 113 (Berlin, Guttenag 1892).

159. See Werner Schubert, Die deutsche Gerichtsverfassung (1869-1877): Entstehung und Quellen 210 (1981). In 1842-1843, Baden had abandoned a similar proposal to replace the single judge court with a collaborative court in trivial cases. See id.

160. Id. at 211 (quoting ACTEN-STÜCKE DER ELF TEN ALLGEMEINEN STÄNNDEVERSAMMLUNG DES KGRS. HANNOVER, ERSTE DIAT 314 (Hannover 1849-1850)).
argued that the jury was an anachronistic remnant of the heady days culminating in the 1848 revolution, when distrust of state judges was widespread.\footnote{See id. at 216, 217.} Since then, they contended, the professional judiciary had proved its independence and incorruptibility and no longer required the jury’s more intensive lay supervision.\footnote{See Frank, supra note 158, at 9; id. at 21 (reporting overwhelming support of the collaborative court among prosecutors and judges in Baden); Stengelein, supra note 158, at 114. It was common knowledge that lay judges on a collaborative court played a far less significant role than jurors. See, e.g., Stengelein, supra note 158, at 110 (remarking that the lay judges on a collaborative court “were in the vast majority of cases so dominated by the presiding judge, that the lay judges did not oppose the judge”); id. at 118 (discussing the irrelevance of lay judges on 1-2 collaborative court).}

Supporters of the collaborative court also relied on old standbys such as the nonviability of the fact/law distinction, a complaint about the jury that had been around since the early nineteenth century,\footnote{See Schubert, supra note 159, at 205; Frank, supra note 158, at 12-18.} and the unreviewability of jury verdicts.\footnote{See Schubert, supra note 159, at 211-12, 214-15. Juries were more likely to acquit than any other tribunal. See Frank, supra note 158, at 6 (noting that between 1881 and 1889, the court of five professional judges (intermediate crime) acquitted 13.1%, the collaborative lay court (minor crime) 20.9%, and the jury in the independent lay court (serious crime) 25.7% of defendants), 6-7 (arguing that with silent judicial approval, prosecutors and judges manipulate charges to avoid jurisdiction of the jury court).

A single professional judge disposed of certain cases of trivial crime.\footnote{A single professional judge disposed of certain cases of trivial crime.}}

In the end, the German Judicial Organization Code of 1877 adopted a tripartite criminal court structure of jury courts, courts without any lay participation, and collaborative courts, that roughly reflected the tripartite crime structure of felonies (\textit{Verbrechen}), misdemeanors (\textit{Vergehen}), and violations (\textit{Übertretungen}).\footnote{A 1-2 collaborative court of one professional and two lay judges dealt with\textit{ Übertretungen} and lesser \textit{Vergehen}. A Strafkammer of five professional judges adjudicated most \textit{Vergehen} and \textit{Verbrechen}. Finally, a 3-12 jury court disposed of the most serious \textit{Verbrechen}, notably most homicides and other acts resulting in death.\footnote{The court’s jurisdiction thus roughly resembled the limited jurisdiction of the collaborative courts in the \textit{Landgericht} today. Today, the jurisdictional cutoff is four years and the list of serious felonies is shorter. See §§ 24, 74 Nr. 2 GVG; cf. \textit{Robert von Hippel, Der Deutsche Strafprozeß} 156 (1941) (stating jury court disposed of 0.31% of all cases and of 0.51% of all cases not adjudicated by penal order) (citing \textit{Statistisches Jahrbuch für das Deutsche Reich}, Jahrgang 36, at 326-27 (1915)). Beginning in 1905, the jurisdiction of the collaborative court was slowly expanded at the expense of the court of five professional judges. See \textit{von Hippel, supra}, at 51-52. The jurisdiction of the jury court remained unchanged.} A 1-2 collaborative court of one professional and two lay judges dealt with\textit{ Übertretungen} and lesser \textit{Vergehen}. A Strafkammer of five professional judges adjudicated most \textit{Vergehen} and \textit{Verbrechen}. Finally, a 3-12 jury court disposed of the most serious \textit{Verbrechen}, notably most homicides and other acts resulting in death.\footnote{A single professional judge disposed of certain cases of trivial crime.}
public interest. The Lex Emminger thus both dramatically expanded the jurisdiction of the collaborative court and laid the statutory foundation for plea bargaining.¹⁶⁸

The Lex Emminger was officially justified as a temporary emergency measure necessary to prevent the impending financial and political collapse of the German state in the wake of the severe crisis of the year 1923.¹⁶⁹ This justification, however, was not altogether convincing. In fact, the newly appointed conservative justice minister Emminger—a former prosecutor and judge from Bavaria—employed the emergency decree to force into law a conservative reform proposal that had been rejected by parliament only months earlier.¹⁷⁰ This proposal had primarily drawn on long familiar criticisms of the jury such as the indivisibility of legal and factual issues, the unreviewability of jury verdicts, and the inability of jurors to understand the law.¹⁷¹ Complaints about cumbersome jury trials were noticeably absent. The replacement of the jury court with the collaborative court was to save money, not because it was expected to accelerate trials, but because only six lay participants had to be paid for each trial before a collaborative court instead of the thirty prospective jurors that had been required for a jury trial.¹⁷²

In sum, the ad hoc Emminger reforms, including the replacement of the jury court by the collaborative court, can hardly be viewed as the fruit of a prolonged and deliberate attempt to render the German criminal process more efficient. If there was an efficiency reform in the Lex Emminger, it was not the substitution of the jury court with collaborative court but the establishment of the opportunity principle to relieve the pressure on the court system exerted by the principle of compulsory prosecution. This first legislative relaxation of the principle of compulsory prosecution, however, laid the groundwork for German plea bargaining in years to come.

In recent decades, efficiency considerations increasingly have been invoked to justify proposed reforms of the German criminal justice system.¹⁷³ The collaborative court, however, has not been credited with rendering the German criminal process more efficient. If anything, legislative reforms designed to make the criminal process more efficient have consistently curtailed the jurisdiction of the collaborative court, reduced the number of lay judges on the collaborative court, and, at least indirectly, stimulated plea bargaining.¹⁷⁴ For example, the introduction in 1974 of section 153a StPO, which significantly

¹⁶⁸ See Langbein, Discretion, supra note 9, at 460 (describing bargaining under section 153).
¹⁶⁹ See von Hippel, supra note 167, at 53-54 (noting that the official justification was "to simplify and reduce the cost of the administration of criminal justice to the limits of that which is bearable in the interest of the administration of justice") (quoting BUMKE, VERORDNUNG VOM 4. JANUAR 1924, at 6-7, 96 (1924)). On the crisis of 1923, see generally Thomas Vormbaum, Die Lex Emminger vom 4. Januar 1924, at 21-29 (1988).
¹⁷⁰ See Casper & Zeisel, supra note 93, at 140.
¹⁷¹ See Vormbaum, supra note 169, at 136-37.
¹⁷² See Schubert, supra note 159, at 227; von Hippel, supra note 167, at 161-62; Vormbaum, supra note 169, at 137.
¹⁷³ See generally Scheffler, supra note 115.
contributed to the expansion of plea bargaining,\textsuperscript{175} was designed specifically to increase the efficiency of the criminal justice system and alleviate the workload of judges and prosecutors.\textsuperscript{176} Efficiency was also invoked to support the 1993 extension of section 153a beyond defendants with "minor guilt,"\textsuperscript{177} the dramatic expansions of the penal order's jurisdiction in 1987 and 1993, the extension of the single judge court's jurisdiction in 1993, and the 1974 transformation of a 6-3 lay majority in the Schwurgericht into a 2-3 minority.\textsuperscript{178}

Even so, German legislators and commentators have been slow to embrace efficiency justifications, perhaps in part because the Nazis had elevated efficiency to an institutional principle of the highest order as they radically simplified, streamlined, and accelerated the German criminal process.\textsuperscript{179} The 1974 introduction of section 153a on efficiency grounds, for example, evoked vociferous resistance.\textsuperscript{180} Even the current debate about acceleration retains a trace of discomfort about efficiency concerns beyond the defendant's right to a speedy trial.\textsuperscript{181} The state's interest in systemic efficiency, it seems, may only be invoked to avert the collapse of the German criminal justice system.\textsuperscript{182}

As a result, reform proposals based on efficiency tend to suffer from an odd disparity between actual and constructed crises and, therefore, also between actual problems and proposed solutions. Take, for example, the 1993 Law for Relief of the Administration of Justice, which fundamentally reformed the German criminal and civil justice systems. Among other things, the Relief Law reduced lay participation in criminal cases and facilitated plea bargaining by expanding prosecutors' charging discretion. According to its official justification, the law was intended to streamline the German criminal justice system in preparation for the impending onslaught of prosecutions against former East German officials.\textsuperscript{183} Like the Emminger reforms seven decades earlier, however, the Relief Law simply seized the dramatic moment and enacted efficiency

\textsuperscript{175} See texts accompanying notes 14 & 53-56 supra.


\textsuperscript{177} See Gesetzentwurf des Bundesrates, supra note 138, at 34.

\textsuperscript{178} See id. at 42, 46; Gesetzentwurf der Bundesregierung, supra note 176, at 31; see also Otto Rudolf Kissel, Gerichtsverfassung unter dem Gesetz zur Entlastung der Rechtspflege, 1993 Neue Juristische Wochenschrift 489, 491.


\textsuperscript{180} See Schmidt-Hieber, supra note 12, at 3 nn.6-7, 27 n.19.

\textsuperscript{181} See Karlsruher Kommentar, supra note 51, at 5 (speedy trial).

\textsuperscript{182} From early on, acceleration proposals have stressed that acceleration gains must be weighed against the defendant's rights and that a speedy trial is also in the defendant's interest. See, e.g., Gesetzentwurf der Bundesregierung, supra note 176, at 36.

\textsuperscript{183} See Gesetzentwurf des Bundesrates, supra note 138, at 17, 19. The efficiency justification for further limiting the jurisdiction of lay courts appears particularly dubious since lay judges do so little to retard proceedings. See Gesetzentwurf der Bundesregierung, supra note 176, at 31; Gesetzentwurf des Bundesrates, supra note 138, at 46.
reforms proposed long before anyone contemplated the collapse of the Berlin Wall.\textsuperscript{184}

Given that efficiency has played a rather limited role in the evolution of the German criminal process in general and of the collaborative court in particular, it is misleading to describe the collaborative court as the product of a continuous effort to meet the increased efficiency demands of “mass justice” in “urban industrial democracies.”\textsuperscript{185} Rather, efficiency considerations have entered the debate about the reform of the German criminal process over the past two decades largely because the German process, as originally designed, has proved so inefficient.

The insignificance of efficiency in the evolution of the German criminal process may help us understand why the statutory model of that process emerged as a recipe for inefficiency. The question now arises, however, why German trials as a rule do not descend into a quagmire of procedural niceties. The answer lies in the considerable discrepancy between statutory model and courtroom reality. German trials run smoothly insofar as the actual trial differs from its statutory ideal in two respects. First, the public trial often merely serves to confirm the presiding judge’s prejudgment based upon her perusal of the case file containing the results of the prosecution’s pretrial investigation. Second, the process participants, other than the presiding judge, do not in fact exercise the extensive participation rights that they possess in theory.

In other words, the efficiency of the German criminal trial results from the gap between statutory promise and courthouse reality. In this sense, the German process is efficient not because, but in spite of its institutional design.


One factor that has helped German criminal trials retain a measure of efficiency has been the extensive preliminary investigation conducted by the prosecution and the police, in which inculpatory and exculpatory leads are to be pursued with equal vigor. The results of this investigation are collected in the case file, called the dossier. At trial the dossier permits the presiding judge to focus her interrogation and to decide on the relevance of evidence. The judge’s heavy reliance on a case file prepared by the prosecution may, of course, accelerate the trial proceedings. This acceleration, however, may come at the price of turning the public oral proceedings into a farce, thereby deepening the sense of partiality that already pervades the inquisitorial German process, where judge and prosecutor cooperate as investigative officers of the court.\textsuperscript{186}

\textsuperscript{184} See, e.g., Gesetzentwurf des Bundesrates, supra note 138, at 34, 41 (1984 proposals).
\textsuperscript{185} See Langbein, Myth, supra note 3, at 126-27.
For over a century, it has been no secret that many if not most cases are decided solely on the basis of the case file long before the trial has begun.\(^{187}\) Since the case file is prepared by the prosecution and may emphasize inculpatory interpretations of the evidence, the judge’s reliance on the case file may result in a bias against the defendant. The German prosecutor can read novels (or even nap) in court,\(^ {188}\) and need only possess a vague familiarity with the case\(^ {189}\) because the presiding judge essentially takes over the prosecution once the prosecutor’s office has completed its preliminary investigation and submitted the dossier to the court.\(^ {190}\) In 1974, the prosecutor officially assumed the pretrial investigatory powers which, until then, had been reserved for the investigating judge.\(^ {191}\) Since then, the prosecutor has had the power to subpoena experts and other witnesses, including the defendant, for investigatory purposes and, without obtaining judicial authorization, to summarily impose fines for unjustified failures to appear or to provide information.\(^ {192}\)

The accelerating potential of the dossier may compromise the statutory ideal of the German criminal process in two ways. First, although the prosecutor’s pretrial investigation and preparation of the case file will simplify the case for the judge and thus expedite its resolution, the prosecutor may fail to live up to the ambitious ideal of the “watchman of the law,” who vigorously pursues all leads and evenhandedly presents all inculpatory and exculpatory facts.\(^ {193}\) Second, and most important, the judge often prejudgets the case in reliance on even

\(^{187}\) See, e.g., Carl Friedrich Rudolf Heinze, Ein deutsches Geschworenergericht 85 (Leipzig, Bernhard Tauchnitz 2d ed. 1865) (judicial prejudgment of the case on the basis of the dossier prior to trial is “as good as inevitable”).

\(^{188}\) See Langbein, Discretion, supra note 9, at 448.

\(^{189}\) This detachment is possible because the prosecutor present at trial is rarely the one who prepared the case file. The trial prosecutor tends to rely solely on the indictment and, perhaps, the rap sheet. She may even be unfamiliar with the law. Since prosecutors are randomly assigned to stand in at trial, a prosecutor who specializes in traffic matters may end up attending a complicated drug trial. See Hohendorf, supra note 51, at 1454.

\(^{190}\) The architecture of some, particularly older, German court rooms still reflects the prosecutor’s proximity to the court. There, the presiding judge occupies the center seat on the top level of an elevated horseshoe consisting of three levels. The two associate professional judges sit at each side of the presiding judge, with the two lay judges occupying the corner seats on the top level. The prosecutor sits on a slightly lower level, close and at a soft angle to one side of the judges. The symmetrically opposite seat on the other flank is occupied by the court reporter. The defendant sits several feet away from the court reporter on the defendant’s bench, located on the lowest, third level of the horseshoe, diagonally across the court room from the prosecutor. Defense counsel sits even lower, at a table on the floor in front of her client. The court may grant the defendant permission to descend from her bench and take a seat next to her lawyer. Cf. note 206 infra (dress code); see also Hans Schröter, Schwurgerichtssache Karl Anton Braun 30-51 (1975) (describing a similar design of a Palatinate court room in 1855).

\(^{191}\) See Gesetzentwurf der Bundesregierung, supra note 176, at 39-40.

\(^{192}\) See §§ 51, 70, 77, 161a StPO. If enacted, a recent draft of yet another Relief Law designed to streamline the German criminal process would even authorize the prosecutor to appoint defense counsel upon consultation with the defendant. See Gesetzentwurf des Bundesrates, Entwurf eines Zweiten Gesetzes zur Entlastung der Rechtspflege (strafrechtlicher Bereich) [Draft Legislation of the Bundesrat, Draft of a Second Law for the Relief of the Administration of Justice], 13, Wahlperiode, Drucksache 13/4541, at 5 (May 7, 1996). The privilege against self-incrimination justifies the defendant’s refusal to speak with, though not to meet with, the prosecutor or her designated police representative. See §§ 136 Nr. 1, 163a Nr. 3 StPO. The judge retains the power to incarcerate obstinate witnesses, see § 161a Nr. 2 StPO, and fines imposed by the prosecutor may be appealed to the judge, see § 161a Nr. 3 StPO.

\(^{193}\) See § 160 Nr. 2 StPO.
the most evenhanded dossier, reducing the trial to a mere formality in violation of the principles of orality, immediacy, and publicity that, according to statute and doctrine, underlie the German criminal process.\textsuperscript{194}

4. Judicial dominance.

Another explanation for the brevity of many German trials is that associate professional judges, lay judges, prosecutors, and defense attorneys acquiesce in the presiding judge’s domination of the proceeding. The German criminal trial, in other words, moves quickly insofar as only the presiding judge takes full advantage of the rights assigned to her by law.

A new type of defense attorney. Aggressive German defense attorneys are the active exception that proves the passive rule. Several commentators even attribute recent breakdowns of the German criminal process in part to the rise of a “new type of defense attorney,” who manipulates a system that since its inception in the 1870s has relied on the actual passivity of all process participants other than the presiding judge:\textsuperscript{195}

I am not referring to the so-called star defense lawyer and also not to the so-called ruckus lawyer (\textit{Krawall-Anwalt}). I am instead referring to the type of very zealous and fundamentally respectable, often very qualified, defense attorney. This attorney, however, exploits the varied and most extreme possibilities of our code of criminal procedure not only in the exceptional case, as the preceding generation might have done, but who, in the interest of his client—even if he thinks his client is guilty—takes advantage of every legal loophole and develops defense strategies that aim at the typical weaknesses of our justice system.\textsuperscript{196}

It therefore appears that the efficiency of the German criminal trial is severely compromised by a new breed of German defense attorneys who do nothing more than fulfill their professional duty as it has been understood by their American colleagues for decades. The German criminal trial thus could expect a similar fate in the United States. Langbein presumably would expect as much. After all, he has argued for years that the Anglo-American trial was a perfectly efficient proceeding until nineteenth century defense lawyers exploited their newly achieved rights in the courtroom.\textsuperscript{197} In fact, critical portrayals of unprofessional German defense lawyers and their courtroom antics resemble Langbein’s attacks on the defense lawyers who, in the past century and a half, have managed to ruin the jury trial.\textsuperscript{198}

\textsuperscript{194} See Karlsruher Kommentar, supra note 51, at 4 (orality), 5 (immediacy), 10 (publicity).

\textsuperscript{195} See generally Hamm, supra note 117, at 289 (discussing the difficulties German defense attorneys face in simultaneously representing their client and acting as an officer of the court).

\textsuperscript{196} Ernst-Walter Hansack, Vereinbarungen im Strafprozeß, ein besseres Mittel zur Bewältigung von Großverfahren?, 1987 STRAFFETTÄGER 500, 501. For less sympathetic discussions of defense lawyers’ contributions to the efficiency crisis of the German criminal trial, see Wassermann, Schwierigkeiten, supra note 117, at 1107; GösSEL, supra note 116, at C19-20.


\textsuperscript{198} German commentators, however, have yet to develop the sort of apocalyptic conspiracy theory that Langbein recently outlined in his Newsweek essay on the O.J. Simpson criminal case: “Now grown immensely wealthy and powerful, the elite criminal bar constitutes an entrenched vested interest
If the problem lies with the defense lawyers, however, there is no reason to replace our jury court with the German criminal court since both are vulnerable to the skillful strategies of zealous defense attorneys. If a few brash defense attorneys can bring the efficient German criminal trial to a screeching halt, one wonders what would happen if every other participant similarly insisted on her statutory right to assist the presiding judge in guiding the proceeding, even if only by posing questions to witnesses. The efficiency of the German trial would evaporate as the gap between statutory promise and courthouse reality would disappear. It therefore may well be that, despite Langbein’s critique of the hypocrisy of the American criminal justice system, the American system is less efficient than the German system precisely because and to the extent that it is less hypocritical.

The insignificance of lay judges. With the exception of aggressive defense attorneys, however, the presiding judge’s fellow process participants do little to disrupt her domination of the trial. For example, the presiding judge’s interrogation of a witness is rarely followed by extensive questioning on the part of other process participants, including the lay judges. The lay judges, in particular, are handicapped by their ignorance of the contents of the dossier from which the presiding judge conducts her interrogation.199 Whereas other process participants’ familiarity with the dossier is determined solely by their interest and their time, the lay judges are prohibited from even glancing at the all-important case file. Should they gain access to even a small part of the dossier, this will be grounds for reversal. Already a formidable acceleration tool, the dossier’s inaccessibility to certain process participants thus further expedites the trial.

Once again, the reality of the German criminal trial turns out not to match its statutory promise. Prohibiting lay judges access to the all-important dossier flies in the face of the statutorily guaranteed absolute equality of professional and lay judges.200 As it turns out, the statutory principle of equality is far less revealing than the explanation for its circumvention. Lay judges are said to be incapable of distinguishing between the facts as they are presented in the dossier and the evidence presented at trial. Even a quick peek at the dossier therefore would violate the immediacy and orality requirements of the German criminal trial. Needless to say, professional judges are presumed to have no difficulty in this regard.201

199. As a practical matter, the trial prosecutor also tends to have at best a passing acquaintance with the case file. See notes 188-190 supra and accompanying text.

200. See § 30 GVG. The training pamphlet for lay judges in Lower Saxony explains that “you in principle enjoy the same rights as professional judges” and that “you are in no way merely the professional judges’ aides, but hold the judicial office with equal rights and equal responsibility.” Niedersächsisches Justizministerium, Das Schöffenenamt [Lower Saxonian Ministry of Justice, The Lay Judge Office] 8-9 (1993).

201. But see text accompanying notes 186-194 supra.
Measuring the actual influence of lay judges on criminal trials can prove difficult. Given the official principle that lay judges are equal partners of their professional colleagues, professional judges who serve on collaborative courts with lay judges may hesitate to confess their actual dominance. Professional judges thus have been known to wax eloquent about the crucial significance of lay participation in general (complete with a citation to the appropriate section of the Judicial Organization Code), yet to fail to document that participation in particular cases.

Despite these difficulties, a review of the professional literature and the popular press, combined with trial observations and conversations with professional and lay judges, prosecutors, and former judicial clerks, strongly suggest that German lay judges play an insignificant and largely symbolic role in the administration of criminal justice. Lay judges therefore promote the efficiency of German criminal trials by not exercising their statutory right to participate meaningfully in the proceedings.

Accounts of criminal trials in the professional journals and the popular press as a rule do not mention lay judges. Many Germans in fact have no idea that lay judges sit on criminal courts. Lawyers who do not practice criminal law often forget that lay judges play a role in the administration of criminal justice; even German criminologists occasionally forget that lay judges exist. A 1969 criminological study of the sentencing practices of several collaborative trial courts, for example, simply equated the practices of the presiding professional judge with those of the entire bench of professional and lay judges.\textsuperscript{202}

Lay judges in German criminal cases may languish in obscurity partly because they do not participate in the formulation and public announcement of the justification for the court’s judgment. The opinion in its oral and written form is drafted by the presiding professional judge in 1-2 courts or by the reporting professional judge in 2-2 and 3-2 courts and announced by the presiding judge.\textsuperscript{203}

The more likely explanation for lay judges’ obscurity, however, lies in their minimal contribution during the public proceedings. For decades, commentators have noted the passivity of lay judges during trial.\textsuperscript{204} Lay judges rarely ask questions.\textsuperscript{205} Many presiding judges may not even give them the opportunity to do so. Ideally, after the presiding judge in a 3-2 court has completed her

\textsuperscript{202} See Rennig, \textit{supra} note 72, at 311 (citing J. Schiel, \textit{Unterschiede in der deutschen Strafrechtsprechung} (1969)).

\textsuperscript{203} The requirement of “a written opinion to explain the court’s finding of fact and law” in every case, Langbein, \textit{Mixed Court, supra} note 10, at 200; \textit{see also} Langbein, \textit{Land Without Plea Bargaining}, supra note 4, at 207, though perhaps advisable, does little to accelerate the disposition of criminal cases.


\textsuperscript{205} According to Casper and Zeisel’s study of lay participation in German criminal trials in the early 1970s, the likelihood of questions by lay judges was roughly proportional to the number of lay judges on the panel: lay judges on 3-2 courts were least likely to ask questions (asking none in 60% of cases), closely followed by their colleagues on 1-2 courts (asking none in 54% of cases). Lay judges on the Schwurgericht, which consisted of three professional and six lay judges and was abolished in 1974,
interrogation of a witness, she should ask first her fellow lay and professional judges, then the prosecutor, and finally the defendant and her attorney, if they would like to put any questions to the witness. In practice, this inquiry may be limited to a quick glance at her professional colleagues, who may ask a question or two, then a nod at the prosecutor and the defense lawyer, who also may want to ask a few additional questions. Ignored by the presiding judge, unfamiliar with the legal jargon laced with references to code sections, subsections, and sub-subsections, disoriented by frequent discussions of and references to motions filed or to be filed, unfamiliar with the contents of the dossier, and surrounded by lawyers, all of whom are court regulars and don the black robes of their profession, many lay judges find it difficult to insist on their statutory rights to influence the proceedings.

Since a considerable number of cases are settled through some sort of bargain between the parties and the court, one might wonder what role lay judges play in plea bargaining. Initially, it might seem that the presence of lay judges would complicate the plea bargaining process. One might expect that it would be more difficult to strike a deal with between three and five judges than it would be with just one, as in the United States. On its statutory face, the German criminal process therefore would appear to be a weapon against plea bargaining, though not, as Langbein suggests, because of its efficiency but because of its inefficiency.

It attests to the insignificance of the lay panel members that this theoretical problem is of no practical significance. As a general rule, only professional judges participate in plea negotiations. In a typical bargaining case, the presiding judge will contact defense counsel to schedule the trial date and, while

were by far the most active, asking questions in 96% of cases. See Casper & Zeisel, supra note 93, at 150.

206. The dress of participants in criminal trials further emphasizes the close relations between prosecutors and professional judges. Cf. note 190 supra (interior architecture). The professional judge and the prosecutor wear the same type of black robe, with black velvet trimming. The defense attorney, by contrast, dons a black robe with black silk trimming, while the court reporter wears a black robe with trimming made of mere black cloth.

207. Lay judges who nonetheless attempt to play the equal role assigned to them by law may soon meet the presiding judge's disgruntled resistance. Eager to move her docket, the presiding judge often has little patience for contributions by her lay colleagues who know nothing about the case file and even less about the law or sentencing practices of a particular judicial district. With remarkable consistency, professional judges, when asked about lay participation, complained about teachers, who apparently tend to be particularly active at trial and during deliberations. Judging by the experience of one alternate lay judge, who has attempted to influence proceedings and deliberations, the obsequiousness of lay judges may well play a role in their retention or "promotion" from alternate to regular status.

208. But see note 248 infra (discussing plea bargaining before Vermont's collaborative court).

209. A recent decision of the German Supreme Court stressed, among other things, the importance of lay participation in plea negotiations. However, given its exclusion of all extra-trial consultations regarding possible case dispositions, it is unlikely to dramatically increase lay participation. See BGHSt 37, 298; see also Alfonso Zschoeckel, Die Urteilsabsprache in der Rechtsprechung des BVerfG und des BGH, 1991 Neue Zeitschrift für Strafrecht 305.
she has counsel on the phone, raise the possibility of a deal. Only after the bargain has been struck will the lay judges be informed.

Most empirical studies of lay participation in German criminal courts have focused on the deliberations following a full-fledged trial, rather than on the trial itself. Supported by anecdotal evidence from conversations with professional judges, lay judges, and former judicial clerks, these studies indicate that German lay judges do not influence the secret deliberations any more than they affect the public proceedings. It indeed would be odd if the very same presiding judge who dominated the trial suddenly fell into the background upon entering the deliberation room, or if lay judges who spent the entire trial feeling alienated and confused turned into confident and coequal deliberators at that same fateful moment.

In their classic 1969 study of lay participation in German collaborative courts, Gerhard Casper and Hans Zeisel concluded that “[t]he traceable overall effect of the lay judges on the verdicts of the German criminal courts is indeed small.” Specifically, Casper and Zeisel determined 1) that, when German lay judges affect the verdict, they are more likely to favor the defendant on the issues of guilt and of sentence, and 2) that German lay judges affect the verdict in only 1.4 percent of trials.

The first finding is consistent with research on lay participation in other countries. For example, Harry Kalven and Hans Zeisel’s pathbreaking 1966 study of the American jury concluded that a reduction in lay influence is likely to result in a higher conviction rate. They found that in 86 percent of cases in which American jurors disagreed with the trial judge on the question of guilt, the jurors favored acquittal. A study of lay participation in Poland similarly determined that “lay judges exerted their influences on the verdict in favor of the defendant in about seventy-five percent of cases in which an influence of lay judges was reported.” The insignificance of German lay judges may

210. For a discussion critical of judicial participation in German plea bargaining, see text accompanying note 68 supra.

211. Cf. Herrmann, Bargaining, supra note 13, at 774-75 (urging professional judges to promptly notify their lay colleagues of plea agreements).

212. Casper & Zeisel, supra note 93, at 189.

213. See id. at 190, tbl.40.

214. See id. at 189.


217. Stanislaw Pomorski, Lay Judges in the Polish Criminal Courts: A Legal and Empirical Description, 7 CASE W. RES. J. IRR."L. 198, 206 (1975). The study also found that “[seven percent of those cases involving sentencing decisions were influenced by lay judges in favor of the defendant.” Id. at 206, see also DORIS MARIE PROVINE, JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM 116-17 (1986) (discussing the Casper and Zeisel study, the Pomorsky study, and a Danish study, and concluding that “[i]n all of this research, agreement between lay and lawyer participants is the norm, but where disagreement occurs, the lay decision makers tend to favor the defendant”).
help explain why, despite the tendency of lay participants to favor the defendant, the acquittal rate in German trials has sunk below 4 percent.\textsuperscript{218}

Casper and Zeisel's second finding has been subjected to some criticism. Several commentators have suggested that the study may have underestimated the influence of German lay judges on the outcome of cases by relying on information provided by presiding professional judges, who may have underrepresented the number of cases in which their lay colleagues affected the outcome.\textsuperscript{219} A recent study at the University of Marburg, however, sampled both professional and lay judges and confirmed Casper and Zeisel's contention that German lay judges rarely influence the outcome of a case.\textsuperscript{220}

Professor Langbein has sharply criticized the Casper and Zeisel study, not for underrepresenting German lay influence on outcome, but for unfairly contrasting this finding with the conclusion of the Kalven and Zeisel study that American jurors affected the outcome far more often.\textsuperscript{221} However, Casper and Zeisel acknowledged the limitation of this cross-national comparison.\textsuperscript{222} It is difficult enough to measure the influence of lay participants on the outcome of cases in one legal system, let alone to compare these results with studies of lay influence in a radically different legal system.

The Casper and Zeisel study, nonetheless, illuminates the role of lay judges during the secret deliberations in German criminal courts. Take, for example, their finding that German lay judges disagreed with their professional colleagues in only 6.5 percent of all cases, prevailing in only 21 percent of these cases, and thus determined the outcome in only 1.4 percent of all cases.\textsuperscript{223} Even given Langbein's suggestion that we take the 6.5 percent figure with a grain of comparative salt,\textsuperscript{224} when lay and professional judges did disagree at the outset of deliberations, the professional judges prevailed in 79 percent of the cases.

The Marburg study paints an even bleaker picture of the influence of German lay judges, especially in cases of initial disagreement between professional and lay judges. The Marburg study confirmed not only the general concurrence of opinion between professional and lay judges reported by Casper and Zeisel,\textsuperscript{225} it also found that professional judges carried the day in every case of initial disagreement.\textsuperscript{226}

The evidence provided by the Casper and Zeisel study and the Marburg study was supported in conversations with German professional judges, lay

\textsuperscript{218} See Schünemann, Absprachen, supra note 12, at B52.
\textsuperscript{219} See Provine, supra note 217, at 116-17; Rennig, supra note 72, at 314.
\textsuperscript{220} See Rennig, supra note 72, at 325; Meurer & Rennig, supra note 215, at 10-11.
\textsuperscript{221} See Langbein, Mixed Court, supra note 10, at 204-05.
\textsuperscript{222} See Casper & Zeisel, supra note 93, at 191.
\textsuperscript{223} See id. at 189.
\textsuperscript{224} Langbein argues that the figures should be taken with a grain of salt because more straightforward cases, in which disagreement among lay and professional judges is unlikely, make it to trial in Germany than in the United States, where pervasive plea bargaining weeds out many open-and-shut cases. See Langbein, Mixed Court, supra note 10, at 204.
\textsuperscript{225} See Casper & Zeisel, supra note 93, at 152.
\textsuperscript{226} See Rennig, supra note 72, at 325; Meurer & Rennig, supra note 215, at 10-11.
judges, and former judicial clerks. These conversations revealed, for instance, that a presiding judge on a 1-2 collaborative court, where her two lay colleagues can always outvote her, reached retirement without ever losing a vote on either guilt or punishment. Another judge on a 1-2 court reported having been outvoted only once in approximately 1600 cases over the previous eight years.

The significance of lay participation in deliberations depends not only on how often disagreements between lay and professional judges arise, but also on how often lay judges resolve these disagreements in their favor. The applicable statutes provide German lay judges with considerable power to outvote their professional colleagues. To affect the verdict in actual cases, however, the lay members of a German collaborative court must vote together and withstand the rhetorical pressure exerted by between one and three professional judges, who have status, training, skill, and experience on their side. In addition, the law clearly assigns the presiding judge the dominant role during deliberations: she “leads the deliberations, asks the questions, and collects the votes.”

In the end, German lay judges abandon their dissenting votes in 70 percent of the cases (6.5 percent of all cases) in which they initially disagree with their

227. A two-thirds majority is required for conviction and sentencing. See § 263 StPO.

228. Casper and Zeisel found that the now defunct 3-6 court had significantly greater lay participation during deliberations. Whereas lay judges in the 1-2 and 3-2 courts initially disagreed with their professional colleagues on the determination of guilt in only 10% and 13% of cases in which there was no confession, respectively, lay judges in the 3-6 court did so in 30% of such cases. See Casper & Zeisel, supra note 93, at 152, tbl.22; see also id. at 153, tbl.24 (finding the percentage of total cases showing initial disagreement on sentence to be 21% for the 1-2 courts, 19% for the 3-2 courts, and 53% for the 3-6 courts).

229. Lay judges are more likely to affect the sentence than the guilt determination. See, e.g., Casper & Zeisel, supra note 93, at 190 tbl.40 (finding an influence on issue of guilt in 1.4% of cases and influence on sentence in 6.2%); see also § 196 GVG (describing mechanism for resolving sentence). Even in the small percentage of 1-2 cases in which a lay mutiny succeeds, the presiding judge has the last laugh because she writes the opinion. Apparently, outvoted professional judges have woven a reversible error of law or fact into their opinions. To ensure such errors are noticed and appealed, the judge may even go so far as to alert the losing side of the error. Alternatively, the outvoted professional judge may register her disagreement with her lay colleagues in the public justification of the court’s decision. See Helke Jung, Die Beteiligung von Laien an der Strafzuständigkeit, in 150 JAHRE LAN- DERGERICHT SAAERBRÜCKEN 317, 317 (1985) (citing DIED ZEIT, NOV. 9, 1984, at 24).

230. In particular, given the requirement of a two-thirds majority for any decision disfavoring the defendant and the impossibility of indemnification, the two lay judges on German collaborative courts can always acquit against their one professional colleague in the 1-2 court or against their three professional colleagues in the 3-2 court. In the 1-2 court, the two lay judges can even convict over the lone professional judge’s dissent. To convict over professional dissent in the 3-2 court, the lay judges must convince two of the three professional judges.

231. § 194 Nr. 1 GVG. She also breaks ties in cases in which the 3-2 court constitutes itself as a 2-2 court. See § 196 Nr. 4 GVG. At the start of the deliberations in a 2-2 or 3-2 court, the reporting associate judge summarizes the evidence and the applicable law and casts her vote. This summary and first vote assume significance because the reporting judge will prepare the written opinion and, along with the presiding judge, will be the deliberator most familiar with the case file. The presiding judge votes after first the lay judges and then the professional judges have announced their decision in reverse order of seniority. See § 197 GVG. In a 1-2 court, by contrast, the presiding judge opens the deliberations with a summation but then casts the last vote. Guilt is discussed first and the sentence, if necessary, second. Although the presiding judge will be the last to officially announce her position, her opinion will have become abundantly clear by the end of her interrogation of the witnesses at trial. In a 1-2 court, any doubts that may remain after trial generally will be dispelled by her summation of the evidence and the law at the start of the deliberations.
professional colleague or colleagues and manage to influence the verdict in only 21 percent of these cases (or 1.4 percent of all cases).\textsuperscript{232} In stark contrast, the American criminal process completely insulates lay participants from the judge’s influence during their deliberation on the defendant’s guilt. The opinion of American lay participants, therefore, prevails in 100 percent of cases in which the judge would have reached a different verdict.\textsuperscript{233}

The insignificant contribution German lay judges make to the conduct and resolution of criminal trials has led several German commentators to call for the abandonment of lay participation altogether.\textsuperscript{234} Commonly reduced to bystanders in the court room, German lay judges retain at most a symbolic significance.\textsuperscript{235}

Importing the German collaborative court, therefore, would amount to substituting one system with merely symbolic lay participation for another. If anything, the American regime of lay participation is preferable because, although symbolic on the systemic level, it has a very noticeable impact in individual cases. In the United States, lay participation has become largely symbolic because only a small percentage of criminal defendants actually have their fate decided by lay participants. No one would suggest, however, that in those few cases that do make it to a jury, lay participation remains a mere symbol. By contrast, German lay participation has become symbolic not only because few criminal cases are decided by a tribunal with lay participants, but because even in those cases that do make it before the collaborative courts, lay participants play a negligible role. Therefore, even if every single criminal case were tried before a German collaborative court, lay participation still would have merely symbolic significance because lay judges would remain under the often overpowering influence of the professional judges, particularly the presiding judge. By contrast, as long as the American jury retains its independence during guilt deliberations, the influence of the presiding professional judge will remain limited.

That German lay judges on collaborative courts have little impact on actual cases, however, does not mean that American lay judges would suffer a similar fate if collaborative courts were adopted. At first glance, it appears that the lay judges’ insignificance springs from the professional judges’ superior status, expertise, and experience. If so, one might expect that American lay judges in collaborative courts would fare little better than their German counterparts, given that the American trial judge, long respected as the common law queen of her courtroom, surely would enjoy a similar edge over her lay codeliberators.

German lay judges, however, may be particularly susceptible to the influence of professional judges. Casper and Zeisel, for example, have speculated that German lay judges might be more likely to accede to the authority of pro-

\textsuperscript{232} See Casper & Zeisel, \textit{supra} note 93, at 186, 187, tbl.38.

\textsuperscript{233} Except, of course, in those extremely rare cases in which the judge enters a directed verdict of acquittal or a judgment of acquittal notwithstanding the verdict.

\textsuperscript{234} See, e.g., Kühne, \textit{supra} note 204, at 237; Klaus Volk, \textit{Der Laien als Strafrichter, in Festschrieb für Hans Dünnheber} 373 (Ernst-Walter Hanack, Peter Rieß & Günter Wendisch eds., 1982).

\textsuperscript{235} See Kühne, \textit{supra} note 204, at 239.
fessional judges than would American lay judges. A study of the Polish 1-2 collaborative criminal court, conducted between 1964 and 1967, suggests that Polish lay judges exert greater influence on their professional colleagues than do their German counterparts. The study found that Polish lay judges outvoted their professional colleague in 6.3 percent of cases.

Then again, perhaps German lay judges do not influence the proceedings or the deliberations simply because they see no need to do so. Perhaps they have not surrendered to the professional judges' superior power and prestige, but never disagreed with their professional colleagues to begin with.

The German lay judges' lack of participation, in other words, may indicate not only subordination, but genuine agreement. The opinions of German lay and professional judges may not diverge considerably simply because, due to their "haphazard" selection process, German lay judges are not representative of German society. Instead lay and professional judges tend to stem from similar societal groups and lay judges are disproportionately drawn from the ranks of the civil service.

236. See Casper & Zeisel, supra note 93, at 190-91.

237. See Pomorski, supra note 217, at 205 n.32. It is unclear, however, whether this figure includes sentencing decisions. Though finding greater lay influence than Casper and Zeisel had detected in German collaborative courts, the Polish study also found that lay judges "rarely" influenced the verdict. See id. at 207.

238. See Langbein, Mixed Court, supra note 10, at 208 (discussing the German selection process).

239. Professional and lay judges are not subject to challenges based on their nonrepresentativeness. Neither the defendant, nor the victim, nor members of the community where the crime was committed have a right to a panel representative of their community. Insofar as representativeness is recognized as important at all, the German system strives for systemwide representativeness of the group of lay judges in their entirety so as to ensure that "the views of the Volk on law and justice are reflected in the administration of justice in the best way." LOWE-ROSENBERG, 5 DIE STRAFPROZEBORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ: GRÖßKOMMENTAR, at 245 (§ 36 Rn.4) (23d ed. 1979). The representativeness of lay judges is not considered from the perspective of participants in a particular case.

The German selection statute combines great specificity in certain formal matters with utter vagueness in others; it says virtually nothing about substantive selection criteria (other than that German citizenship is required). See §§ 31-58, 77-78 GVG. According to the statute, each municipality is to assemble a preliminary list of candidates every four years, which must be approved by a two-third's majority of the municipal legislature. A selection committee headed by a judge of the local Amtsgericht and including a state official and ten "concerned citizens" selects the lay judges for the next four years. Lay judges are then assigned to specific trial dates by lottery. Whereas the lay judges' representativeness has received little attention in theory and practice, German commentators and courts have meticulously guarded the adherence to certain formal requirements regarding the selection of potential lay judges for the preliminary list, the appointment of the "concerned citizens" on the selection committee, the composition of the selection committee, the selection committee's voting procedure, the assignment of lay judges to particular courts, or the random assignment of selected lay judges to particular panels. See, e.g., 5 LOWE-ROSENBERG, supra, at 251-58 (§ 40 Rn.9-22). As noted earlier, these requirements have proved particularly popular among defense attorneys because their frequent violation has made for an excellent issue in recusal motions and appellate briefs. See text accompanying notes 145-147 supra. One former defense attorney told me that, in his opinion, lay judges retained significance in today's German criminal process only for that reason.

As to representativeness, the statute merely provides that the preliminary list "should consider in an appropriate way all population groups according to gender, age, profession, and social status." § 36 Nr. 2 GVG (emphasis added); see 5 LOWE-ROSENBERG, supra, at 244-45 (§ 36 Rn.4). It says nothing about representativeness at later stages of the selection process, including the selection of lay judges from that list and the assembly of panels in particular cases.

240. See Kühne, supra note 204, at 238. All German professional judges are civil servants.
In particular, the selection process for lay judges discriminates on the basis of socioeconomic status, gender, and age, as blue-collar workers, women, and young persons are underrepresented on the preliminary lists and selected in disproportionately small numbers from them. By contrast, public employees, and lifetime civil servants (Beamte) in particular, are privileged at every stage of the process and make up a vastly disproportionate share of the lay judges selected. When all is said and done, lay judges, therefore, tend to resemble their professional colleagues: they are disproportionately male, middle-class, public employees.

Another reason for a consonance of views between professional and lay judges may lie in the socialization of lay judges into the criminal justice culture. Unlike jurors in the United States, German lay judges are not one-time visitors to the court room. They are appointed for terms of four years and may serve two consecutive terms. Although lay judges may participate in as few as one dozen trials per year, their elaborate appointment process, their lengthy

241. See Erkheard Klausa, Ehrenamtliche Richter: Ihre Auswahl und Funktion, empirisch untersucht 42-43 (1972); Casper & Zeisel, supra note 93, at 182-85; Oskar Katholnigg & Heinrich Bierstedt, Sind bei den Schöffen alle Gruppen der Bevölkerung angemessen berücksichtigt?, 1982 ZEITSCHRIFT FÜR RECHTSPOLITIK 267; Meurer & Rennig, supra note 215, at 13. Although recent efforts in certain regions of Germany to increase the representation of women in the court system have resulted in the appointment of more female professional and lay judges, women nonetheless remain underrepresented in both categories. See Bundesministerium der Justiz, Geschlechts-, Alters- und Berufsstruktur der Schöffen im Bundesgebiet (alte Länder) im Vergleich mit der Bevölkerungsstruktur, Pub. No. 3221/1 - R2 0775/93, at 7 (1993) [Composition of Lay Judges in the Federal Republic of Germany (old Länder) by Gender, Age, and Occupation as Compared to the Composition of the Population] [hereinafter, Geschlechts-, Alters- und Berufsstruktur]. No similar efforts have been undertaken to improve the representation of blue-collar workers or of young people. In fact, the underrepresentation of those aged 25-40 has worsened steadily and substantially since 1975. See id. at 8.

242. See Klausa, supra note 241, at 42-43. The minimum age for lay judges is 25. See § 33 GVG. Given the continued ethnic homogeneity of German society, questions of ethnic representation have not arisen. The vague recommendation of representativeness in the preparation of preliminary lists, for example, does not mention ethnicity. See § 36 Nr. 2 GVG. Although data on this question are not available, it is safe to assume that ethnic minorities are underrepresented among lay judges if only because many so-called guest workers and their relatives do not hold German citizenship, a prerequisite for selection as a lay judge. See § 31 GVG.

243. See Geschlechts-, Alters- und Berufsstruktur, supra note 241, at 9 (stating civil servants make up 30.4% of lay judges, but only 11.8% of population). The subservience of the German civil servant in the presence of a superior, in this case the professional judge, surely has abated over the past few decades. Nonetheless, the following remarks by a keen observer of the German judicial system in 1865 still ring true today: "the world of civil servants (Beamtenwelt) is mostly used to regard official superiors as men of superior insight and therefore also to grant their opinions a certain authoritative significance." Heinz, supra note 187, at 76.

244. This phenomenon may be familiar to observers of the American criminal justice system. Compared to the petit jury, the more permanent grand jury, whose members come in frequent contact with court officials on a quasi-collegial level, display a considerable willingness to go along with prosecutorial investigation and indictment decisions.

245. Once they have served two consecutive terms, they may be reappointed after eight years. See § 34 Nr. 1 GVG. The maximum period of consecutive service was introduced in 1974 specifically to combat the socialization of constantly reappointed lay judges. In 1974, that maximum period was six years. See Gesetzentwurf der Bundesregierung, supra note 176, at 54, 99.
association with the court over several years,\footnote{246} and their training session (which, though voluntary, often includes a trip to the local prison and instruction in the basics of criminal procedure)\footnote{247} may lead them to consider themselves a part of the machinery of criminal justice skillfully operated by the presiding professional judge. Particularly if the dominance of the presiding judge remains largely unchallenged by other professional system participants, including the associate professional judges, the prosecutor, and even the defense attorney, these not-so-lay judges may easily find their place in the institutional hierarchy of the German criminal court room.

Let us assume that the efficiency of the German collaborative court turns in large part on the willingness of other process participants, including the lay judges, not to interfere with the presiding judge’s direction of the proceedings. Were we to adopt the German collaborative court because of its superior efficiency, as Langbein suggests, then the success of the collaborative court in the United States would depend on the likelihood of process participants in this country displaying a similar passivity. Moreover, if the passivity of German lay judges in turn derives from their unrepresentativeness and that unrepresentativeness constitutes a feature of the German collaborative court that does not deserve our emulation, then neither does the German collaborative court. However, if the passivity of German lay judges results from their socialization into the hierarchical culture of the criminal courtroom, one might expect a similar passivity even among more representative American lay judges on a collaborative court.\footnote{248}

In sum, assuming \textit{arguendo} that the German collaborative court in fact disposes of cases more efficiently and that its superior efficiency in fact accounts for the lower level of plea bargaining in Germany, the collaborative court accomplishes these feats at the considerable price of turning over control of the proceedings to a presiding professional judge who dominates the process and all its participants. Nonetheless, even if we were willing to pay the price of

\footnote{246} The Marburg study found that 13\% of lay judges reportedly spent more than eight hours per month, and in one case as many as fifty hours per month, in court. \textit{See} Meurer \& Rennig, \textit{supra} note 215, at 5.

\footnote{247} Of the lay judges in the Marburg study, most had received the instruction, though only a minority had visited a prison. Even fewer had attended a trial. \textit{See id.} at 5.

\footnote{248} Whether the successful importation of passivity would be desirable is of course another question. At any rate, if the experience with the only remaining collaborative court in the United States is any indication, the German collaborative lay court might well surrender some of its velocity during its transatlantic voyage. Although the two assistant lay judges in the 1-2 Vermont superior court have become mostly irrelevant in practice because of negligible caseloads, \textit{see} Richard H. Coutant, \textit{Note, A Farewell to Side Judges; Or, Are We Available?}, 10 \textit{Vt. L. Rev.} 321, 340 n.132 (1985) (remarking that courts with lay judges heard only four out of 5337 criminal cases in 1983), they have been known to assert their influence. \textit{See}, e.g., State v. Hunt, 485 A.2d 109, 115 (Vt. 1984) (holding that lay judges may reject plea agreement over professional judge’s objection). From 1802 until 1851, Ohio’s Court of Common Pleas, which also had a considerable criminal jurisdiction, sat with one president and two or three associate judges. \textit{See} 2 \textit{A HISTORY OF THE COURTS AND LAWYERS OF OHIO} 367-71 (Carrington T. Marshall ed., 1934). The associate judges, most of whom were laymen, could decide cases without the presiding judge. Although the president, if present, normally would decide evidentiary and legal questions without consulting his lay associates, “it sometimes though not frequently happened that the laymen overruled the lawyer and their judgment necessarily prevailed.” \textit{Id.} at 369. I am indebted to Dean Richard Aynes for bringing the Ohio mixed court to my attention and providing me with this reference.
passivity to accelerate and multiply our trials, we would not need to import the German collaborative court. The accelerating potential of a dominant presiding judge is not limited to collaborative courts. As Professor Langbein himself has pointed out repeatedly, jury trials in eighteenth century England were summary proceedings dominated by professional judges who would not hesitate to interfere in the proceedings, give strongly biased summations of the evidence, and throw jurors in jail for failing to deliberate with sufficient dispatch. Short of reverting to eighteenth century practices, one might simply adopt Professor Stephen Schulhofer's proposal and expand the use of bench trials without enhancing the judge's power in jury trials. Then again, if velocity is what we are after, it is not difficult to imagine how the jury trial might be streamlined without turning it into an inquisitorial proceeding.

Accelerating our criminal trials, by importing the German collaborative court or otherwise, will not eliminate plea bargaining, however. Since plea bargaining exists independent of trial duration, we must combat the hypocrisy of our constitutional promise of lay participation in all criminal cases by reforming plea bargaining instead of vainly seeking to eradicate it. Moreover, the guarantee of lay participation will remain hollow unless it is extended from the trial to the sentencing hearing, which together with plea bargaining today fulfills the core function of the criminal process, the imposition of punishment.

II. REFORMING PLEA BARGAINING AND SENTENCING

Any reform of plea bargaining and sentencing practices must proceed from the recognition that these practices are problematic because they undercut the legitimacy of the punishment they impose. In particular, they currently lack institutional features such as lay participation that help justify the imposition of punishment by respecting the autonomy of the accused.

A. Autonomy

Having placed the naturally autonomous rational person at its core, Enlightenment political theory faced the problem of justifying the state's infliction of punitive pain upon its subjects. The criminal law had to be legitimised as rooted in autonomy, i.e., as a rational law that the individual originated and applied to herself. The provisions of the penal codes were said to be of autonomous origin either because they reflected the original social compact, the basis of political autonomy, or, in Kant's view, the categorical imperative, the princi-

249. See Langbein, Criminal Trial, supra note 197, at 285-97.
251. Take, for example, the list of homegrown acceleration devices assembled by another commentator favorably disposed toward the German criminal process. See Craig M. Bradley, Reforming the Criminal Trial, 68 Ind. L.J. 659, 661-64 (1993) (suggesting that courts conduct voir dire, limit opening statement and closing argument to five minutes each, cut back on jury instructions, and allow non-unanimous verdicts).
ple of moral autonomy. More tangibly, the state's constituents also could influence, albeit indirectly, their community's criminal norms by electing representatives who codified the norms in their stead.

These criminal laws, however, had to be applied to particular persons in particular cases. It was one thing to justify the threat of penal sanctions in the codes and quite another to justify imposing these sanctions on individual autonomous persons. The problem of punishment imposition was to be solved in analogy to the problem of its threat. The rights to vote, to participate in government, and to be tried before and to participate in a jury were but different manifestations of the one right of autonomy or self-determination. As the constituent was to originate the criminal law, either directly as legislator or indirectly through representatives, so she was to apply this law to herself, either directly by confession or indirectly by the verdict of representatives of her community, the jury.

Lay participation was merely the most obvious way in which the autonomy of the accused was to be preserved. In theory, the modern process of punishment imposition in its entirety reflects the autonomy of the accused, striking a careful balance between participatory provisions such as the right to counsel, which give the accused a say in the imposition of punishment upon her, and protective provisions such as the privilege against self-incrimination, which guard the accused against coercive state interference.

These so-called procedural protections legitimize the process of punishment imposition as consistent with the autonomy of the accused. To bridge the gap between legitimizing promise and systemic reality, they must be extended to plea bargaining and sentencing, which have become the dominant processes for imposing punishment. The central role of plea bargaining in the criminal process is easily established by pointing out that plea bargains dispose of approximately 90 percent of criminal cases. We now turn to the crucial role of sentencing in our trialless system of punishment imposition.


253. On the distinction between the threat, the imposition, and the infliction of punishment, see text accompanying notes 21-22 supra.


256. See Bond, supra note 94, § 1.2.
B. Sentencing Trials

In the current age of sentencing guidelines and recidivist premiums, the crime of conviction has become increasingly irrelevant. 257 Under the federal sentencing guidelines, for example, two defendants convicted of the same offense can face radically different penalties as a result of an elaborate sentencing hearing that resembles a bench trial. Every day, judges sentence scores of federal defendants to penalties grossly out of proportion to their crime of conviction on the basis of a supplementary penalty trial at which the prosecution seeks to prove that the defendant deserves a harsher sentence than that mandated by the applicable sentencing guideline because "there exists an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission" 258 or because the defendant engaged in certain "relevant conduct." 259

The courts have loosely interpreted the "relevant conduct" provision to cover uncharged conduct and even charged conduct of which the jury had acquitted the defendant at trial. 260 The "relevant conduct" provision has proved particularly popular in drug cases. It is not uncommon for the prosecution to prove to the trial jury, beyond a reasonable doubt, that the defendant distributed a relatively small amount of drugs, 261 only to establish at the sentencing bench trial, now by a mere preponderance of the evidence, that the defendant in fact had distributed vastly greater quantities, thus dramatically enhancing the punishment. 262

Consider the hypocrisy of a system of punishment imposition that solemnly enshrines certain rights of the accused, then limits these rights to the jury trial, restricts the jury trial to 5 percent of cases, and finally, renders the jury trial and the jury verdict a farce. Under the guidelines' regime, the jury verdict merely


258. 18 U.S.C. § 3553(b) (1996); see, e.g., United States v. Kikumura, 918 F.2d 1084, 1089 (3d Cir. 1990) (upholding upward departure from guidelines range of 27-33 months to 21 years).

259. See United States Sentencing Guidelines Manual, § 1B1.3(a)(1) (1994) (defining "relevant conduct" as acts and omissions "that occurred during the commission of the offense of conviction, in preparation for the offense, or in the course of attempting to avoid detection or responsibility for that offense"); id. § 1B1.3(a)(2) (defining "relevant conduct" as acts and omissions "that were part of the same course of conduct or common scheme or plan as the offense of conviction").

260. See, e.g., United States v. Sanders, 982 F.2d 4, 10 (1st Cir. 1992) (allowing uncharged shooting to be used in sentencing calculation); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 180-82 (2d Cir. 1990) (allowing sentence enhancement for conduct of which defendant was acquitted); United States v. Kim, 896 F.2d 678, 684 (2d Cir. 1990) (allowing consideration of misconduct not resulting in a conviction); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989) (allowing sentence enhancement for conduct of which defendant was acquitted).

261. Be it because the prosecution never attempted to prove that the defendant had distributed a larger amount or because they tried and failed.

262. See, e.g., United States v. Sleet, 893 F.2d 947, 948-49 (8th Cir. 1990) (upholding sentence based on possession of 396 ounces of cocaine when defendant convicted of possessing 27 ounces); United States v. Moreno, 1 FED. SENT. REP. 420 (E.D. Mich. Jan. 25, 1989) (sentencing defendants for conspiring to distribute 5 or more kilograms of cocaine, where defendants had been indicted for conspiracy to distribute "more than 5 kilograms" but convicted by jury of having conspired to distribute only 500 or more grams).
convicts the defendant of having engaged in some form of criminal conduct. The specific violation of a particular penal norm is determined not at trial, and not by the jury, but by a professional judge in a separate proceeding at which the defendant enjoys minimal rights.263 In the words of a recent Eighth Circuit decision: "The guilt phase remains the stage at which the fact-finder determines whether a defendant broke the law, while at the sentencing phase the court determines the extent to which a defendant broke the law and what punishment would be appropriate."264 In short, the principal function of the criminal process, the application of penal norms to particular cases, has shifted from the trial to the sentencing hearing.265

C. Sentencing Reform

Given that sentencing plays such a crucial role in the imposition of punishment, the principles that are said to legitimize the imposition of punishment by preserving the autonomy of the accused must be extended to the sentencing trial. In the terms of traditional American criminal procedure, constitutional protections must be fully applied to the sentencing hearing. In particular, since lay participation legitimizes the imposition of punishment on an equal, rational person entitled to self-determination, the jury must be permitted to participate in sentencing.266 Again constitutionally speaking, to make good on the Sixth Amendment's guarantee of lay participation, it is not enough to limit plea bargaining. Lay participation must be ensured not only at the guilt trial, but also at the sentencing trial.

Lay participation in sentencing may be accomplished in several ways. One might follow Langbein's suggestion to adopt the German collaborative court where lay judges deliberate not only on guilt but also on punishment.267 As we have seen, however, the statutory authority to deliberate does not automatically translate into actual influence in specific cases.268 It is, however, precisely the application of abstract norms to particular persons that requires justification in the process of punishment imposition. Moreover, insofar as the legitimacy of

264. United States v. Wise, 976 F.2d 393, 400 (8th Cir. 1992) (emphasis added).
265. Consider, for example, the sentencing order in the federal case against Rodney King's police assailants. There, the judge significantly reduced the defendants' guideline sentence based on factual findings that minimized the officers' criminal liability and came dangerously close to directly contradicting the jury's guilt determination. See United States v. Koon, 833 F. Supp. 769 (C.D. Cal. 1993) (departing downward from a guidelines range of 70-87 months to 30 months), aff'd in part, vacated in part, 34 F.3d 1416 (9th Cir. 1994), aff'd in part, rev'd in part, 116 S. Ct. 2035 (1996). The sentencing judge felt entitled to make these factual findings "because the verdicts were general and no special findings were made by the jury." Id. at 774-75. Since American law disfavors special jury verdicts in criminal cases, see, e.g., United States v. Spock, 416 F.2d 165, 181-82 (1st Cir. 1969), this reasoning gives the sentencing judge sweeping authority to ignore the jury's verdict on guilt or innocence in virtually every criminal case.
267. See Langbein, Mixed Court, supra note 10, at 217.
268. Though they appear to contribute more to the sentencing decision than they do to the guilt decision. See id. at 204; note 229 supra.
punishment imposition requires the actual and not merely the apparent participation of representatives of the defendant’s community, a system that permits lay participation in sentencing on its face, but not in fact, possesses at best a false legitimacy.269

To avoid the danger of merely apparent lay participation in sentencing, one might consider simply expanding the jury’s authority to sentencing matters. Jurors have in fact influenced the sentencing options available to the judge since the time of the English Bloody Code by carefully choosing the crime of conviction with an eye toward the applicable sentencing range.270 Neither their independence nor the Constitution bars jurors from participating in sentencing.271 Arkansas, Missouri, Oklahoma, Tennessee, Texas, and Virginia already permit jurors to deliberate on both guilt and punishment.272 Since all death penalty states provide for jury sentencing in cases of capital crime, the jury’s sentencing authority easily could be expanded to other, less serious cases.

D. Plea Bargaining Reform

As with sentencing reform, the reform of plea bargaining must attempt to turn it into an autonomous process of punishment imposition. Given the existing power imbalance between the accused and the members of the professional courtroom elite there may be little hope of injecting autonomy into courthouse bargains. The complete elimination of plea bargaining, however, is even less feasible. As the limited success of recent attempts to prohibit plea bargaining in California and Alaska make clear,273 the legislative prohibition of plea bargaining can at best serve as one of the incentives to choose trial over bargain.

Since any criminal justice system requires the frequent exercise of discretion, it will retain the potential for bargaining of all sorts, including bargaining about the ultimate outcome of the case.274 Attacks on plea bargaining, there-

---

269. See Schubert, supra note 159, at 221 (citing criticism, in 1873, of attempts by supporters of the collaborative court “to reduce lay participants to harmless helpers of the dominant state judge under the pretense of full equality”).
270. See Langbein, Mixed Court, supra note 10, at 204.
274. Pieter Spijker, for example, reports that Dutch prosecutors in the sixteenth century openly and as a matter of course offered wealthy suspects the option of having their charges dropped in exchange for the payment of a certain sum. Rich adulterers and Johns could evade prosecution through the composite system under which the public prosecutor would drop the charges in exchange for a payment by the accused to him. See Pieter Spijker, The Spectacle of Suffering: Executions and the Evolution of Repression: From a Preindustrial Metropolis to the European Experience 122 (1984). This practice differs from the dismissal of charges in exchange for the contribution of a certain sum under § 153a of the German Code of Criminal Procedure only in the recipient of the payment. In fact, even in contemporary Germany not all payments apparently make it to the state or a
fore, often miss something fundamental about the nature of discretion in the administration of power in general, and about the nature of the modern criminal process in particular. Clearly, prosecutorial discretion and the bargaining it engenders have contributed to the hypocritical system of modern criminal punishment. Nonetheless, launching an attack exclusively on the hypocrisy of plea bargaining gives plea bargaining an extraordinary status it does not deserve. Plea bargaining represents one of the many ways in which the modern system of criminal punishment suffers from illegitimacy. To critique plea bargaining alone for its hypocrisy, therefore, may do more harm than good by obscuring the need for more sweeping reform. At most, plea bargaining reform can hope to limit plea bargaining by making it less attractive to process participants and to improve it by augmenting its potentially potentialious aspects.

1. Lower penalties.

A look at the German system suggests several reforms that would reduce the coercive element of American plea bargaining and thereby limit and improve the practice. Most important is the reduction of excessive sentences. The often enormous differential between the plea offer and the potential trial sentence provides a crucial incentive for American defendants to enter a plea. Particularly disturbing are cases in which the defendant pleads guilty to life imprisonment without the possibility of parole to avoid the imposition of the death penalty—a penalty that the Supreme Court has told us for decades is qualitatively different from any other punishment.275

Plea bargaining in this country will continue as long as our criminal penalties remain among the harshest in the world. Criminal penalties in Germany are generally far less severe than in the United States. The German constitution prohibits both capital punishment and life imprisonment without the possibility of parole.276 The German courts impose fines on roughly 80 percent of convicted defendants and reserve imprisonment for the remaining 20 percent. In more than two-thirds of these cases the prison sentence is suspended on probation.277 Only about 5 percent of convicted German defendants thus actually leave the courtroom prisoners.278

275. Not to mention the cases in which the defendant’s attempt fails and she is sentenced to death on the basis of a guilty plea. See, e.g., Strickland v. Washington, 466 U.S. 668 (1984); Agan v. Singleton, 12 F.3d 1012 (11th Cir. 1994); see also Welsh S. White, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 53-72 (1991) (discussing plea bargaining in capital cases).

276. See 45 BVerfGE 187. Art. 102 of the German Basic Law prohibits capital punishment.


By contrast, U.S. federal courts in 1990 imposed prison sentences on 100 percent of convicted defendants, 40 percent of whom received a probationary sentence. Fines were never imposed as the exclusive penalty and supplemented a prison sentence in less than 10 percent of cases.\textsuperscript{279} Sentencing practices in state courts resemble those in the federal system, except that the death penalty ensures that fewer than 100 percent of convicted state defendants receive prison sentences.\textsuperscript{280}

Lower maximum sentences reduce the potential discrepancy between plea and trial sentences, thus reducing the defendant's incentive to plead. In a homicide case, the prosecutor's offer of a 15-year sentence in exchange for a manslaughter plea has considerably greater force when backed by the threat of capital punishment. If the defendant, at worst, faces a life sentence with the possibility of parole and knows that she has the right to be considered for early release after fifteen years,\textsuperscript{281} she may well choose to go to trial.\textsuperscript{282} A legislature committed to limiting plea bargaining cannot have its cake and eat it too. To significantly reduce plea bargaining, we must also reduce our criminal penalties.

2. Judicial supervision.

German practices suggest another avenue of reform of American plea bargaining: judicial supervision. Judicial supervision of the plea bargaining process and its results would limit and improve plea bargaining by curtailing prosecutorial discretion.\textsuperscript{283} More generally, regulating the infamously freewheeling American prosecutor promises to reduce plea bargaining, if only by ensuring more effective enforcement of more specific measures designed to limit the practice.\textsuperscript{284} In the German practice of confession bargaining, the de-


\textsuperscript{280} The revival of the federal death penalty threatens to similarly challenge the monopoly of imprisonment in federal sentencing.

\textsuperscript{281} See § 57a StGB.

\textsuperscript{282} In Germany, almost all lifers are in fact released within fifteen years, and, in 1991, only 56 defendants (less than 0.01 percent of nonjuvenile convicted defendants) received a life sentence in all of Germany. See STATISTISCHES JAHRBUCH 1994, supra note 46, at 395 (1970: 67; 1980: 54; 1985: 85; 1990: 56; 1991: 56).

\textsuperscript{283} Judicial supervision, however, should not be confused with judicial participation. See text accompanying note 68 supra.

\textsuperscript{284} See Donald G. Gifford, Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion, 1983 U. ILL. L. REV. 37, 96-98 (proposing an administrative model under which specified guidelines would govern plea bargains and prosecutors' adherence to the guidelines would be subject to judicial review); Jeffrey Standen, Plea Bargaining in the Shadow of the Guidelines, 81 CAL. L. REV. 1471, 1537-38 (1993) (criticizing the sentencing guidelines for ceding control to prosecutors and arguing that judge-made law should set boundaries of plea bargains); see also Langbein, Land Without Plea Bargaining, supra note 4, at 210 (suggesting that elimination of prosecutorial discretion in serious cases also eliminates plea bargaining). Although the German system provides for greater supervision of prosecutorial discretion on paper (particularly through the much watered-down rule of compulsory prosecution), it is unclear how much better it is at constraining actual prosecutorial decisionmaking in the field; cf. Frase, supra note 5, at 611 (noting that French prosecutors exercise broad discretion in practice although they face greater formal constraints than their American counterparts); Abraham S. Goldstein & Martin Marcus, The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany, 87 YALE L.J. 240, 279-83 (1977) (arguing that continental prosecutors enjoy greater discre-
fendant receives a previously arranged sentence discount in exchange for a confession in open court on the record.285 The requirement of a public confession in open court, even in bargained cases, reflects the German trial’s inquisitorial origins, not any policy decision about the regulation of plea bargaining. Yet, whatever its origin, it serves not only to deter bargains in general, but also false convictions in particular.286

The German confession requirement would probably be unconstitutional in the United States. Here, a confession may be considered involuntary if given in exchange for promises of lenient treatment. The very same promises, however, would not render a guilty plea involuntary.287 This odd result reflects the traditional distinction between guilty pleas and confessions in American law.

Ostensibly designed to protect the defendant against intrusive state interrogation practices, the distinction between guilty plea and confession has been converted into a barn door exception to the Due Process Clause. Since courts do not seriously scrutinize the voluntariness of guilty pleas, the Due Process Clause effectively does not apply to the vast majority of criminal proceedings in the United States. American courts have fallen into the comfortable habit of regarding defendants who complain about involuntary pleas as smooth operators who copped a deal with the assistance of a savvy defense lawyer.288 In the end, the defendant gets caught between a low voluntariness standard for confessions and an even lower voluntariness threshold for guilty pleas. If she confesses, she cannot claim involuntariness because she was not beaten and had signed a Miranda waiver. If she pleads guilty, she cannot claim involuntariness because a guilty plea is not a confession.

Current involuntariness law epitomizes the hypocrisy of modern criminal procedure by promising protections but failing to deliver them in practice. An overhaul of the law is long overdue. The existing protections against involuntary confessions should be strengthened and, along with all other constitutional safeguards designed to preserve the accused’s autonomy, extended to guilty pleas.289 There simply is no pragmatic distinction between guilty pleas and

286. Assuming, of course, that this requirement does not deteriorate into the submission of a written statement prepared by defense counsel, as apparently has occurred in some German cases.
287. See Bond, supra note 94, § 3.11; see also Malvina Halberstam, Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning Plea Bargaining, 73 J. CRM. L. & CRIMINOLOGY 1, 3-4 (1982) (noting Supreme Court’s ruling that confessions induced by threats or promises may not be used to convict at trial but may result in convictions without a trial).
288. The mere fact of representation by counsel largely predetermines the voluntariness inquiry. See Albert W. Ahschuler, The Supreme Court, the Defense Attorney, and the Guilty Plea, 47 U. COLO. L. REV. 1, 55-58 (1975) (arguing against Supreme Court’s equation of competent counsel with voluntariness).
289. Cf. United States v. Blyallock, 20 F.3d 1458 (9th Cir. 1994) (applying right to effective assistance to pre-trial bargaining); Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1994) (same); Kevin C. McMunigal, Disclosure and Accuracy in the Guilty Plea Process, 40 HASTINGS L.J. 957 (1989) (arguing for application of Brady disclosure duty to guilty plea cases).
confessions that justifies different voluntariness standards. If anything, guilty pleas should be reviewed more strictly because they are often induced by promises of considerable sentence reductions and immediately result in a conviction, whereas a confession does not automatically dispose of the case.

Voluntariness scrutiny must begin with judicial supervision by the trial court. If one maintains the distinction between guilty pleas and confessions, the German requirement of public confession probably cannot be followed. However, one could still require a detailed public inquiry into the voluntariness and the factual basis of the plea.

In principle, such an inquiry is required in federal courts and some state courts.290 Once again, however, promise dramatically differs from practice. Plea hearings today are too perfunctory to ensure that even minimal voluntariness requirement for pleas has been met. They also fail to ensure that the defendant in fact did what she claims to have done by pleading guilty.

Any attempt to improve judicial supervision of plea bargaining must start by putting some teeth into the sentencing judge’s review of the plea agreement and by improving appellate court supervision of that review.291 Rule 11 of the Federal Rules of Criminal Procedure already prohibits the court from taking a plea “without making such inquiry as shall satisfy it that there is a factual basis for the plea.”292 The American Bar Association’s Standards for Criminal Justice relating to guilty pleas further suggest that the court “require the defendant to make a detailed statement in the defendant’s own words concerning the commission of the offense to which the defendant is pleading” in order to determine the plea’s accuracy.293 Similarly, the Supreme Court has interpreted Rule 11 to require the court to “develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge.”294

Unfortunately, not all jurisdictions require the court to establish a factual basis for the plea. And even in those jurisdictions that do require a factual basis inquiry, the courts often lack comprehensive statutory guidelines on how to conduct such an inquiry. Moreover, most jurisdictions permit defendants to enter pleas of guilty (not nolo contendere) while maintaining their innocence.295 Many jurisdictions also allow defendants to plead guilty to offenses


291. In recent years, the opposite has occurred. See, e.g., United States v. Johnson, 1 F.3d 296 (5th Cir. 1993) (en banc) (adopting a harmless error analysis for failures in the plea colloquy); Meyers v. Gillis, 93 F.3d 1147 (3d Cir. 1996) (refusing to require an on-the-record development of the factual basis supporting a guilty plea).


293. 3 American Bar Association, Standards for Criminal Justice § 14-1.6(b) (Supp. 1986).


295. These are called Alford pleas. See North Carolina v. Alford, 400 U.S. 25 (1970). For recent examples, see State v. Garcia, 532 N.W.2d 111 (Wisc. 1995) (requiring finding of strong proof of guilt before trial court may accept an Alford plea); Rigabar v. Broome, 658 So. 2d 1038 (Fla. Dist. Ct. App.) (permitting “best interest guilty pleas” without admission of guilt where such a plea is made knowingly and voluntarily, a factual foundation supports it, and the state agrees to it), reh’g denied, 664 So. 2d 248 (Fla. 1995).
that include material elements their conduct did not satisfy, as well as to impossible offenses, such as attempted intent crimes. Finally, as a result of so-called fact bargaining, many plea agreements simply do not accurately represent the facts of the case. More intrusive judicial supervision of plea agreements and their factual foundation should help eradicate unsavory practices of this kind.

If fully implemented, Rule 11 and the American Bar Association Standard would do much to prevent false convictions. The accuracy inquiry they mandate, however, should be spelled out in greater detail. The court should be required to question the defendant about the facts of the crime to which she pleads guilty. A written statement prepared by the prosecution or the defense should never suffice to establish the factual basis of the plea. Furthermore, an evidentiary standard should be set to guide the court's examination of the defendant.

Even with these changes, the trial court cannot be expected to bear the full burden of weeding out involuntary and inaccurate pleas. Ideally, such pleas should never be struck and therefore should never make it to the trial court. One, therefore, might attempt to regulate the plea bargaining process itself. Although the Germans have not taken this step, the Italians have. Loosely following the Italian example, one might specifically provide for plea bargaining by statute and entitle defendants who plead guilty to a standard discount of, say, one third of the statutory sentence. By specifying a standard plea discount for all cases, this provision may help prevent the prosecutor from varying the plea discount according to the strength of the case against the defendant. In current practice, the weakest case generates the greatest sentencing differential and thus the greatest pressure to plead guilty. By restricting the discount to one third of the statutory sentence, the proposed provision also might help impose

---

296. See generally Bond, supra note 94, § 3.55(a). For example, in many jurisdictions, drivers charged with speeding are routinely permitted to plead guilty to a parking violation.

297. See id. § 3.55(b).


300. See Graham Hughes, Pleas Without Bargains, 33 Rutgers L. Rev. 753, 764-65 (1981) (arguing that such a proposal eliminates bargaining while providing adequate incentives for guilty pleas); Note, Restructuring the Plea Bargain, 82 Yale L.J. 286, 301-02 (1972) (suggesting a "specific discount rule" for guilty pleas).
reasonable limits on plea discounts and thereby on the pressure to plead guilty generally.\textsuperscript{301}

Given the informal nature of plea bargaining and its remarkable resilience in the face of previous attempts at legislative regulation, the formalization of plea bargaining may well prove impossible. Certainly any attempt to regulate plea bargaining requires regulating prosecutorial discretion in general, and the prosecutorial charging decision in particular. As the experience with the federal sentencing guidelines makes clear, merely introducing a moderate and standard plea discount\textsuperscript{302} without simultaneously controlling the prosecutorial charging decision, does little to constrain prosecutorial bargaining power or to prevent rampant charge and fact bargaining.\textsuperscript{303}

Nonetheless, the legislative formalization of plea bargaining at the very least acknowledges the existence of plea bargaining and drags it into the open. Insofar as publicity remains an important principle of the modern imposition of punishment, a system that puts plea agreements on the record should be preferable to a system that closes deals in prosecutors’ offices and court corridors and reduces the public plea colloquy to a charade. The public proceeding that followed torture in the premodern punishment process at least made no pretense that it respected the autonomy of equal rational persons.\textsuperscript{304}

III. BEYOND PLEA BARGAINING

Reform of the American criminal process along the suggested lines may limit and improve plea bargaining. In the end, however, this sort of superficial tinkering will not address the fundamental problem Langbein has identified: the deep rooted hypocrisy of the modern system of state punishment. This hypocrisy is epitomized by the gap between the official celebration of lay participation and its actual insignificance. The maintenance of merely symbolic lay participation both here and in Germany is particularly troubling because lay

\textsuperscript{301} A moderate plea discount also would mitigate the unfairness of widely disproportionate punishments for similarly blameworthy defendants. Alternatively, one could specifically require the prosecutor or the court to guard against disproportionate plea discounts in multidefendant cases. \textit{See e.g., Criminal Procedure Bill} (Amendment No. 19: Plea Arrangements) § 155c(b), Proposed Statutes, No. 2374 (Feb. 27, 1995) 360 (5755-1995) (Isr.) (requiring prosecutor, in multi-defendant cases, to “ascertain . . . that the agreement offered . . . is not unreasonable or substantially disproportionate in its outcome, when compared with the part of another accused in the same criminal event”). I am indebted to Professor Alex Stein of the Hebrew University of Jerusalem for providing me with an annotated translation of this bill.


\textsuperscript{303} \textit{See Symposium, supra} note 298, at 299 (discussing fact bargaining); \textit{see generally} Nagel & Schulhofer, \textit{supra} note 302 (discussing plea bargaining in general); Standen, \textit{supra} note 284 (same).

\textsuperscript{304} \textit{See Langbein, Torture, supra} note 19, at 3. Once again, Langbein’s perceptive critique of American practice also applies to the German system. As noted earlier, the German trial can also be seen as merely publicizing the contents of the case file from which the presiding judge decided the case long before trial. \textit{See text accompanying notes 186-194 supra; see also} Jörgen Wolter, \textit{Aspekte einer Strafformenreform bis 2007} (1991), Schünemann, \textit{Richter, supra} note 186, at 229-30.
participation played a crucial role in the Enlightenment effort to legitimize the imposition of punishment in the modern state. The diminution of lay participation in the United States, Germany, and elsewhere reflects the gradual but continuous disappearance of concern for the legitimacy of state punishment. Today it is widely assumed that the grand Enlightenment reform of state punishment settled the question of the legitimacy and limitations of state punishment once and for all.

In the United States today, not even the shorthand guideposts of retribution, prevention, and rehabilitation play much of a role in debates about criminal laws or their application. After the reform wave triggered by Herbert Wechsler's Model Penal Code in the 1960s and 70s, legislatures have resumed their unconsidered ad hoc criminal lawmakers. Instead of considering the purposes and limitations of punishment, federal judges calculate offense levels, offender categories, guideline ranges, and departure levels. The state's constituents no longer show any interest in limiting their state's punishment power or in forcing the state to justify the exercise of that power. On the contrary, the voting population calls for even greater increases in the scope and severity of state punishment.

Perhaps most distressing is that, rather than devise a rational system for the imposition of punishment in our courts in light of the principles of state punishment, criminal proceduralists have turned their field into the poor relative of constitutional law, by studying a trial paradigm that does not reflect the reality of our criminal justice system. To cure their subject of its constitutional myopia, American criminal proceduralists must go beyond charting the rise and fall of the constitutional protections for criminal defendants established by the Warren Court. The constitutionality of a given process should no longer be confused with its appropriateness.

Largely content to stick to the narrow (though surely troubling) constitutional issues, criminal proceduralists have failed to produce a principled account of the system of punishment imposition that could challenge the unconsidered punishment policies of today. Although the lines in the sand drawn by the Fourth, Fifth, and Sixth Amendments have been guarded with remarkable vigilance, all too little thought has been expended on the question of how to choose among the multitude of possible systems of punishment imposition that would satisfy the vague and modest requirements of the Constitution. As a result, the question of the legitimacy (as opposed to the constitutionality) of our system of punishment imposition has been left as unresolved as the question of its desirability. Not only the fact of state punishment has been taken as a given, so has the method of its imposition.

The appearance in the Constitution of certain provisions pertaining to the criminal process undoubtedly attests to their significance. But the mere fact

---

305. See Dubber, supra note 257, at 689-90 (using “three strikes” laws as examples of irrational punishment).

306. See James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 155-56 & 156 n.1 (1893) (arguing that constitutional issues are dwarfing the more important issues of principle and policy).
that the Constitution mentions certain procedural guarantees surely cannot mean that the study of criminal procedure should be relegated to a subcategory of constitutional law. No one proposes to treat criminal law as constitutional law simply because the Constitution also contains a prohibition of retroactive punishment or a Due Process Clause.

The future of so-called constitutional criminal procedure lies in its criminal core, not its constitutional pretense. There is no reason why scholars of criminal procedure should limit their attention to the Bill of Rights, as though three notoriously thin eighteenth century amendments could bear the burden of explaining and justifying every feature of the modern system of punishment imposition. American criminal procedure therefore should be freed of its random organization according to the fortuitous sequence of constitutional amendments in increasing numerical order.

Having thus emancipated their discipline, American criminal proceduralists should turn their attention to the important and difficult task of analyzing and, if possible, justifying our actual practices of punishment imposition. Their inquiry into the principles of punishment imposition in turn could lay the groundwork for a public reconsideration of the central question whether our system of punishment imposition can continue to derive its legitimacy from the enlightenment principle of autonomy and, if not, whether it can and must be legitimized on a different ground altogether.

By relentlessly critiquing our hypocritical system of punishment imposition, Professor Langbein has provided an important impetus for the sort of fundamental reform debate about the nature and purpose of the criminal process that can help turn criminal procedure into a purposeful academic discipline. Despite his laudable pathbreaking efforts, however, even Langbein remains mired in the constitutional morass of traditional criminal procedure.

At bottom, the problem with plea bargaining is not that the Constitution guarantees every criminal defendant a jury trial. Plea bargaining instead is problematic only insofar as it is inconsistent with the legitimizing principle of autonomy that underlies our modern system of punishment imposition. If Professor Klaus Lüderssen of the University of Frankfurt is right and plea bargaining can be turned into a noncoercive consultation among representatives of the state—or perhaps the victim—and the defendant and her representative, it would no longer be illegitimate.307 Presumably, Langbein would not find fault with our criminal justice system if, despite the constitutional right to jury trial, every criminal defendant, without concessions or undue coercion, pled guilty or confessed or chose a bench trial. If one follows Hegel and takes the confession to be the paradigmatic case of the offender’s direct self-application of the norms of state punishment,308 one might even find a plea bargain easier to

---


308. See Hegel, supra note 255, § 227 (addition).
justify than a jury verdict. The jury verdict, after all, can be characterized as autonomous punishment only with the help of the difficult construction of a self-application of norms through another.\footnote{See id.; text accompanying notes 252-255 supra.}

The desirability and legitimacy of plea bargaining, however, depend on the overall nature of the system of punishment imposition. Based on an account of the traditional German criminal process as an inquisitorial proceeding dominated by a powerful judge whose sole aim is to obtain a confession from the defendant, some German commentators have welcomed plea bargaining. According to this account, the German defendant’s role in the proceedings is entirely passive, and is limited to responding to the interrogation by the presiding judge who knows the case file prepared by the prosecution that contains all facts relevant to the resolution of the case. The defendant develops no evidence on her own; she merely motions the court to do the investigating for her. She may request that the court call certain witnesses and appoint certain experts, but she never takes the active role of developing a case and presenting it to the court.\footnote{See Schmidt-Hieber, supra note 12, at 12 (citing Luhmann); Klaus Lüderssen, Die Verständigung im Strafprozeß: Überlebensstrategie oder Paradigmenwechsel?, in Abschaffen Des Strafens? 323, 337 (1995) (alluding to Habermas).}

Against the background of this image of the German criminal process, some German commentators regard plea bargaining as an opportunity for the defendant to take a more active role in the process. In this view, plea bargaining strengthens the defendant’s position by permitting her to shape the proceedings that will settle her fate. Plea bargaining appears as a process that permits the resolution of disputes in the course of a rational discourse among equals. With an occasional nod in the direction of modern discourse and process theories, it is said that the participation of the defendant in the dialogic process both improves the quality of its resolution and legitimizes it.\footnote{Klaus Lüderssen, Strafrecht als schwarzer Mann, in Abschaffen Des Strafens? 17, 18 (1995). Langbein, from this standpoint, has it exactly backwards. It is not plea bargaining, but the current German judge-dominated criminal process that resembles the medieval inquisitorial process. See Schmidt-Hieber, supra note 12, at 9-13; Herrmann, Bargaining, supra note 13, at 775 (arguing that “traditional unilateral decisionmaking has, to some extent, been replaced by a cooperation of prosecutors, judges, defense counsel and the accused,” who now “feels authorized to participate in the process of defining guilt and punishment”).}

Professor Lüderssen has gone one step further: he sees the rise of plea bargaining as an important indication of an actual paradigm shift. He calls for the abandonment of traditional substantive and procedural criminal law and advocates the resolution of what are now criminal cases in private tort actions. According to Lüderssen, plea bargaining serves as a model for the rational, dialogic resolution of disputes between victim and offender. Lüderssen views
this dialogic resolution as the only way to legitimize the imposition and infliction of sanctions in our modern society of autonomous persons.\textsuperscript{313}

Let us assume for the moment that plea bargaining could be rendered consistent with the autonomy of the accused, as Lüderssen and other German commentators suggest.\textsuperscript{314} The legitimacy of plea bargaining, however, does not establish its desirability any more than does its constitutionality. Legitimacy, like constitutionality, is a necessary, not a sufficient, condition for the desirability of a given practice. The autonomy of the accused is not the only principle underlying our system of punishment imposition. These other principles may help us choose between two punishment practices, each of which comports with the autonomy of the accused.

To maintain the stability of the practice of punishment as a state institution, for example, it is crucial that the constituents not be alienated from that practice. The participation of community members as lay judges or jurors in the process of imposing punishment is one way in which they can come to see state institutions of punishment as their institutions, thereby enhancing the stability of these institutions. Therefore, although noncoercive plea bargaining may be legitimate as direct autonomous punishment, a system that retains lay participation in the imposition of punishment may be preferable to one that does not. Moreover, the principle of autonomy itself counsels against the abandonment of lay participation, as meaningful lay participation manifests not only the autonomy of the accused, but also that of the lay participants.\textsuperscript{315}

\textsuperscript{313} See LÜDERSSEN, supra note 311, at 323.
\textsuperscript{314} See, e.g., Joachim Herrmann, Überlegungen zur Reform der notwendigen Verteidigung, 1996 Strafverteidiger 396, 397.
\textsuperscript{315} See text accompanying notes 252-255 supra.